Dr Michelle Atkinson and Dr Angelo Virgona
By email: julia.thoener@ranzcp.org

Dear Dr Atkinson and Dr Virgona

Thank you for your correspondence about Medical Privacy and the Personal Injury Commission of NSW (Commission). I note that you write on behalf of the Medical Assessors who are appointed by the Commission to conduct assessments in motor accidents and workers compensation matters.

Your letter addressed to the Hon Mark Speakman SC MP, Attorney General and the Hon Brad Hazzard MP, Minister for Health and Medical Research was referred to me because the Commission falls under my portfolio of Ministerial responsibilities.

I understand that you are concerned about the Commission’s publication of its decisions, primarily Medical Review Panel certificates, which you view as a breach of patient privacy and ethical standards. Section 58 of the Personal Injury Commission Act 2020 provides for the mandatory publication of details of decisions of the Commission, subject to the Personal Injury Commission Rules 2021.

I will address these matters below, but firstly, I refer to your request for urgent legislative amendment to the Personal Injury Commission Act 2020 for the de-identification of Commission decisions, due to the potential of psychological, employment and social damage caused to claimants as a result of the detail published in these decisions.

If you wish to pursue this proposal following review of my response below, I advise that a review of the Personal Injury Commission Act 2020 is scheduled to commence imminently, on 11 August 2022. Given the significance of the reform you have proposed, you may refer your letter to the State Insurance Regulatory Authority (SIRA), the regulatory body which has been commissioned to undertake the review. The review provides the forum to contribute your proposal with an opportunity for wider stakeholder consultation.

Breach of patient privacy and ethical standards

I turn to the other concerns outlined in your letter, starting with the loss of “patient privacy”. The issue of patient privacy does not arise, as the release of decision details is permitted by law, and as the Commission’s Medical Assessors are not administering medical treatment to “patients” in the course of their functions. Medical Assessors are appointed to assess claimants in the course of legal proceedings through an independent medical examination, for the purpose of resolution or determination of their dispute before the Commission.

Similarly, I do acknowledge that you consider the publication of decisions by the Commission constitutes a major breach of ethical standards. As I understand, the ethics to which you refer are those governing medical practice in the delivery of patient care and the confidentiality of patient material. Again, this would not apply to Medical Assessors’ work in the Commission.
The Commission’s **Medical Assessor Code of Conduct** guides the work of Medical Assessors, and highlights the “Privacy and Confidentiality” obligations of Medical Assessors in circumstances otherwise as permitted by law or in the exercise of Commission function (paragraphs [35]–[36]).

**Correction of errors in medical certificates**

I appreciate your concern that decisions published feature highly detailed clinical and personal information and is made available on public forums, with no easy mechanism to correct an error in medical detail.

The ability to correct the errors is available in both legislation and the Commission’s Procedural Directions, information which is available to those who interact with the Commission. For workers compensation matters, section 57 of the **Personal Injury Commission Act 2020** allows the Commission to correct an error. **Procedural Direction PIC7 – Appeals, reviews, reconsiderations and corrections of obvious errors in medical disputes** also highlights this pathway for parties, specifically, paragraph [78] provides:

> In Motor Accidents Division matters, the President will refer an application for correction of an obvious error to the Medical Assessor or review panel as soon as practicable after receipt of the application. In deciding whether there is an obvious error in the certificate, the Medical Assessor or review panel may seek submissions from the parties.

**Parliamentary consideration and justice**

You have questioned whether Parliament considered the loss of medical privacy in the formation of the Commission through the **Personal Injury Commission Act 2020**, and whether this was an unintended consequence of its formation. I understand that you query how justice can be achieved through the identification of parties in decisions.

The provision governing the publication of decisions at section 58 must be read in consideration of the objects of the **Personal Injury Commission Act 2020**, at **section 3**: namely a Commission which is accessible, open and transparent about its processes, and promotes public confidence in decision making. The objects of the Act exhibit the Parliamentary intention for open justice and the publication of the Commission’s decisions under section 58.

As you are aware, prior to the Commission’s formation, the Workers Compensation Commission published its decisions, while the Dispute Resolution Service (DRS) which previously governed the motor accidents scheme published very few decisions, if at all, as it was not a court or tribunal.

