

Developing a ‘Guide for Arranging Rehabilitation Assessments and Requiring Examinations’

Submission to Comcare, Australian Government

4 March 2024

Contents

Who we are	4
Introduction	5
Question 1 regarding the <i>Safety, Rehabilitation and Compensation Act 1988</i> (Cth) ss 57A(3)(a)-(b) 5	
Question 2 regarding the <i>Safety, Rehabilitation and Compensation Act 1988</i> (Cth) s 57A(3)(c)	6
Question 3 regarding the <i>Safety, Rehabilitation and Compensation Act 1988</i> (Cth) s 57A(3)(d).....	7
Question 4 regarding the <i>Safety, Rehabilitation and Compensation Act 1988</i> (Cth) s 57A(3)(e).....	8
Question 5 regarding the <i>Safety, Rehabilitation and Compensation Act 1988</i> (Cth) s 57A(3)(f)	8
Question 6 regarding the <i>Safety, Rehabilitation and Compensation Act 1988</i> (Cth) s 57A(4).....	9
Question 7 regarding risks or unintended consequences	10
Question 8 regarding operational considerations.....	10
Question 9 regarding additional factors for Comcare.....	11
Conclusion	11

Enclosed: The Australian Lawyers Alliance’s responses to Comcare.

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 people of the Eora Nation.

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input to Comcare on developing a 'Guide for Arranging Rehabilitation Assessments and Requiring Examinations' ('the Guide').
2. The ALA's submission is **enclosed**, on the template provided by Comcare. However, with regard to the length of many of our answers, we have also replicated our responses below.

Question 1 regarding the *Safety, Rehabilitation and Compensation Act 1988 (Cth) ss 57A(3)(a)-(b)*

3. ALA members submit that a treating medical practitioner – whether General Practitioner (GP) or specialist – is to be the first contact in obtaining information in relation to the employee. If the employee has a treating practitioner who is treating the employee's injury or illness and can be engaged to provide the required and requested information, and complies with the determining authority's request for that information, there should be no circumstances in which a rehabilitation assessment or examination is required.
4. Where information is obtained from one or more treating practitioners (for example, a GP and psychologist) and there is conflicting opinion as to diagnosis, cause, treatment and incapacity, those conflicting opinions should be shared between the treating practitioners and clarification should be obtained from those treating practitioners.
5. ALA members submit that an assessment should not be considered as standard method for obtaining evidence to justify terminating liability or ceasing some payments.
6. It may be appropriate, in the view of ALA members, to refer an employee to an independent medical practitioner or another qualified person for a rehabilitation assessment or an examination in the following circumstances:
 - a. In circumstances where the opinion of the treating doctor(s) has been requested and the doctor has failed to provide the requested information, despite follow up, or where there is no treating doctor from whom to seek the information.
 - b. When evidence from treatment providers is inadequate to establish if an injury is ongoing and causing incapacity.

- c. When requested by the injured worker (or their representative) particularly in circumstances where the employee has doubt as to the medical suitability of the duties recommended by the employer.
 - d. When invalidity retirement has been requested by the employee.
 - e. When it is necessitated for the safety of the employee and the safety of those working around them.
 - f. When it is to assist the employee, noting that the legislation is beneficial legislation.
 - g. When a documented return to work plan needs to be developed, such as when the worker has been certified as unfit or partially unfit for an extended period, requires modified duties or hours, or is unable to return to their pre-injury role, and their treatment providers are unable to assist.
7. Further, where an assessment or examination is determined to be appropriate, ALA members submit that:
- a. An employee should be offered a choice of assessors from a list of 2 or 3 assessors.
 - b. The employer/their representative should always be provided with the briefing material well before attendance, so that any errors can be corrected and consulted as to the choice of doctor/specialisation.

Question 2 regarding the *Safety, Rehabilitation and Compensation Act 1988 (Cth) s 57A(3)(c)*

8. ALA members submit that there should be no more than one request per specialist per 12 months and then only if there has been a medical event which justifies a review. Consideration should be given to the risk of harm and/or distress caused to the employee in engaging in a rehabilitation examination or assessment. Once liability has been accepted, ALA members submit that it is inappropriate and distressing for an employee to continually have to prove the initial injury.
9. Requests for information should be made to an employee's treating medical practitioner(s) at any time information regarding the employee's injury is required. This includes after a rehabilitation assessment and examination is undertaken and further information is required

in respect of the employee's subsequent injury status. For example, an assessment is undertaken and 10 physiotherapy sessions are recommended with a review after the treatment has been undertaken to determine ongoing effects and capacity for work. This information ought to be obtained from the treating practitioners undertaking the suggested treatment as they are best placed, due to their regular and ongoing contact, to provide comment on the injury status, on the effects of the treatment, and they have relevant mechanisms in place to support successful outcome.

