Submissions on the Impairment Assessment Guidelines – Proposed Changes

Submissions to Return to Work SA and

the Treasurer Rob Lucas

25 June 2021

Suite 5 Level 7, 189 Kent Street, Sydney NSW 2000 | GPO Box 7052, Sydney NSW 2001 | **ABN** 96 086 880 499
T +61 2 (02) 9258 7700 | **F** +61 2 9258 7777 | **E** enquiries@lawyersalliance.com.au | **W** www.lawyersalliance.com.au
Protecting and promoting justice, freedom and the rights of the individual.

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.[1]

The ALA office is located on the land of the Gadigal of the Eora Nation.

[1] www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to comment on the Consultation Paper for Impairment Assessment Guidelines – Proposed Changes.

Consultation Process

2. The ALA is concerned about the very short consultation time that was given, especially when the changes to the guidelines are substantial and will have a very large impact on injured workers.

3. In view of the wide reaching impact of the changes, the ALA is concerned that the Consultation Paper was not provided directly to groups who represent injured workers. Whilst not a requirement under the Act, we believe the Paper should have been provided directly to lawyers who represent injured workers, the ALA, Unions and other key stakeholders.

4. The ALA only received a copy of the proposed changes on 11 June 2021 after being provided with it by one of its concerned members.

5. Given the short time frame given for consultation, it has not been possible to consider the proposed changes in as much detail as they deserve.

6. Although the consultation paper refers to 72 proposed changes, there are in fact many more changes than this.

7. Not all of the changes are clearly identified. The deletions to the current guidelines are not marked in the draft that has been provided.

8. To make the consultation process fair and more transparent, we request that a marked up copy of the Guidelines be provided to all interested parties who have commented on the current proposals. This copy should make all additions, changes and deletions clear.

9. We also ask that the medical advice relied upon to make the amendments be provided to all relevant parties.

Impact of Proposed Changes

10. The consultation paper says that "It is anticipated that the proposed changes will provide a fairer scheme for workers and employers". It goes on to say that "[o]f the 72 proposed changes, the majority are not expected to impact on average WPI ratings. A small number of the changes may result in the increased WPI ratings and similarly a small number may result in decreased ratings."

11. The above statements are both misleading and incorrect.

12. On our reading of the changes and after speaking to numerous doctors about the proposed changes, we understand that the changes will overwhelmingly decrease WPI ratings.

13. We have not been able to find an example where the WPI will increase. We request that you provide us with examples of any WPI that is expected to increase under the proposed changes.

Proposed Changes Relate to Tribunal and Court Decisions

14. It is evident that some of the proposed changes seek to alter the Guidelines to accord with an interpretation advocated by the Corporation in proceedings before the South Australian Employment Tribunal (SAET) and which the Tribunal rejected, including:

    a. How to assess skin impairments resulting from scars;[2]
    b. The practice of "peer reviewing" assessments;[3]
    c. The definitions of "disregard" and "deduct";

15. It is not appropriate that RTWSA propose changes to the Guidelines that are inconsistent with Tribunal or Court rulings. If changes are to be made that impact these decisions, they should be made by Parliament, after adequate debate and consideration.

16. Many of the changes also relate to matters that are currently the subject of litigation in the Supreme Court and Court of Appeal, including the Full Court of the Supreme Court in *Paschalis v*

[2] *Gooch v RTWSA* [2020] SAET 27

[3] *Palios v RTWSA* [2019] SAET 224; *Canales-Cordova v RTWSA* [2020] SAET 8

RTWSA[4], the appeal to the Court of Appeal in *RTWSA v Opie*[5]and the appeal to the Full Bench of the SAET in *RTWSA v Gooch*[6].

Specific Clauses

17. The ALA considers that the majority of the proposed changes will result in significant injustice to workers and strongly objects to same. However, given the limited time permitted to prepare this submission, our comments below are not intended to be exhaustive. Many of the changes are complicated and require us to consider medical advice on the appropriateness of the change and the likely impact.

18. The amendment to clause 1.8 is inconsistent with the decision in *Lohman*.[7] It does not make sense to require a whole person impairment to only be undertaken once an injury or condition has been determined or is the subject of an application for review. This will simply increase the number of proceedings.

