THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Injury:JElw:934741

19 February 2015

Mr Andrew Nicholls
General Manager
Motor Accidents Authority
Level 25, 580 George Street
SYDNEY NSW 2000

By email: regulation@maa.nsw.gov.au

Dear Mr Nicholls,

Draft Motor Accidents Compensation Regulation

I am writing to you on behalf of the Injury Compensation Committee ("Committee") of the Law Society of New South Wales in response to the invitation to comment on the draft Motor Accidents Compensation Regulation 2015 ("draft Regulation").

The Committee would like to thank the Motor Accidents Authority ("Authority") for the opportunity to participate over a number of months in the costs regulation working group leading to the production of the draft Regulation, and for the invitation to now provide feedback.

Overall, the Committee welcomes the draft Regulation as a positive step which significantly improves the existing Regulation. The Committee does have continuing concerns about the limited nature of the increases to professional costs at Stages 4 and 5 of Schedule 1 to the draft Regulation. However, its members appreciate that there are limits to what increases can be permitted in the current scheme environment.

The Committee comments on the following clauses of the draft Regulation in the order in which they appear:

Clause 10(3)

The Committee welcomes the rationale associated with reducing the number of reports obtained from treating medical practitioners, where possible. It does not make sense for the same report to be obtained from both an insurer and from a claimant solicitor. However, the Committee submits that this restriction on obtaining the cost of medical reports from treating practitioners should only apply to the initial report obtained from each of these treating practitioners. Very often it is necessary for a claimant's solicitor to obtain a report from a

treating practitioner commenting on a specific issue or issues after the standard format report is obtained. It would be entirely inappropriate to restrict the capacity of the claimant's solicitor to obtain such a report in circumstances where to disclose the contents of the proposed draft letter requesting the additional report, would telegraph to the insurer the issue of concern to the claimant's solicitor. This would place the claimant's solicitor at a forensic disadvantage. The Committee does note that the regulatory impact statement recognises that the restriction in Clause 10(3) should only apply to the initial treating report but this should be clarified in the draft Regulation itself.

Clause 13

The purpose of this clause is unclear. The Committee suspects that the clause is meant to provide for an allowance for a third party to be paid the reasonable cost of complying with the direction. If this interpretation is correct, then the Committee suggests that this clause should refer to section 100(1A) of the *Motor Accidents Compensation Act 1999* ("the Act") specifically.

Clause 15

The Committee recognises that this provision is a much needed attempt to level the playing field between the claimant and the insurer given the provisions of section 151(2) of the Act. However, the Committee questions the power to award costs on an indemnity basis within a scheme which is otherwise entirely regulated. Further, the Committee questions whether what is proposed here is a sufficient deterrent to an insurer rejecting an assessor's assessment of damages when the insurer will only be liable for indemnity costs for the period after the certificate of assessment is issued. The Committee considers the better option would be for this type of scenario to be covered in the same way as an exempted matter under clause 7(2). This would then render clause 15 unnecessary.

Clause 23(2)

Motor accident legal practitioners in New South Wales are some of the most highly regulated practitioners in the country. The Authority is referred to the provisions of sections 309, 313, 316, 317 and sections 322 to 328 of the *Legal Profession Act 2004* which evidence this regulation. The Legal Profession Uniform Law, to be introduced this year, also contains comprehensive cost disclosure obligations for solicitors. The Authority is also referred to the separate pre-disclosure requirement detailed in clause 11(1)(c) of the current Regulation and clause 8(c) of the draft Regulation. These disclosure obligations are highly prescriptive and failure to comply with the minutiae of the disclosure requirements is likely to prove fatal to the prospect of successfully contracting out of the regulated regime. Even if the practitioner has successfully managed to comply with both the disclosure requirements and the contracting out requirements, the costs bill is potentially subject to further scrutiny by the Supreme Court costs assessment process.

Additionally, section 393 of the *Legal Profession Act 2004* requires a costs assessor of the Supreme Court to refer a practitioner to the Legal Services Commissioner if the costs charged by the practitioner are determined to be "grossly excessive". Section 202(1) of the Legal Profession Uniform Law will provide for a discretionary referral if the legal costs charged are not "fair and reasonable". The assessor will be required to refer the matter if the legal costs charged may amount to unsatisfactory professional conduct or professional misconduct pursuant to section 202(2). For all these reasons, the Committee questions the need for a disclosure of this type to be made to a third party such as the Authority.

The Committee also strongly opposes the imposition of a criminal sanction as highly unfair and discriminatory to the legal profession. Such a sanction is quite unnecessary given that clause 8(d) now invalidates any attempts to contract out of the regulated scale if a costs break-down has not been provided to the Authority as soon as practicable after finalisation of the matter. It is also noted that clause 23(4) provides for a referral to the Legal Services Commissioner in circumstances of potential overcharging.

If the costs disclosure requirement is to remain in a revised Regulation the Committee submits that the Regulation should provide for a small regulated fee for completion of the costs form, in the order of $350.

Clause 23(4)

The Committee questions the need for this provision as the Authority already has the power to refer a complaint to the Legal Services Commissioner under the *Legal Profession Act 2004*. There will be similar provisions under the Legal Profession Uniform Law.