The Standing Committee on Law and Justice in its [2018 review of the Workers Compensation Scheme](https://www.pac.gov.au/en/legislation/draft-justice-reports) recommended the formation of a harmonised Commission which published all of its decisions (Recommendations 1 and 2). You will see that the recommendation was supported by stakeholders who saw the importance of transparency to improve dispute resolution, the decision-making process and acceptance of decisions within the community (see paragraphs [2.6] – [2.63]).

The Parliamentary debates around the formation of the Commission also addressed the publication of decisions in the Commission. I draw your attention to the following excerpts of my [Second Reading Speech](https://www.pac.gov.au/en/about/parliament-speeches) for the **Personal Injury Commission Bill 2020**:

> “…. The commission will publish its decisions across all schemes in accordance with the commission rules, guiding and assisting parties to a dispute, promoting public confidence and transparency in commission decision-making, and reducing disputation…"
... Consistent with the objects of the bill this new independent personal injury commission is to be accessible and responsive to the needs of all users, encourage early dispute resolution and resolve the real issues between parties, justly, quickly, cost-effectively and with as little formality as possible. A key object of the bill is to ensure that it promotes public confidence in its decision-making and in the conduct of its members. A rule committee will make rules to regulate the commission’s practice and procedure. Establishing a rule committee strengthens the commission’s independence and ensures appropriate representation from both schemes..."

Accordingly, the publication of decisions was not an unintended consequence, with s 58 of the Personal Injury Commission Act 2020 reflecting the clear intent of Parliament.

The de-identification of decisions

As you have highlighted, parties may request for the de-identification of decisions, an avenue provided by rules 131 and 132 of the Personal Injury Commission Rules 2021. As noted in the above excerpt of the Second Reading Speech, the creation of these rules is done through a Rule Committee which comprises 11 persons, one of whom I understand is an appointee of RACS and RANZCP. When rules 131 and 132 were made, I understand they were made with unanimous consent of the Rule Committee, including your representative.

Rule 132 provides a pathway where parties may apply for, or where a Commission member direct for the de-identification or redaction of a decision seven days prior to publication. Decisions are issued by the Commission seven days prior to publication, and the parties to those proceedings are directly notified of this pathway. Where the safety, health and wellbeing of a person may be affected by publishable decision, or where it is necessary in public interest or the prevention of prejudice to the proper administration of justice, the pathway provides the means to de-identify or redact a decision. Any application must have regard to the objects of the Personal Injury Commission Act and in particular, that the Commission be open and transparent about its processes.

Whilst the President’s comments in the Judicial Officer’s Bulletin (Vol 33 No 2 March 2021) expressed an opinion that such orders would not commonly be made, as can be seen from these rules, a relevant person or a Commission member can seek these orders.

I am informed that very few applications for de-identification or redaction are made by parties, despite the majority of claimants being legally represented and having access to advice about applying for a redaction or de-identification as soon as a decision is issued to them, prior to publication. This information about publication is also available on the Commission’s website. Although I note your concern for claimant’s potential psychological, employment and social damage as a result of publication, very small numbers are pursuing their right to seek de-identification or redaction.

Workforce Issue

Since the Commission’s establishment, Medical Assessors have departed and new Medical Assessors are retained in the usual course of the Commission. The delays which the Commission is currently experiencing in respect of the work of Medical Assessors arises from the suspension of medical assessments as a result of the restrictions imposed by the COVID-19 pandemic.

Currently, the Commission has retained 160 Medical Assessors across all specialties, and each year there are departures as well as new starters. The Commission has opened its new medical suites and have received a high degree of interest by Medical Assessors in undertaking their duties in those rooms.

Next steps
As noted in the outset of this letter, if your concerns are not alleviated, your proposal for legislative amendment may be submitted in the review of the *Personal Injury Commission Act 2020* commencing in August this year, conducted by SIRA.

With a view to allay this matter without requiring legislative change, I do suggest that Medical Assessors concerned with the “highly detailed clinical and personal information” in decisions approach the Commission for training and guidance on the exercise of discretion as to the appropriate level of detail included, particularly in Medical Review Panel decisions. I understand this guidance may be provided by legally qualified members of Commission who retain experience in decision writing.

I hope this information is helpful to you. If you have any further queries, please contact Marianne Christmann, Principal Registrar, Personal Injury Commission on 02 9289 1367

Yours sincerely

The Hon. Victor Dominello MP
Minister for Customer Service and Digital Government

Date: 01/07/22