19. ALA does not agree with the amendment to clause 1.9. The clause gives total power to the requestor to direct the assessor to proceed with the assessment and to exclude the additional injuries identified by the assessor without any obligation on the requestor to communicate with the unrepresented worker or legal representative. The assessor is then required to provide the one and only assessment, thereby precluding the worker from claiming the additional injuries identified by the assessor.

20. This is an unacceptable denial of natural justice. The worker should be included in those communications and given an opportunity to stop the assessment at that time.

21. This also creates an unworkable onus on the medical professional concerned as to how to deal with the issue, especially when case managers can be difficult to contact at short notice.

22. The ALA strongly objects to the amendment to clause 1.27. There is no logical reason to require a doctor to make a deduction for an unrelated injury or condition that was asymptomatic. This

[4] on appeal from [2019] SAET 199

[5] on appeal from [2020] SAET 62

[6] on appeal from [2020] SAET 27.

[7] *Lohmann v RTWSA* [2019] SAET 213.

clause will require doctors to make a deduction for degenerative changes, even where the worker had no pain or impairment from such a condition. Given the high incidence of asymptomatic degenerative changes in the general population, this clause can only be seen as deliberately and unfairly reducing WPI.

23. The ALA objects to the amendment to clause 1.28 as a deduction should not be made where the objective evidence is not complete. This is unfair to the worker.

24. ALA strongly objects to clause 1.29 and the mandatory deduction of 1/10th of the assessed impairment where there is insufficient evidence to assess the unrelated impairment. This reduction is unfair and should not be made.

25. If despite objections, the 1/10th deduction rule is introduced, the Guidelines need to be clear on how the reduction is to be applied. If a person is assessed as having a WPI of 5% and undergoes a reduction of 10%, this would be a 0.5% reduction. We believe in this situation, the WPI would be reduced to 4.5% and this figure should then be rounded up to 5%. It is important however that this is made clear.

26. In relation to the compliance section in Chapter 1 (1.53 and 1.54), these amendments seem to have the effect of undermining the rulings of the SAET in *Palios*[8], *Canales-Cordova*[9] and *Frkic*[10] It is not appropriate that the Guidelines be used to change Tribunal Rulings. This should be reserved for Parliament.

27. The imposition of minimum time frames before various specific injuries can be assessed, as detailed below, is unnecessary and unwarranted given the existing requirement that the worker has reached MMI before an assessment can occur. The proposed minimum time frames will unfairly delay injured workers' access to lump sum payments in circumstances where weekly payments for the vast majority of workers cease after a period of 2 years, regardless of whether they remain unfit for work or not. Workers in this category, of which there are many, are usually suffering from financial hardship. Delaying their access to the lumps sums to which they are entitled, for economic loss and non-economic loss, will only exacerbate their situation.

[8] *Palios v RTWSA* – [2019] SAET 224

[9] *Canales-Cordova v RTWSA* – [2020] SAET 8

[10] *Frkic v RTWSA* – [2020] SAET 16

28. Further to the above, in relation to clause 2.9, concerning peripheral nerve injuries, no explanation is given for the requirement that injured workers should wait for 12 months before being assessed. This will result in a delay of the worker's entitlement to a lump sum payment.

29. In clause 2.21 there is no explanation for requiring workers to wait at least 18 months after an initial diagnosis of adhesive capsulitis. This will have the effect of delaying the worker's entitlement to any lump sum payment.

30. In clauses 2.30 and 3.51 there is no explanation as to why injured workers are required to wait at least 18 months after an initial diagnosis of Complex Regional Pain Syndrome. This will have the effect of delaying the worker's entitlement to any lump sum payment.

31. In relation to clause 3.44 and table 17-35, no justification is given for replacing the table contained in AMA5 with this table. The purpose of this seems solely to be to reduce any lump sum entitlement.

32. The introduction of clause 4.3 seems to have the sole purpose of reducing an injured person's lump sum entitlement when they have suffered multiple injuries in the same trauma.