10. In circumstances where the treating practitioner fails to provide the required information upon request and within an appropriate time frame, it may be appropriate to have a rehabilitation assessment undertaken, in circumstances where the assessment is no sooner than 12 months since the last assessment. The employee's support person/s must be allowed to attend any further assessment with that employee.
11. Additionally, ALA members submit that in the event that a report is not helpful to the employer/the insurer, the employee should not be sent to multiple specialists to enable the employer/insurer to "doctor shop" until one has been found that will support denial/cessation of liability.

Question 3 regarding the *Safety, Rehabilitation and Compensation Act 1988 (Cth) s 57A(3)(d)*

12. ALA members contend that it must be established that the legally qualified medical practitioner (LQMP) has the required specialty in order to assess the employee (for example, occupation or similar skills if assessing work capacity). This should be confirmed by way of review of a CV or express confirmation from the LQMP, since recent treatment experience is relevant.
13. Further, a LQMP should not have been subject to significant criticism or failure to accept their evidence by Tribunals or Courts. The ALA recommends that a database should be kept by Comcare in relation to the reports provided and whether they have been supportive to injured workers. Doctors who have a very high denial rate should not be used as a LQMP.
14. ALA members submit that it must always be kept in mind that this is beneficial legislation and Comcare, insurers and employers operating under the scheme are required to be a model litigant under the model litigant rules.

Question 4 regarding the *Safety, Rehabilitation and Compensation Act 1988 (Cth) s 57A(3)(e)*

15. ALA members submit that it should be taken into account if the employee has reasoned concerns and/or comments regarding the appropriateness, reliability, impartiality, competency and qualifications of the assessor. This may include the employee's past experience with that particular assessor. An employee's concerns with the location of the assessment, the employee's ability to travel to the location, and availability of the assessor should also be taken into account.
16. If concerns are raised by an employee, the relevant authority must provide the employee with a panel of assessors or must consider the appropriateness of any assessors suggested by the employee. If an assessor suggested by the employee is not selected, reasons must be provided as to why the assessor was not selected.
17. In cases which include culturally sensitive or serious matters (such as, sexual harassment), the relevant authority must consider an assessment from an appropriate examiner and the employee's comments on whether a selected assessor is considered appropriate to the employee (for example, providing a female assessor).
18. Legal representatives often have significant experience with assessors and can advise of significant criticisms of an assessor by Tribunals or Courts.

Question 5 regarding the *Safety, Rehabilitation and Compensation Act 1988 (Cth) s 57A(3)(f)*

19. The ALA agrees that it is appropriate for employees to be given a notice of the employee's rights relating to the rehabilitation assessment or examination.
20. ALA members submit that it must be specified in the Guide that the notice must be provided in writing and provided at the same time as being advised of the requirement to attend the assessment.
21. Further, the ALA submits that it must be ensured that any consent provided by the employee is real consent and that consent has not been coerced.

Question 6 regarding the *Safety, Rehabilitation and Compensation Act 1988 (Cth) s 57A(4)*

22. ALA members have provided the following matters for inclusion in the Guide:

- a. This is beneficial legislation and there is a requirement for Comcare, insurers and employers to act as a model litigant (for example, no doctor shopping).
- b. The assessor must take into account the views of the employee's treatment providers, and if they disagree with them, be required to state why. There should be consideration of and communication with the worker's treating doctor to ensure that the views of the treating team are included in the development of any rehabilitation program. Having these views embedded in the assessment and any subsequent program may also assist in managing any concerns that a worker may have in attending a doctor or assessor who could be viewed as Comcare's doctor.
- c. A GP is a LQMP and an appropriate doctor to provide a diagnosis of medical conditions. It is not appropriate for an examination or assessment to be undertaken in circumstances where a GP has provided a diagnosis. This will ensure the employee is able to receive appropriate and timely support of their injury.
- d. The location and accessibility of an employee to specialists is an important consideration in the relevant authority relying on the opinion of the treating GP/practitioner. This is known to be a community wide issue, however it is even more prevalent in regional, rural and remote locations where wait times are in excess of six to 12 months.
- e. Injured employees should not be flown to other states or territories to undertake a rehabilitation assessment or examination, except in extraordinary circumstances and only where appropriate reasoning for its necessity is provided to the employee.
- f. The employee is to be provided with the questions asked of a rehabilitation assessor no less than 14 days prior to the appointment for relevant comment and inclusion of relevant documentation not already included.
- g. Where a previous assessment or examination has been undertaken by a rehabilitation assessor and a further assessment or examination is required (in circumstances where the information cannot be obtained from the treating practitioner(s)), the further