Clause 24

The Committee has no difficulty with the proposition that payment of certain referral fees is undesirable in any circumstances. One such scenario would involve a person attending the accident scene and providing contact details for those involved in a motor accident to a legal practitioner who pays for this service and who then contacts the injured claimant within days of the accident while the claimant is in a traumatised state. However, this scenario is only one of many potential situations where referral fees can be paid. It could be validly argued that many forms of referral fees are no better nor worse than personal injury advertising provided the potential for conflict is removed.

The Committee is concerned that this proposed clause is in direct contradiction to the existing *New South Wales Professional Conduct and Practice Rules 2013* ("Solicitors' Rules"). Rule 12.4.3 only prohibits referral fees in circumstances where the claimant has not given informed consent to payment of such a referral fee after this having been fully disclosed. Rule 12.4.3 provides:

> 12.4 A solicitor will not have breached this Rule merely by:
>
> 12.4.3 receiving a financial benefit from a third party in relation to any dealing where the solicitor represents a client, or from another service provider to whom a client has been referred by the solicitor, provided that the solicitor advises the client:
>
> (i) that a commission or benefit is or may be payable to the solicitor in respect of the dealing or referral and the nature of that commission or benefit;
>
> (ii) that the client may refuse any referral, and the client has given informed consent to the commission or benefit received or which may be received.

It is our understanding that the proposed national Legal Profession Conduct Rules which are likely to commence in mid 2015, will have similar, if not identical, provisions. The Committee submits it would be highly undesirable if the rules relating to one aspect of personal injury are in direct conflict with the general rules concerning solicitors' conduct. Formulation of the National Conduct Rules has required an extensive consultative and research process involving the law societies of the various states and territories.

With respect to the "accident scene" referrals mentioned above, the Committee considers Rule 34.2 of the Solicitors' Rules addresses this issue. Rule 34.2 provides the solicitor must not

> ... seek instructions for the provision of legal services in a manner likely to oppress or harass a person who, by reason of some recent trauma or injury, or other circumstances, is, or might reasonably be expected to be, at a significant disadvantage in dealing with the solicitor at the time when the instructions are sought.

It is noted that a breach of clause 24 is to be a criminal offence. The Committee is of the view that a criminal sanction is inappropriate and that a breach would be better dealt with by referral to the Legal Services Commissioner.

Further, the terms of the offence do not make clear the required state of mind of the solicitor such as whether it is necessary that the solicitor "knowingly" solicited or received the fee.

Stage 4 and 5 of Schedule 1

The Committee notes that Stages 4 and 5 make provision for an amount to be allowed for professional costs where the insurer wholly admits liability or denies liability but makes no similar provision for circumstances in which contributory negligence has been alleged. Accordingly, the Committee suggests that the wording of paragraphs 4(d), 4(f) and 4(h) be amended to delete the words "the insurer denied liability" and replace them with "the insurer did not wholly admit liability."

Clause 6 and 7 of Schedule 2

The Committee submits that the allowances for reports from attending specialists and for medico-legal specialists still fall very short of market charges for these services. In the Committee's experience, even a straightforward medico-legal report from a specialist costs not less than $1,400.00 to $1,500.00 and many report fees are now well in excess of $2,000.00. Accordingly, the Committee would recommend to the Authority an increase from the suggested sum of $990.00 at clause 6(b) and 7(b) to the sum of $1,400.00. If the Authority then still wants to provide an incentive for a joint medical examination at clause 8, it is submitted that an appropriate allowance at clause 8(b) would be $2,000.00.

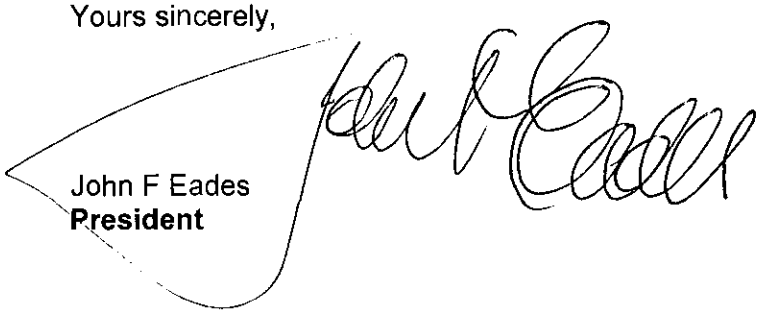
Clause 9 of Schedule 3.

The Committee has some concerns about the definition of an "existing claim" for the purposes of the transitional provisions. In particular, an existing claim is defined to be one "that commenced" before the commencement of this Regulation. This creates potential ambiguity as it is unclear what the word "commenced" means. It may be referring to the date of the motor accident or the date when the claim was made or the date when the CARS application was lodged. It is the Committee's understanding that the Authority intended to define an existing claim as one where a claim under section 72 was made before the commencement of the legislation. If so, then the Committee believes that the words "that commenced" should be replaced with the words "where a claim was made".

The Committee appreciates the opportunity to make a submission in response to the draft Regulation. Our representatives would be happy to confer with you concerning the re-wording of any amended clauses if this would be of assistance.

Any queries arising from this submission should be directed to Leonora Wilson, the policy lawyer for the Committee, on (02) 9926 0323 or leonora.wilson@lawsociety.com.au.

Yours sincerely,



John F Eades
President