



Transport Accident Act Impairment Assessment Protocols - 1 July 2016

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1. INTRODUCTION

- 1.1 The Transport Accident Commission (TAC) is a statutory authority established by the *Transport Accident Act 1986 (Vic)* (TAA). The TAC manages a statutory compensation scheme in respect of people who sustain injury or die as a consequence of a transport accident (claimant/s). The interests of claimants are the foremost consideration of all parties to these protocols.
- 1.2 Consistent with its mission and vision statement, Client Service Charter and public commitment to *Model Litigant Guidelines*, the TAC strives to assess and deliver the correct impairment benefits to claimants as expeditiously as possible.
- 1.3 The TAC, Law Institute of Victoria (LIV) and Australian Lawyers Alliance (ALA) all agree these protocols recognise appropriate impairment benefit delivery processes which are important for ensuring that claimants' legal rights are being exercised and are not abandoned for the lack of opportunity to enforce them.
- 1.4 The TAC recognises the role played by claimants' lawyers in the impairment process, including initiating the process, proactively arranging and initiating medical examinations, obtaining and collating documentation, and engaging in negotiation with the TAC to facilitate the most appropriate outcome for claimants in accordance with the provisions of the TAA.
- 1.5 These protocols have been agreed between the TAC, LIV and ALA who agree that they and their membership will comply with them, and promote their use as the preferred method for delivering impairment benefits to claimants.

2. OBJECTIVES

- 2.1 To ensure that impairment benefit delivery processes are fair, expeditious and transparent and provide an effective mechanism for the delivery of appropriate impairment benefits to claimants. It is recognised that the assessment of impairment benefits should be undertaken in respect of all injuries where there is a clinical indication of permanent impairment or a reasonable indication of potential impairment.
- 2.2 To ensure timely impairment benefit delivery to claimants.
- 2.3 The processes giving rise to the consideration, assessment and delivery of impairment benefits are, by the mutual and early exchange of relevant and reasonable information, productive of quality decision making by the TAC. Claimants' lawyers will use their best endeavors to facilitate this by providing relevant information to the TAC at the earliest opportunity in the impairment decision making process.
 - 2.3.1 The parties agree to only collect relevant information that assists the TAC for the purpose of making a quality impairment determination.
 - 2.3.2 Where the claimant's authority is used to obtain information the TAC must comply with the Protocols for Authority Use by the TAC agreed between the TAC, LIV, ALA.

2.3.3 In accordance with the TAC's *Privacy Policy*, where the TAC requires information about a claimant from a claimant's treating practitioner in order to assess impairment, the TAC agrees to request a report from the claimant's treating practitioner at first instance, and only request clinical notes where:

2.3.3.1 the report is insufficient; and

2.3.3.2 it is necessary to establish liability or the apportionment of impairment for a known pre-existing injury or condition that is affecting the transport accident injuries; or

2.3.3.3 it is necessary to establish liability with respect to the claim.

Where the TAC seeks to obtain clinical notes, the TAC will write to the claimant's lawyer setting out why a request for clinical notes (rather than a treating practitioner report) is appropriate.

- 2.4 The processes giving rise to the assessment and delivery of impairment benefits to claimants involve medical examinations by practitioners accredited in the use of the American Medical Association Guides to the Evaluation of Permanent Impairment (AMA Guides) as amended by the TAA.
- 2.5 The TAC, LIV and ALA recognise that attending multiple medical examinations may be stressful for claimants and are committed to ensuring that impairment benefit delivery is undertaken in a manner that minimises the number of medical examinations that a claimant is required to attend. It is recognised by the parties that Joint Medical Examinations (JMEs) are an appropriate mechanism for achieving this objective.
- 2.6 It is agreed that JMEs can be utilised in the Impairment Assessment Protocols. JMEs are governed by the Joint Medical Examination Protocols which are to be read in conjunction with these protocols.

