



The Royal
Australian &
New Zealand
College of
Psychiatrists

Statutory Review of the Personal Injury Commission Act 2020

Improving the mental health of the community

Introduction

The NSW Branch of the Royal Australian and New Zealand College of Psychiatrists welcomes the opportunity to contribute to the Statutory Review of the *Personal Injury Commission Act 2020* (the Act).

The Royal Australian and New Zealand College of Psychiatrists (RANZCP) is a membership organisation that prepares doctors to be medical specialists in the field of psychiatry, supports and enhances clinical practice, advocates for people affected by mental illness and advises governments on mental health care.

The RANZCP is the peak body representing psychiatrists in Australia and New Zealand, and as a binational college, has strong ties with associations in the Asia and Pacific region. The College has over 7700 members, including more than 5500 qualified psychiatrists (consisting of both Fellows and Affiliates of the College) and over 2100 members who are training to qualify as psychiatrists (referred to as Associate members or trainees).

The NSW Branch represents nearly 1950 members, including some 1350 qualified psychiatrists. Psychiatrists are clinical leaders in the provision of mental health care in the community and use a range of evidence-based treatments to support a person in their journey of recovery.

RANZCP Members as Medical Assessors

Members of the NSW Branch of RANZCP, as Medical Assessors, conduct assessments on behalf of the Personal Injury Commission (PIC) for motor accident and workers compensation matters.

Individual psychiatrists, who are Medical Assessors for the PIC, may contribute their own thoughts to this Review, and the Branch has encouraged them to do so.

About our submission

The NSW Branch's submission does not comment on the detailed workings of the PIC and whether there are specific areas of concern related to these operations when evaluated against the objectives of the Act, as outlined in Section 3.

We confine our comments to the loss of medical privacy in the operation of the Act, with respect to the publication of Medical Review Panel certificates. The loss of individuals' medical privacy as a result of publication of those certificates has been raised as a concern by our Members.

We note that Section 3 of the Act articulates that the Commission should be accessible, open and transparent, and we agree that this is an important element of the PIC's operations.

However, we strongly disagree with what appears to be an underlying assumption that identification of an individual and publication of that individual's details, as is the case with Medical Review Panel certificates, are necessary for decisions to be transparent.

Accessibility, openness and transparency need not, and indeed should not, come at the expense of an individual's medical privacy. Similarly, it is unreasonable to argue that justice can only be achieved when parties to a dispute are publicly identified.

Objectives of the Act, as per section 3:

(a) to establish an independent Personal Injury Commission of New South Wales to deal with certain matters under the workers compensation legislation and motor accidents legislation and provide a central registry for that purpose,

We note the establishment of the PIC brought into one Commission workers compensation and motor accidents claims, previously administered by the Workers Compensation Commission (WCC) and the Dispute Resolution Service (DRS) respectively. Psychiatrists, alongside other medical professionals, provide medical assessments for PIC cases.

In a proportion of cases dealt with by the PIC, the decisions of Medical Assessors are appealed, and reviewed by a Panel, which includes medical and legal experts. The certificates issued by the Panel following a re-assessment, are published.

In these instances, the Privacy Act does not apply and the claimant is nearly always fully identified in the published decision, which may also feature highly detailed clinical and personal information.

The resulting Panel Certificate is placed on a public internet site for any inquisitive neighbour, acquaintance, relative or potential employer to read. In addition, if medical detail happens to be incorrect, there is no easy mechanism to correct it.

The NSW Branch sees this as a major breach of ethical standards, and we do not believe that there was sufficient consultation with the medical profession with regard to the PIC legislation at the critical phase of consideration by the NSW Legislative Council Law and Justice Committee. Better consultation may have resulted in greater protections for individuals, rather than publishing their details, and justifying doing so on the basis of openness and transparency.

We note that Panel decisions were published by the former WCC, but not by the DRS. That the DRS did not publish decisions is attributed to the fact that it was not a court or tribunal. Publishing decisions, however, does not require the identification of individuals. The NSW Branch believes it is unreasonable to argue that justice can only be achieved when parties to a dispute are publicly identified. Other Courts, most notably the Family Court, have been prohibited by statute to publicly identify the parties to decisions, in all but the most exceptional of circumstances.

The NSW Branch reviewed the draft legislation in the lead-up to the establishment of the PIC, in consultation with senior RANZCP members who were working specifically in the previous systems or serving on Review Panels. We, together with representatives of other medical peak bodies, argued for a number of amendments to the draft legislation, including that appeals panels be comprised solely of medical practitioners; that the Rule Committee comprise two nominees of the medical colleges (the RANZCP; the Royal Australasian College of Physicians and the Royal Australasian College of Surgeons); and that a position of Principal Medical Officer be created.

The final legislation did not include a Principal Medical Officer; nor make provision for appeals panels to be comprised solely of medical practitioners. Our (and others') request in relation to two medical nominees to the Rule Committee eventuated in an amendment to the

legislation that the Rule Committee would include one medical nominee (of 11 members) jointly nominated by the medical colleges. Since the PIC's establishment, that medical appointee to the Rule Committee has consistently opposed identification of individuals in Panel Certificates.

