

# ALA Submission to OIR

Second Submission to OIR re: (a) Injured worker medical consultations + additional consent and (b) 2 x Rehabilitation Guidelines

**9 September 2022**



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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.<sup>1</sup>

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

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<sup>1</sup>[www.lawyersalliance.com.au](http://www.lawyersalliance.com.au)

## Introduction

Thank you for the opportunity to make further comment on your draft documents. We refer to our previous submissions dated 10 December 2021 **attached** for your reference.

We apologize for the piecemeal approach to our response. Some people wishing to provide feedback were unavailable until early September.

Our comments follow. We are happy to meet, were you to consider it helpful, to discuss the documents in further detail. We preface our comments with strong support for the principle of returning injured workers, as soon as is medically feasible, safely; to meaningful work following a work injury.

## Our Submission

The safety and meaningful work aspects are features we would emphasize. A safe return to work usually has both physical and psychological needs to be addressed.

Our members' experience is that the holistic assessment of the needs of injured workers commonly:

- (a) Does not occur at all, or
- (b) If an assessment of that nature purports to occur, it occurs:
  - Later than optimal,
  - In a defective way, with this usually being a product of the person conducting the assessment lacking the professional skills and training (usually tertiary qualifications in an allied health discipline) to understand and report upon the often-complex suite of injuries and sequelae thereof, the needs resultant upon the injuries, and the type and cost of rehab measures needed to optimize a return to work, and/or
  - In a set and forget way, failing to re-mould a plan as the injured workers' medical circumstances evolve, and their needs and work capacity change accordingly.

Our members have also seen countless instances of injured workers being forced, as they would perceive it, to return to work prematurely and to jobs which were demeaning, misaligned with their skills and experience, and in many cases seen as meaningless.

There are two documents which have much overlap.

The first, "Overview" document is a roles and responsibilities overview and framing document. It seeks to stipulate which entity has responsibility for each core function, and in doing so, demarcates in particular between insurers (including self-insurers), and employers.

The document states an expectation that "a self-insurer maintain structural separation of these obligations." Our members have seen numerous examples of deplorable conduct by many self-insurers, who have not even had a pretense of that structural separation: the HR and rehab roles are interlinked and injured workers exposed to that inappropriate mixing of roles, amongst other undesirable conduct, do not have their rehab needs met. We would be interested to know at a practical, coalface level, how the WCRS would intend to apply vigilance to ensure that the necessary structural separation always occurs. And where it is lacking, what sanctions, including we hope, the potential withdrawal of license, would apply.

Central to our observations is the fact that the insurer has responsibility for the first, and critical steps, being:

- (a) Identifying those injured workers needing a RRTW plan,

- (b) Discharging its legal obligation under the WCRA, by taking “all reasonable steps to coordinate the development and maintenance of a RRTW plan...”

We agree with the observation that RRTW plans are not “one size fits all”. Indeed, our members’ experience is that adopting a cookie-cutter approach to assessing needs, and subsequently developing plans to assess those needs, will not enhance rehabilitation and RTW prospects.

Some injured workers usually at the lower end of the injury severity spectrum, once identified and assessed, will be professionally evaluated as only needing a “light touch” RRTW plan. But not always. Some less serious physical injuries can have a profound effect on vocational functioning, and on psychological health. And circumstances and medical insights about the injured worker can change.

For a RRTW to have reasonable prospects of efficacy, those first steps are fundamental. A high-quality, professionally (in the sense of proper qualifications) prepared, individualized and holistic needs assessment is the foundation stone upon which the subsequent steps will proceed. The more serious the injury or mix of injuries, the more critical it is that:

- The injured worker be identified and engaged as early as medically feasible on rehab,
- The person charged with responsibility for formulating the RRTW plan be independent; and have the proper qualifications, skills and experience to do so.

Page 5 of the document states:

*The insurer’s claim manager [by whatever title] is responsible for ... developing, leading, monitoring, reviewing and updating rehabilitation plans..., providing progress updates to all stakeholders when relevant or at completion of the RRTW plan; and keeping all stakeholders advised of any changes to the RRTW plan.”*

We consider that there is insufficient guidance on these matters, and related problems. We frame those in questions:

1. Whom at the insurer has the task – is the claims manager way out of their depth?

The vast majority of insurance claims managers do not hold tertiary allied health qualifications. Ignorance about injury type, severity, duration, psychological impacts, treatment options and all of the other needs which flow from the injuries will, often irrevocably, lead to the formulation of deficient RRTW plans.