3. OPERATION

- 3.1 These protocols apply where an impairment application under Sections 46A, 47, 48 or 54 of the TAA has been initiated pursuant to Chapter 6 of these protocols on or after 1 July 2016.
- 3.2 Written communication to the TAC regarding these protocols, including lodgement of an Impairment Application form in accordance with Chapter 7, can be made to the Manager, Impairment, Transport Accident Commission, 60 Brougham Street, Geelong 3220 or via email to impairment@tac.vic.gov.au.
- 3.3 Where a claimant has been involved in multiple transport accidents or has a concurrent entitlement to a Minor's Additional Benefit, the assessment of impairment from each accident or entitlement, where practicable and agreed by the parties, will be conducted concurrently (unless the impairment from an earlier accident or Minor's Additional Benefit has already been determined).
- 3.4 Where the TAC is notified that the claimant is represented by a lawyer, the claimant's lawyer will always be advised of an impairment decision or

impairment proposal at the same time as the claimant. Where the TAC provides an impairment proposal, the claimant's lawyer will always have the opportunity to obtain instructions from the claimant and negotiate with the TAC on the impairment proposal pursuant to Chapter 10 of these protocols.

4. BYPASS OF IMPAIRMENT PROCESS

- 4.1 Where practical and in the interests of the claimant, an impairment assessment pursuant to Section 46A of the TAA may be bypassed to allow a claimant to fast-track a serious injury application/common law claim. To enable a claimant to make an informed decision regarding the most timely and efficient path through the impairment and serious injury/common law process the TAC will provide a preliminary view on liability pursuant to Chapter 7 of the Common Law Protocols.
- 4.2 A claimant's lawyer will notify TAC that the claimant intends to bypass the impairment process by indicating this on the Serious Injury Application form as described in Chapter 6 of the Common Law Protocols.
- 4.3 Where a claimant elects to bypass the impairment process, the TAC will make an impairment determination pursuant to Section 47(7) of the TAA at the same time the serious injury decision is made.
- 4.4 If a claimant initially elects to bypass the impairment process but then decides to pursue an impairment benefit, nothing in these protocols prevents a claimant from subsequently lodging an Impairment Application form in accordance with Chapter 7 of these protocols and exercising their legal rights to an impairment benefit under the TAA.
- 4.5 TAC will pay legal costs to a claimant's lawyer in the amount of \$3,300, being the impairment bypass price point, where a claimant has not commenced an impairment application at the time their common law claim is resolved.
 - 4.5.1 For the purpose of Clause 4.5 'not commenced an impairment application' means:
 - 4.5.1.1 An Impairment Application form has not been lodged with TAC;
or
 - 4.5.1.2 An impairment determination has not been made pursuant to Section 46A of the TAA.

5. INTERIM IMPAIRMENT BENEFIT

- 5.1 The TAC commits to paying an interim impairment benefit to a claimant where requested and in accordance with the TAA. Nothing in these protocols precludes the TAC from paying an interim impairment benefit to a claimant.
- 5.2 The completion of JMEs and/or the lodgement of an Impairment Application form in accordance with Chapter 7 of these protocols are not required for the TAC to pay an interim impairment benefit.
- 5.3 Payment of an interim impairment benefit can be requested by letter addressed to the Manager, Impairment, Transport Accident Commission, 60 Brougham

Street, Geelong 3220 or via email to impairment@tac.vic.gov.au

- 5.4 If an interim impairment benefit is paid to a claimant by reason of a request by letter pursuant to Clause 5.3, legal costs under these protocols (i.e. an impairment price point or impairment bypass price point) will not be paid.
- 5.5 If an Impairment Application form is lodged in accordance with Chapter 7 of these protocols, and an interim impairment benefit is subsequently paid to a claimant, the TAC will pay the impairment price point with no release in accordance with Clause 11.1.2. If the claimant subsequently finalises their entitlement to an impairment benefit and signs an impairment release, TAC will pay the additional legal costs in accordance with Clause 11.1.1, less the amount already paid in accordance with Clause 11.1.2.

