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Peter Cain MLA

Chair

Standing Committee on Justice and Community Safety (Legislative Scrutiny Role)

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Dear Mr Cain *Peter*

Thank you for Scrutiny Report No. 39, published on 12 March 2024. The Committee made comments in relation to four guidelines made by the Motor Accident Injuries (MAI) Commission under the *Motor Accident Injuries Act 2019* (MAI Act). I am advised by the MAI Commission that they were unaware that the Committee's role had recently been expanded under section 38 of the *Human Rights Act 2004* (HRA), and that this legislative change has formalised the Committee's role with HRA considerations for subordinate laws. While noting the Committee's comments related to disallowable instruments, in the future the Commission will document any applicable HRA considerations in all its legislative explanatory statements. The MAI Commission offers the following comments in relation to each of the guidelines.

Motor Accident Injuries (Significant Occupational Impact Assessment) Guidelines 2023 (DI2023-243) and Motor Accident Injuries (Significant Occupational Injuries Assessment Referral) Guidelines 2023 (DI2023-313)

The right to work and work-related rights are not engaged by the significant occupational impact (SOI) assessment guidelines. The scheme's principles and key processes, including for a SOI assessment, are contained in the MAI Act. The SOI guidelines provide for the procedural and technical matters that flow from these principles. Section 27B of the HRA (the right to work) is not engaged as the assessment does not interfere with that right. This is because the assessment is not about a person's right to work but what effect the injuries from the motor accident had on their ability to work in their chosen field.

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The assessment is only relevant and necessary to ascertain whether an injured person meets one of the thresholds for a common law claim. The guidelines specify what it is that the assessor is to assess and are very clear in what they are confirming with respect to the assessment. An assessor is not asked, nor should they, to opine on whether the injuries will compound, worsen or manifest over time. If after the assessor confirms that the injured person has experienced a significant occupational impact from their motor accident injuries, then the expertise of others can be called upon during the common law claim.

The SOI referral guidelines were originally to form part of the SOI guidelines. Feedback following a consultation process in early 2023 suggested the referral processes be in a separate guideline. With the development of the guidelines, the right to privacy (section 12, HRA) was considered, as a limitation on the right to privacy was noted in the explanatory statements to the *Motor Accident Injuries Amendment Bill 2023* (the Bill) and the MAI Act. Personal information, in the form of work and employment information, needs to be provided to enable the independent assessor to complete a SOI assessment. The MAI Act and the guidelines require that consent is obtained for a referral for a SOI assessment, so that a person is fully informed and can engage in the assessment. The guidelines utilise reasonable and objective criteria and adopt the least restrictive means to achieve the purpose.

The Committee has suggested the right to life, protected by section 9 of the HRA, should have been referenced with respect to the SOI referral guidelines. Noting the discussion below about the protective nature of section 9, it is unclear to the Commission this section is, in fact, engaged as the SOI referral guidelines do not influence or interfere in the receipt of medical services.

Motor Accident Injuries (Treatment and Care) Guidelines 2023 (DI2023-310) and Motor Accident Injuries (Quality of Life Benefit) Guidelines 2023 (DI2023-311)

The Committee suggests that the right to life, section 9 of the HRA, may have human rights impacts relating to the treatment and care (T&C) and quality of life (QOL) benefit guidelines. Regarding the T&C guidelines, the Committee says this is due to the guidelines influencing the T&C that is paid for by an insurer. For the QOL benefit guidelines it was related to the information and support given to applicants.

It is not apparent to the MAI Commission from the words of section 9 how this section may be said to be engaged given it is simply that everyone has a right to life. The Commission understands section 9 has also been interpreted to include a protective aspect, e.g., a government's obligation to safeguard life, including protecting and promoting the health and well-being of Canberrans.

The T&C guidelines give effect to the scheme's principles and key processes with respect to guidance given to insurers about their obligations to pay T&C benefits. This includes making decisions about whether the T&C is reasonable and necessary, and verifying T&C expenses. The guidelines were largely remade, with some updates as outlined in the explanatory statement, but not enough to require a HRA assessment.

The Commission observes that a MAI insurer is not a treatment provider and has no control over the delivery or availability of public/private medical resources within the Territory. That said, if a wide interpretation is being taken of this right, the T&C guidelines could be said to promote the right to life as the guidelines outline what a MAI insurer is required to consider when determining what treatment and care meets the criteria to be paid under the MAI Scheme. This is by, for example,

limiting the risk of harm to injured persons from inappropriate treatment and ensuring that the treatment is relevant to the injuries arising from the motor accident.

The QOL benefit is a payment to an injured person who has sustained a permanent injury because of a motor accident. It is one of several different benefits available under the MAI Scheme and its receipt does not impact on whether a person receives treatment and care under the Scheme. The QOL benefit guidelines provide guidance to insurers about their obligations to provide information and support to potential applications for the QOL benefit, after they have completed their treatment and care or their injury is stable. The 2023 QOL benefit guidelines were a relatively small update to the 2022 guidelines to clearly state the requirement for a diagnosis of a primary psychological injury. This update was to address an emerging issue that had potential to cause delays with QOL assessments; however, a HRA assessment was not considered necessary given most of the guidelines were not changed.

The Commission does not consider the right to life under section 9 arises with respect to the QOL benefit guidelines as it is not about the receipt of treatment and care. The right to privacy, section 12, is more relevant as it requires, following an insurer providing information and support to apply for the benefit, the provision of personal medical information (if not already held by the MAI insurer). The QOL benefit guidelines utilise reasonable and objective criteria and adopt the least restrictive means to achieve its purpose.

The Commission trusts that the above information addresses the concern raised by the Committee.

Yours sincerely



Rachel Stephen-Smith MLA
Acting Special Minister of State
8 April 2024