We understand that Workcover Qld employ some staff with allied health qualifications. Their roles, reportedly, include assisting claims managers in various ways to develop bespoke and proactive rehab plans and carefully considered RTW options. Our members have seen little direct evidence of this.

The model, as the overview document contemplates, is of the claim’s manager being the fulcrum. The role of the insurer claims manager in the italicized extract above is, in effect, that of a rehabilitation case manager. This person is the hub, from which various spokes emerge and must operate collaboratively towards the common goal of supporting the worker to a timely, safe and meaningful return to work.

Without proper qualifications, and even if the conflicts issue below in 2. were absent, there are serious doubts as to whether the vast majority of insurer case managers have the professional qualifications, skills and experience; to properly discharge the rehab case manager role. Put simply, the documents expect of the case managers, something which nearly all of them lack the professional qualifications and skills to do. This is a fundamental deficit.

## 2. Is the insurer and hence claims manager conflicted?

This will be an uncomfortable question for both Workcover Qld and self-insurers.

Particularly, but not only, at the more serious end of the injury spectrum, a comprehensive and professionally formulated needs assessment will require expenditure. Also, the implementation of the plans will sometimes require substantial further expenditure. Often, rehab needs assessments identify needs which had been overlooked by the claims manager and sometimes by treating medical practitioners who are time-poor. Common examples include:

- Housing modifications
- Transportation issues
- New injuries not yet accepted formally by the insurer
- Post-surgical therapies to aid recovery
- Paid care
- Psychological supports. Many workers, and blue-collar males in particular, are reticent to reveal their psychological distress.

There are many other examples.

The meeting of those new or upgraded needs will invariably involve expenditure which we regard as an investment in the worker, their optimized recovery and therefore improved prospects of a timely and meaningful return to some form of work.

This expenditure will usually be more than presently allocated for the worker's rehab needs, and more than the financial modelling for the future of that worker's statutory claim.

There is, and will continue to be a tension between insurers' desire to limit claims cost, and the needs and expenditure flowing from a thorough, professional needs assessment. We do not accept that the claims manager can, comfortably and to the benefit of the worker, walk both sides of that street. In our view, the higher the anticipated additional expenditure – a general correlation with injury severity – the more acute the tension and conflict.

In our members' experience, the early investment pays dividends in the form of:

- The worker feeling genuinely supported,
- Other stakeholder being kept informed and their views being respected,
- Improved chances of an RTW in some form

## 3. Were the skills/qualifications and conflicts issues absent, precisely how would the claims manager discharge their responsibilities?

That is, what guidance do the documents provide on the specific methodologies required to be adopted by claims managers to develop, lead, monitor, review and update RRTW plans and effectively liaise with stakeholders?

The documents are short on this important issue. Whilst the documents clearly require liaison between the claim's manager and each of the worker and employer; the primary deficits we consider exist are at the front end: the holistic evaluation of needs at the earliest opportunity, then a model for acting on such an evaluation.

The documents provide little guidance on how a claims manager will fully evaluate the injured worker's

needs. We emphasize again that such an evaluation, properly conducted, will differ according to many factors. Cookie-cutter formulas are to be avoided. Nevertheless, and particularly due to the absence of formal case-management qualifications in the claim's manager cohort, one would expect a greater level of specificity on how the claims manager would discharge their stated function.

## Proposed Solutions:

In our respectful view, the documents would benefit from a structural re-think. Whilst we again endorse the guiding principles, we consider that the documents will have limited utility in improving Queensland's mediocre RTW metrics. In a scheme which we regard as, in many other respects, nation-leading; there is an opportunity for greater improvement.

We believe that a pointer to a key initiative is found in a note forming part of the second document. Page 5 of that document, in referencing workers who have not been able to RTW in their pre-injury role, some of whom will have had their statutory claims closed; states:

*"In practice, a referral to the insurer's RRTW program may involve referral to a workplace rehabilitation provider (WRP), who will develop a plan tailored to the individual worker, detailing how they will assist the worker in their rehabilitation now their claim is closed."*

In our submission:

1. A referral to an external provider at that late juncture (post statutory claim) might help some injured workers,
2. However, the optimal time for a referral to the external provider is far earlier in the claims process.