33. In clause 4.17, the insertion of the word 'significant' prior to muscle guarding, seems to have been done solely to make it more difficult for injured workers to meet the 5% threshold.

34. In relation to clause 9.16, using the audiogram closest to the date of retirement is inconsistent with section 22(7) of the Act, which states that the worker's current impairment must be assessed as at the date of the assessment. This clause is also inconsistent with the Tribunal's decision in the matter of *Stewart v RTWSA*[11].

35. In relation to Chapter 15, the amendments in this section seem to be for the purpose of changing the effect of the Supreme Court decision of *Mitchell.*[12] This will simply reduce an injured worker's entitlement to a lump sum payment.

36. In relation to clause 16.15, it is unfair to require the assessor to deduct a 1/10th of the assessed WPI, where there is inadequate information as to a pre-existing impairment.

[11] [2018] SAET 35

[12] [2019] SASCFC 34

37. In relation to Clause 17.3 and the selection of an accredited assessor, the changes seek to dramatically restrict a worker's choice as to the most appropriate assessor.

38. We cannot see the need for musculoskeletal injuries, where surgery has occurred, to be exclusively assessed by surgeons. Occupational physicians and rehabilitation physicians have extensive experience in assessing the impact of injuries on the day to day life and capacity of injured workers, the very issues that are at the heart of assessing WPIs. They also have extensive working knowledge of the Guides across multiple body systems, the requirements of the legislation and the operations of the Tribunal. There are many instances, especially with injuries involving multiple body parts, where an occupational physician or rehabilitation physician is a more appropriate assessor than a surgeon.

39. We are concerned as to who will perform assessments if occupational physicians are precluded from doing so, there being a paucity of accredited surgeons in Adelaide capable of undertaking such assessments, and reliance on interstate surgeons not being a feasible solution given ongoing snap border closures around Australia.

40. There is no need for the amendment that states that if there is another assessor available with appointments, they must be selected over an alternative assessor with a waiting time in excess of 6 weeks. Where the worker is happy to wait a longer time for an appointment, they should be allowed to do so. If the worker is not happy to wait, they can select another assessor.

41. In relation to clause 17.4, the requirement that a worker select an assessor within 10 business days is too short. There are many legitimate reasons why the worker may seek to take extra time to choose an assessor. Also, if the worker does not have access to email, they may not receive correspondence by post in relation to this choice before the time limit has expired. RTWSA is not prejudiced by this delay. The time limit should be removed. If it is not removed, a much longer period is required.

Conclusion

42. The Australian Lawyers Alliance (ALA) are very concerned about the proposed changes to the guidelines, without allowing time for proper community consultation, or sufficient circulation of the proposal to interested parties
43. We believe it is inappropriate that such dramatic changes that disadvantage workers are being made under the guidelines.
44. If such widespread changes are to be made, this should be done by amending the legislation. This would allow for proper scrutiny of the changes and the likely impact.
45. The proposed changes are likely to cause uncertainty and increase litigation. The current scheme was introduced in 2015. Since then, there has been extensive and ongoing litigation as the parties involved, the Tribunal and the Supreme Court clarify and interpret those changes. It is inevitable that further changes will result in additional litigation, and significantly delay the clarity and consistency in understanding, the proposed changes are intended to achieve.
46. Furthermore, the proposed changes are inconsistent with, and contrary to the stated aims of the Act. In particular, section 3 states that the objects of the Act include:

    "to ensure workers who suffer injury at work receive high-quality service, are treated with dignity, and are supported financially" and

    "to provide a reasonable balance between the interests of the workers and the interests of the employers."
47. To enable us to provide a more thorough position on the proposed changes, we ask that the following be provided:
    a. A marked up copy of the proposed amended guidelines that show all deletions, additions and amendments.
    b. A copy of the medical evidence and details of the "clinical developments" that have been relied upon by RTWSA when drafting the proposed changes.
    c. A copy of the actuarial and other costing advice that has been obtained by RTWSA with respect to the proposed changes.
    d. Details of any injuries that will result in an increased WPI under the guidelines, as stated at the start of the consultation paper.

48. We are also happy to meet to discuss our submissions in person.

Sarah Vinall

SA President
Australian Lawyers Alliance