INSURANCE COUNCIL OF AUSTRALIA

Mr Philip Reed
Director General
Department of Justice and Attorney-General
GPO Box 149
BRISBANE QLD 4001

Via email: jane.flower@justice.qld.gov.au

15 March 2012

Dear Mr Reed

PERSONAL INJURIES PROCEEDINGS ACT (QLD) 2002 (PIPA): SECTION 30

The Insurance Council of Australia[1] (Insurance Council) welcomes the opportunity to provide comments to the Department of Justice and Attorney-General in relation to the Personal Injuries Proceeding Act 2002 (***PIPA***) following the recent majority Court of Appeal decision in *State of Queensland v Allen* [2011] (***Allen***).

We have consulted with our members who offer medical indemnity insurance in relation to your 1 February 2012 letter and can advise *Allen* has led to uncertainty in the application of the law of legal professional privilege under the PIPA and raises serious concerns about the likely impact of the decision on future Queensland cases.

As the term 'medical report' and other reports referred to in s 30 are not defined in the PIPA, it is submitted the Court of Appeal in *Allen* has construed the term more widely than intended by the legislature giving rise to two significant problems:

- Lack of certainty as to when a health care professional (including medical practice , medical officer, midwife) or medical indemnity insurer can be confident of an entitlement to a claim for legal professional privilege and;
- Potential for prejudice to health care professionals, medical practices and medical indemnity insurers in litigation, by treating the health sector differently under the PIPA process and unlike any jurisdiction outside Queensland.

[1] The Insurance Council of Australia is the representative body of the general insurance industry in Australia. Our members represent more than 90 percent of total premium income written by private sector general insurers. Insurance Council members, both insurers and reinsurers, are a significant part of the financial services system. December 2011 Australian Prudential Regulation Authority statistics show that the private sector insurance industry generates gross written premium of $36.0 billion per annum and has total assets of $115.6 billion. The industry employs approx 60,000 people and on average pays out about $110 million in claims each working day. Insurance Council members provide insurance products ranging from those usually purchased by individuals (such as home and contents insurance, travel insurance, motor vehicle insurance) to those purchased by small businesses and larger organisations (such as product and public liability insurance, professional indemnity insurance, commercial property, and directors and officers insurance).

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This has adverse implications for insurance providers in Queensland and the Insurance Council therefore submits the PIPA should be amended to address the current uncertainty for the legal and health care professions.

LACK OF CERTAINTY AND POTENTIAL FOR PREJUDICE

Allen suggests that where a document or author possesses certain characteristics, it may comprise a 'medical report'. Some of the diverse characteristics attributed to a 'medical report' in *Allen* include where:

- the doctor is not at the time of producing the document a respondent to a personal injury claim;
- the solicitor requesting the document is not acting for or on behalf of the health practitioner witness;
- the document, in form, 'looks like' a medical report; (Justice Fryberg at para 95 of *Allen*, states that 'in content and form it resembles the thousands of medical reports prepared for courts each year.')
- the medical records in respect of the incident to which the document relates are inadequate or incomplete.

Prior to *Allen* it was understood that medical reports to be excluded from privilege were those made by an appropriately qualified **independent** third party – as opposed to a witness for a party (including an employee of a health care provider) or a respondent. A statement made by an insured doctor, for example, was not a 'medical report' but rather allowed for full investigation of the matter, achieving the purpose of s 4(2)(a)-(e) of the PIPA, such as promoting settlement of claims at an early stage wherever possible.

Although the *Allen* decision recognised a 'proof of evidence' might be privileged, it offered no guidance about what is required to attract such privilege. It is submitted that it would not be reasonably contemplated that a proof of evidence or statement of a witness of fact, prepared by a solicitor for their use would constitute a 'medical report' and thereby be exempt from legal professional privilege, merely because of the professional qualification of the witness. This, it is submitted, is the outcome of *Allen*.

As recognised by Fraser JA in *Allen* at para 33:

> *If reports about an incident constituted "medical reports" merely because the reports were prepared by doctors and concerned a medical incident, the effect of s 30(2) would be to subject persons, including doctors, alleged to be liable for medical incidents to more extensive obligations of disclosure than all other potential defendants in personal injury claims. Such a discriminatory result does not seem to have been a purpose of PIPA*.

Our members are further concerned the reasoning in *Allen* has the potential to capture most documents prepared by health care professionals (including for example medical officers or midwives) which would place them at an unwarranted disadvantage to any other class of witness or respondent in a PIPA claim. There is a potential prejudice for health practitioners, medical practices as well as medical indemnity insurers, given health practitioners are frequently asked to comment on matters for which there is the potential for subsequent

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litigation and in which they may be joined as a party. Prejudice may also arise where a health care professional is unaware of the implications of wider disclosure of a communication intended for their insurer or lawyer.