(b) to ensure the Commission—

- i. is accessible, professional and responsive to the needs of all of its users, and**
- ii. is open and transparent about its processes, and**
- iii. encourages early dispute resolution,**

The NSW Branch supports the principles listed under (b). We submit, however, that by publishing individuals' medical details as part of the Panel decisions, the PIC is not "responsive to the needs of all of its users" as stipulated in (b)i. These claimants are "users" of the PIC system, and it is a system that does not protect their right to medical privacy.

As outlined, any person can access the medical details of an individual who is the subject of a Panel Certificate. The potential for psychological, employment and social damage caused to claimants when their medical and social habits, and past and present disabilities, are exposed, is clear.

Patient privacy is at the heart of medical ethics. It is also a value shared by the community, and governments have a duty to protect that privacy. Ensuring that the PIC is open and transparent in its processes (as per ii,) does not require identification of individuals.

The NSW Branch is aware that it is possible for parties to request de-identification. This is not sufficient protection for claimants' privacy, particularly given that such orders are not normally made. PIC President, Judge Phillips, has repeatedly noted that de-identification will only be agreed to in very exceptional circumstances.¹

We note few applications for de-identification or redaction are made. This is not an indication that claimants agree with their medical details being published. There are significant barriers to lodging a de-identification application, such as time limits on legal representation for applications under circumstances where claimants may be suffering physical or mental ill health, together with the unlikely chance of success of such an application.

(c) to enable the Commission to resolve the real issues in proceedings justly, quickly, cost effectively and with as little formality as possible,

In relation to the Commission resolving issues "justly", we reiterate the point that identifying individuals is not a requirement for justice to be achieved. Indeed, the NSW Branch argues that, by identifying those claimants and therefore breaching their right to medical privacy, in effect means the PIC is not resolving the issues "justly" for all parties.

The NSW Branch is aware that a number of senior medical assessors have left the PIC system because of their concerns around medical privacy. This is contributing to an already significant workforce issue for the PIC, impacting its ability to resolve issues "quickly" and leading to delays in justice.

¹ See for example the Hon Judge Phillips, *Judicial Officers' Bulletin*, 2021, Vol 33, No 2, p. 20

In addition, see comment under (e) below.

(d) to ensure that the decisions of the Commission are timely, fair, consistent and of a high quality,

See comment under (e) below

(e) to promote public confidence in the decision-making of the Commission and in the conduct of its members,

The NSW Branch submits that the publication of individual claimants' details in Panel Certificates does not promote public confidence; indeed, in addition to the potential harm done to claimants who are already suffering mental or physical ill health, this practice may deter some individuals from seeking resolution.

We refer this Review to the words of former High Court Judge, the Hon Michael Kirby AC CMG, describing the increasing trend for de-identification of litigants in many theatres of law, to wit:

*The balance of the public interested is better served by sensitivity to the legitimate privacy of litigants. Some might be discouraged from resorting to courts and tribunals if the price were identification of the litigant, especially in cases involving issues of factual detail that could be private or embarrassing.*²

This adversity selectively impacts on claimants, not insurers. In that sense, the decisions of the Commission in such instances are neither "fair", as stipulated in (d) above; nor are issues resolved "justly", as required under (c) above.

(f) to ensure that the Commission—

- i. publicises and disseminates information concerning its processes, and**
- ii. establishes effective liaison and communication with interested parties concerning its processes and the role of the Commission,**

The medical colleges, and their representative on the Rule Committee, have expressed their concerns about breaches of medical privacy on a number of occasions, and most recently, in correspondence to the responsible Minister, the Hon Victor Dominello MP.

We are of the view that, while liaison and communication in relation to this issue has taken place, the proper responsibilities of the medical profession have not been taken into account. Those responsibilities include the protection of individuals' medical privacy.

(g) to make appropriate use of the knowledge and experience of members and other decision-makers.

As described under (c) above, a number of senior medical assessors have left the PIC system because of they do not agree with the publication of an individual's details in Panel Certificates. Further, we note that repeated requests have been made in the Motor Accidents division for joint training of doctors and lawyers in decision-writing. This would

² The Hon Michael Kirby AC CMG, "Privacy and Law Reporting", *Privacy Law Bulletin*, 2020, 17, pp. 142-143

result in better use of the knowledge and experience of Members, but has unfortunately not eventuated.

Additional comments:

Ours, and the other medical colleges', concerns have been rejected on the basis that 'claimants' are not 'patients', and therefore the issue of patient privacy does not arise. Medical assessors are not considered to be administering treatment to patients, and the release of details is permitted by law.

We submit that the difference between a 'claimant' and a 'patient' is one of terminology only. Claimants must provide medical information to a medical professional in order to receive treatment or medical advice, giving them the same right to privacy as a patient in a different setting. Moreover, they would assume the content divulged to be, and to remain, private. There is no difference in relation to the right to medical privacy, simply because the context of the disclosure is a medico-legal interaction. An interaction with a medical professional by its very nature becomes a clinical contact.

The interaction of divulging information to a medical professional may be therapeutic in itself, and may also uncover other health (including mental health) issues that are pertinent to the case and the claimant's future health. From the medical profession's point of view, any such interaction is therefore one between 'medical professional' and 'patient', with all the medical ethics this entails.

Lastly, to argue that medical professionals need not be concerned about individuals' medical privacy in relation to Medical Review Panel certificates because publication is enshrined in law is a logical fallacy. A law that does not afford medical privacy to individuals is a law that requires urgent amendment.