6. COMMENCEMENT OF IMPAIRMENT ASSESSMENT

- 6.1 A claimant who may be entitled to an impairment benefit can request through their lawyer that the TAC commence the assessment of impairment.
- 6.2 If a lawyer has been retained by a claimant and the TAC is about to commence the assessment of impairment, the TAC will write to the lawyer advising that the impairment process is commencing. The TAC will also invite the claimant's lawyer to initiate the impairment process in accordance with the requirements in Clause 6.3 and participate in the JME process.
- 6.3 To initiate the impairment process, a claimant's lawyer can either:
 - 6.3.1 Lodge an Impairment Application form in accordance with Chapter 7; or
 - 6.3.2 Notify the TAC of the claimant's intention to lodge an Impairment Application form on the JME Request form when requesting a JME for the purpose of an impairment assessment; or
 - 6.3.3 Notify the TAC by way of a letter of the claimant's intention to request an impairment assessment and lodge a completed Impairment Application form.
- 6.4 Within 28 days of receipt of notification pursuant to Clause 6.3, the TAC will ensure that a claimant's lawyer is provided with all information in its possession that it will consider, or ought to consider, in the assessment of the claimant's impairment, including a copy of the claimant's completed claim form, unless the information has already been provided to the claimant's lawyer.
- 6.5 Where a claimant obtains legal representation subsequent to the TAC arranging Independent Medical Examinations (IMEs) and commencing the assessment of impairment, the claimant's lawyer should expeditiously contact the TAC. The parties should then agree as to the most efficient way of completing the impairment assessment process.
 - 6.5.1 The parties should refer to the JME Protocols as to whether IMEs should be converted to JMEs, whether alternative or additional JMEs are required and the timeframe for any further JMEs to be arranged and conducted.

7. LODGEMENT OF IMPAIRMENT APPLICATION FORM

- 7.1 The claimant's lawyer must lodge with the TAC a complete Impairment Application form. The Impairment Application form should include the following, where relevant:
- 7.1.1 Medical and treatment information relating to the claimant's injuries, including test or diagnostic reports and, where required, clinical notes from the claimant's treating practitioner(s);
 - 7.1.2 Details of JMEs that have been conducted for the purpose of assessing the claimant's impairment;
 - 7.1.3 IMEs (not jointly obtained with the TAC) with the letter of instruction and attachments sent to the medical examiner;
 - 7.1.4 A report from the claimant's treating practitioner addressing any pre-existing injury or condition that has been affected by the transport accident and where possible, an opinion on the impact of the transport accident on the claimant's pre-existing injury or condition. If the treating practitioner's report does not sufficiently address this issue, their clinical notes regarding the pre-existing injury or condition should be provided; and
 - 7.1.5 A lawyer's suggested whole person impairment percentage based on the evidence, including reference to the relevant AMA Guides section and any other relevant information.
- 7.2 The claimant's lawyer should provide details on the Impairment Application form of all information previously provided to the TAC (e.g. treating practitioner reports, JMEs, medico-legal reports), that is being relied upon for the purpose of the impairment assessment. It is not necessary for the claimant's lawyer to attach additional copies of this information to the Impairment Application form or re-send to the TAC.

8. EVALUATION AND ASSESSMENT

- 8.1 Within 28 days of receiving a complete Impairment Application form, the TAC must provide the claimant's lawyer with a written proposal regarding the determination of the claimant's entitlement to an impairment benefit (impairment proposal) or provide notice that the TAC reasonably requires:
- 8.1.1 Additional relevant information about any matter contained in the Impairment Application form and supporting material.
 - 8.1.2 A supplementary report from a JME. Where appropriate, TAC will notify a claimant's lawyer of any issue that requires clarification within a JME report as soon as the TAC becomes aware of it, rather than wait until the Impairment Application form is lodged.
 - 8.1.3 The claimant to attend an IME. The TAC may request that the claimant attend an IME where it believes a JME report provides an assessment that is not in accordance with the AMA Guides as amended by the TAA or where additional information indicates that the medico-legal or JME

reports obtained may otherwise have inaccurately assessed a claimant's degree of impairment. The TAC will provide written reasons to the claimant's lawyer for requiring the claimant to attend further examination.