Additionally, our members are concerned about the different treatment of an employee witness to a claim to that of a named respondent. A corporate entity will rely on the evidence of its employees when protecting its interests in an anticipated claim or seeking advice about an adverse medical event. The Insurance Council understands proceedings may be streamlined to name one corporate respondent rather than list multiple individuals involved in the matter. It is noted that a discussion of these matters is not evident in *Allen*.

POTENTIAL SOLUTIONS

The Insurance Council would be pleased to discuss with the Justice and Attorney General's Department the detail of any potential amendments to the PIPA to address the uncertainty created by *Allen* and remove the need for, and associated costs, of an appeal.

A number of options for discussion are outlined in the **Attachment**.

Importantly, the Insurance Council submits any potential amendment to the PIPA should preserve legal professional privilege in a document prepared for or by a witness of fact in anticipation of litigation or during the conduct of a PIPA claim, or for the purpose of obtaining legal advice.

As the Insurance Council's Healthcare Indemnity insurers next meet on **Thursday, 19 April at 2:00pm,** via teleconference, we would welcome departmental officials joining this meeting to discuss the issues raised in this letter and any additional assistance the Insurance Council may provide.

Please contact the Insurance Council's General Manager Policy – Regulation, Mr John Anning to advise your availability to participate in further discussions, on Tel: 02 9253 5121 or janning@insurancecouncil.com.au.

Yours sincerely

Robert Whelan
Executive Director & CEO

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ATTACHMENT

WORKING DOCUMENT ONLY - POTENTIAL AMENDMENTS TO PIPA FOR FURTHER DISCUSSION

1. **Greater consistency with Uniform Civil Procedure Rules 1999**

- Medical report could be defined as '*a document giving an independent expert health practitioner's opinion on an incident or its consequences'*. This would provide consistency with the Uniform Civil Procedure Rules 1999 definition: 'a document giving an expert's opinion on an issue arising in the proceeding' which:
  - automatically precludes a pure witness of fact that does not proffer an opinion (regardless of their professional qualifications);
  - recognises the report writer is an expert with appropriate qualifications to comment on the matters directly in issue;
  - connotes a level of independence in the person preparing the report.
- Opinions and reports prepared by treating health practitioners (whether they be medical practitioners or rehabilitation providers) continue to be discoverable under the definition of 'rehabilitation reports'. Section 30(2) be amended to replace 'reports relevant to the claimant's rehabilitation' with 'rehabilitation reports' defined as 'reports from treating health practitioner or other rehabilitation provider'. This would still encompass disclosure of reports from vocational providers etc.

2. **Clinical reports with an exclusion for statements in anticipation of claim**

- Medical report could be confined to clinical reports created by medical or other healthcare practitioners in the course of their treatment of the claimant, with a specific exclusion applying to statements obtained from medical practitioners in anticipation of a claim or whilst investigating a claim under PIPA.

3. **Wider PIPA amendment including sections 20, 22, 27, 28, 29**

- Include an acknowledgement in s 30(1) that a claim may not resolve during the PIPA process, so a document may attract legal professional privilege even if prepared during a PIPA claim.
- To recognise that the State and corporate health entities generally do instruct lawyers to act on behalf of our individual members whether they are individually named as respondents, or in the position of witnesses of fact or opinion, section 30(5) should be amended and expanded to provide that investigative reports, medical reports and reports relevant to the claimant's rehabilitation do not include any document:
  - prepared in relation to an application for, and opinion on or a decision about, indemnity against the claim from the State or other corporate entity;
  - if the respondent is the State or a corporate entity, at the request of the entity's legal representatives for the dominant purpose of:
    - providing legal advice to the respondent or its employees or agents; or
    - protecting the interests of the respondent, its employees or agents in anticipation of a legal claim.
- The disclosure obligations in sections 22, 27, 28 and 29 of the PIPA should be amended to ensure consistent terminology used.
- Section 20(3) should be repealed because it is superfluous to the parties disclosure obligations generally and creates confusion about the purpose for which documents

are created depending on the particular and discrete stage a PIPA claim is at (see State of Queensland v Watkins [2007] QCA 57).

4. Definition of 'medical reports' and 'investigative reports'

- 'Medical reports' and 'investigative reports' be defined to expressly exclude:
  - correspondence between a party to a claim and that party's lawyer (as currently exists in s.284(b) of the Workers' Compensation & Rehabilitation Act 2003);
  - any document prepared in relation to an application for, or an opinion or decision about, indemnity against the claim from the State;
  - any document of information provided by a person who is granted indemnity against the claim from the State and;
  - a 'witness' statement provided by a medical practitioner in relation to a claim falling within s.9A of the PIPA.