Development of a model whereby timely evaluation of injured workers' needs by a firm, independent of the insurer and the employer, is central to our view of remediation of the present draft model. We again apprehend the possibility of discomfort. There are non-workers' compensation scheme injury scheme contexts where such a model resists the flaws borne of the issues explored in the questions posed above.

There is more detail which would need to be developed under each of the below points. At a top level, the guiding principles and design fundamentals for the model we would recommend are:

1. The insurer acts as the insurer, not a rehabilitation case manager. The role of the claim's manager is to manage the claim in accordance with the Act. And, crucially, only within the professional expertise of the claim's manager.
2. As a matter of urgent priority upon a statutory claim being accepted, the claims manager allocates the worker's claim within the insurer:
  - (a) To a person with suitable allied health qualifications (ideally in Occupational Therapy), or
  - (b) If no such person exists at the insurer, to a suitably qualified external expert.

That person determines if a formal needs assessment is required, and if so the timing thereof and identity of the independent external firm to be commissioned to conduct the needs assessment. A set of criteria be developed to inform the "yes/no" needs assessment decision, and the triage to the independent firm.

3. The insurer makes the referral to the external firm. Employers cannot be trusted to do this properly, consistently.

4. A needs assessment be undertaken promptly. As is indicated above, not all matters will require a needs assessment. Some claims will be plainly straightforward, and where a full recovery and RTW in pre-injury duties reasonably expected. However, some matters which are initially seemingly simple, may be proven to be more complex. For example, an injury originally thought to be a hamstring tear, subsequently diagnosed as referred pain from an intervertebral disc injury, requiring spinal surgery.
5. The firm conducting the needs assessment have demonstrated experience in conducting needs assessments in a vocational rehab context, and staff with the suitable tertiary qualifications. A small panel of providers, perceived to captive to the economic direction of the insurer, is to be avoided.
6. The needs assessment has a major vocational rehab focus. The needs assessment report would be informed by the author of that report liaising with and considering views of all key stakeholders including:
  - (i) The worker,
  - (ii) The worker's family, especially where cognition and capacity issues may be live,
  - (iii) The employer and other key people therein, such as the pre-injury supervisor,
  - (iv) Treating medical and allied health practitioners,
  - (v) Where additional unmet needs requiring new treatment, treating provider options,
  - (vi) The injured worker's lawyer,
  - (vii) The insurer.
7. The needs assessment, with (usually) a RRTW plan in it, be delivered within mandated timeframes from the referral in 3, above. Time will usually be of the essence.
8. The insurer trust and abide the professional opinions in the report. The report effectively umpires the injured worker's needs and the content of a RRTW plan. Whilst the report and the needs and costs arising from it, need to be evaluated by the insurer through the prism of the WCRA, the guiding precept must be "hands off – we have commissioned an expert and their professional opinions need to be trusted". That is, neither the insurers nor the employer should seek to nit-pick, dissect or dismiss the report.
9. The firm conducting the needs assessment hold, where necessary, a stakeholder meeting to coordinate the effective implementation of the need's assessment and embedded RRTW plan.
10. Implementation. All stakeholders are kept informed.
11. The external firm monitors, adjusts and keeps stakeholders informed of key refinements to the worker's needs and the RRTW plan.
12. Shortly before the cessation of the statutory claim, consideration of the merits of keeping the external firm, now acting as case manager with oversight of the RRTW plan, involved post the statutory claim. There will be merit in some matters, to a continuum through to the resolution of any common law claim.
13. Dispute resolution throughout, on an informal basis, be encouraged. Skilled rehab case managers are usually adept at reconciling competing views and interests. And where this is unsuccessful, parties have various rights under the WCRA.

## Conclusion

Thank you again for the opportunity to comment on this important initiative.

Should you have any questions about any of the comments above, please do not hesitate to make contact. Should you consider it helpful would be happy to meet with you to discuss further at a mutually convenient time.

**Sarah Grace**

A handwritten signature in black ink, appearing to read 'Sarah Grace', written in a cursive style.

**Queensland President  
Australian Lawyers Alliance**