8.2 Within 14 days of receiving the TAC's request for additional information pursuant to Clause 8.1.1 the claimant's lawyer must:

8.2.1 Confirm with the TAC that the information has been sought; or

8.2.2. Confirm that the TAC should obtain the requested information itself. Where the TAC does not have the claimant's signed authority on file, the claimant will sign a specific authority allowing the TAC to obtain the requested material; or

8.2.3 Provide an explanation of why the request for additional information is considered to be unreasonable or unnecessary and, where appropriate, suggest an alternative or modified request.

8.3 Within 14 days of receipt of an explanation pursuant to Clause 8.2.3, the TAC will either modify the request for additional information or maintain the request.

8.4 Following receipt of the TAC's response pursuant to Clause 8.3, the claimant's lawyer must either provide the requested information or refer the issue to the relevant TAC Impairment Manager who will attempt to resolve or refine the issues in dispute between the parties. The Impairment Manager will provide a response to the claimant's lawyer within 7 days of receipt of the referral.

8.5 Communications between the parties regarding the reasonableness, or otherwise, of the additional information being sought by the TAC may be in writing, or by telephone.

8.6 If the parties are unable to resolve the dispute regarding the provision of additional information, the TAC will provide the claimant's lawyer with an impairment proposal based on the available material and subject to the TAC's reservations about the evidence.

8.7 If the additional information requested by the TAC is provided or obtained by the claimant's lawyer in a subsequent Dispute Resolution Application under the No Fault Dispute Resolution Protocols or in any subsequent proceedings, the TAC can rely upon any correspondence or telephone attendance notes in relation to any costs that may be applicable.

9. NON LODGEMENT OF IMPAIRMENT APPLICATION FORM FOLLOWING JME REPORTS

9.1 If a period of 28 days has lapsed since the last JME report has been received by the parties and an Impairment Application form is yet to be lodged, the TAC may send a reminder letter to the claimant's lawyer requesting lodgment of the Application.

9.2 Within 14 days of receipt of the TAC's reminder letter, the claimant's lawyer must either:

- 9.2.1 Lodge an Impairment Application form with the TAC; or
- 9.2.2 Provide the TAC with a reason for the inability to lodge the Impairment Application form within the 14 day time frame and provide an alternative lodgement date.
- 9.3 If the TAC does not receive an Impairment Application form or a response from the claimant's lawyer with an alternative lodgment date within 35 days of sending the reminder letter in Clause 9.1, the TAC can proceed to make an impairment determination without the need to first provide an impairment proposal to the claimant's lawyer.
- 9.4 If TAC makes an impairment determination pursuant to Clause 9.3, legal costs under these protocols (ie. an impairment price point or impairment bypass price point) will not be paid.

10. PROPOSAL AND NEGOTIATION

- 10.1 Where a claimant's lawyer has commenced an impairment assessment in accordance with Chapter 6, the TAC will not determine a claimant's entitlement to an impairment benefit without first providing the impairment proposal to the claimant's lawyer (subject to Clause 9.3 above).
- 10.2 Within 28 days of receiving a complete Impairment Application form or receiving any additional requested information or IME report pursuant to Clause 8.1 (whichever last occurs), the TAC must provide an impairment proposal to the claimant's lawyer.
- 10.3 The TAC's impairment proposal must outline how the proposal was calculated, including reference to the relevant AMA Guides section and any other relevant information. The impairment proposal must also refer to the information the TAC considered in making the proposal and enclose copies of this information unless previously provided to the claimant's lawyer.
- 10.4 Within 28 days of receiving the TAC's impairment proposal, the claimant's lawyer must advise TAC whether the claimant:
 - 10.4.1 accepts the TAC's impairment proposal with release; or
 - 10.4.2 accepts the TAC's impairment proposal without release; or
 - 10.4.3 proposes an alternative impairment determination, setting out brief reasons why the initial impairment proposal is not accepted.
- 10.5 Within 14 days of receiving an alternative proposal in accordance with Clause 10.4.3, the TAC must:
 - 10.5.1 advise the claimant's lawyer whether the alternative proposal is accepted; or
 - 10.5.2 by way of negotiation, attempt to reach agreement between the parties on the appropriate impairment determination.
- 10.6 Where the parties are unable to reach agreement by way of negotiation, the TAC must proceed to make an impairment determination without a release

being signed. The TAC will pay legal costs to a claimant's lawyer in accordance with Clause 11.1.2 (impairment price point with no release). In such situations, the release price point in Clause 11.1.1 will only be paid if a signed impairment or common law release is provided to the TAC within 12 months of the impairment determination.

- 10.7 If the claimant's lawyer fails to respond to the TAC's impairment proposal within 28 days of receipt (as required in Clause 10.4) the TAC may proceed to make an impairment determination without a release being signed. The TAC will pay legal costs to a claimant's lawyer in accordance with Clause 11.1.2 (impairment price point with no release). In such situations, the release price point in Clause 11.1.1 will only be paid if a signed impairment or common law release is provided to the TAC within 12 months of the impairment determination.
- 10.8 Communications between the parties regarding alternative impairment proposals and/or negotiations may be in writing, or by scheduled telephone appointment.

11. LEGAL COSTS AND DISBURSEMENTS

- 11.1 In recognition of the role played by a claimant's lawyer in the impairment benefit delivery process, the TAC will, within 14 days of payment of an impairment benefit to the claimant, pay legal costs to a claimant's lawyer as follows:
- 11.1.1 Legal costs of \$5,000 where the claimant accepts an impairment determination proposal and provides a release in respect of impairment benefits under sections 47 and 48 of the TAA; or
- 11.1.2 Legal costs of \$3,600 where no release is provided.
- 11.2 The legal price points described in Clauses 11.1.1 and 11.1.2 include any relevant counsel's fees and all other disbursements except for those listed below:
- 11.2.1 The TAC will reimburse the reasonable cost of medico legal reports not obtained on a joint basis if the claimant receives an impairment benefit and the report is submitted prior to the impairment determination being made.
- 11.2.2 The TAC will not reimburse the cost of a medico-legal reports (and supplementary reports) not obtained on a joint basis where the report is a duplication of a JME specialty used in the determination of impairment (e.g. where two orthopaedic reports have been obtained for the same claim and injury).
- 11.3 To facilitate payment of any disbursements claimed under Clause 11.2.1, a claimant's lawyer will forward a letter outlining the claimed disbursements, and attaching invoices or appropriate documentation.
- 11.4 Pursuant to the TAA, the TAC will reimburse reasonable fees and invoices, including:
- 11.4.1 Records, documents and reports from a claimant's treating doctor or practitioner.

- 11.4.2 Application fees and associated charges for requests made for a claimant's hospital and ambulance records pursuant to the *Freedom of Information Act 1982* and requests made for medical records pursuant to the *Health Records Act 2001* where these requests are made for the purpose of an assessment of impairment under the Impairment Assessment Protocols.
- 11.4.2 Reasonable professional interpreter fees incurred in a claimant attending medical examinations and providing instructions to their lawyer with respect to their application under the Impairment Assessment Protocols.
- 11.4.3 Reasonable travel and accommodation costs associated with a claimant attending a medical examination (JME and/or IME) for the purpose of these protocols. These costs will be met in accordance with the TAC's 'Travel and Accommodation Expenses' policy. Also refer to the JME Protocols regarding reimbursement of reasonable travel and accommodation expenses incurred as a result of a JME.
- 11.5 Where the assessment of impairment has been conducted concurrently as specified in Clause 3.3, one impairment price point will be payable.
- 11.6 Where payment of legal costs is made in accordance with Clause 11.1, this amount shall be offset against any legal costs payable to the claimant's lawyer in any subsequent dispute or merit review in respect of the claimant's entitlement to impairment benefits.
- 11.7 Where a dollar amount is specified in these protocols, that amount will be indexed on the first anniversary of the commencement of these protocols and on each anniversary thereafter in accordance with the Consumer Price Index for Melbourne as published by the Australian Statistician for the preceding period immediately prior to the indexation date.
- 11.8 Where there are concurrent applications under the Impairment Assessment and Common Law Protocols an impairment price point with release (Clause 11.1.1) will be paid if the common law claim resolves prior to an impairment determination being made if:
 - 11.8.1 A completed Impairment Application form has been lodged; and
 - 11.8.2 The medical material provided supports a whole person impairment determination of more than 10%.