assessment or examination is to be sought and conducted by that same assessor. Should a different assessor be selected, justified reasons must be provided. The first assessor already has an understanding of the employee's injury and is suitable in providing an updated opinion. This is especially the case in sensitive matters where an employee should not be made to re-live the events causative of their injury.

- h. The employee is to have rights to provide comment and review of any subsequent report by an assessor.
- i. Questions asked by the relevant authority to the rehabilitation assessor must be appropriate, appropriately-worded, and relevant to the injury claimed - that is, the questions should only be asked to ascertain comment on issues relating to a claimed knee injury and not asked about events unrelated to that knee injury.
- j. In line with the Commonwealth Ombudsman's report on medical examinations dated 20 October 2022, the Guide must seek to keep record of the information and data surrounding the use of rehabilitation assessments and examinations. These are to be managed under the relevant delegations and available for auditing and accountability, to ensure the Guide is being monitored and complied with. Further, where complaints of rehabilitation assessors are raised, these must be recorded by the determining authority to monitor any patterns of complaints or concerns, and ensure these assessors are not continuing to be used in these circumstances. This will enable greater and more positive participation by employees and optimal practices by determining authorities.

Question 7 regarding risks or unintended consequences

- 23. There is a risk that the Guide could make the process more onerous or distressing for employees. The ALA has provided ways to mitigate this risk in our responses above (including in Question 6).

Question 8 regarding operational considerations

- 24. The ALA has provided feedback on this in our responses above (including in Question 6).

Question 9 regarding additional factors for Comcare to consider

25. The ALA again notes that this is beneficial legislation and there is a requirement for Comcare, insurers and employers to act as a model litigant (for example, no doctor shopping).
26. ALA members also note that additional assessments and examinations of employees are too often unnecessary, which not only can have a damaging physical and/or psychological effect on the employee but are also an unnecessary cost worn by Comcare and other insurers. As such, it will be beneficial if any proposed Guide imposes clear restrictions on the range and frequency of assessments and examinations.
27. The ALA has provided further relevant feedback in our responses above (including in Question 6), which is aimed at improving Comcare and licensee administrative frameworks to ensure support is provided to employees in reducing the length and severity of the employee's injury.
28. Finally, the ALA notes that any Guide developed by Comcare should be designed to assist an injured worker in their recovery from injury and return to work. There are similar guides that exist to achieve a similar purpose in some of the state-based workers' compensation schemes. For example, the Workers' Compensation Regulatory Service has developed the '*Guidelines for standard rehabilitation*', and the '*Rehabilitation and return to work plan guideline – for insurers*'.

Conclusion

29. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input to Comcare on developing a 'Guide for Arranging Rehabilitation Assessments and Requiring Examinations'.
30. The ALA is available to provide further assistance to Comcare on the issues raised in this submission.



Shaun Marcus

National President

Australian Lawyers Alliance



RESPONSE FORM: QUESTIONS FOR STAKEHOLDERS

Instructions

Stakeholder feedback will inform Comcare's development of the Guide. The discussion paper seeks your responses to the following questions with respect to the operation of the SRC Act. You may wish to read the relevant excerpts from the [Fair Work Legislation Amendment \(Closing Loopholes\) Act 2023](#) (**Attachment A** to the discussion paper) and the Supplementary Explanatory Memorandum (**Attachment B** to the discussion paper). Excerpts of relevant subsections are also provided under each question for ease of reference.

Please insert your responses against the questions below. There is no word limit however it will assist us if your answer is as clear and concise as possible. You are welcome to respond to any or all questions and provide any other information you believe is relevant.

Please capture the response of your organisation within the spaces provided below, and return to schemepolicyanddesign@comcare.gov.au

Specific questions—ss57A(3)(a)-(f)

1. Please comment on the circumstances and provide examples of when it may be appropriate to refer an employee to an independent medical practitioner or other qualified person (e.g. a workplace rehabilitation provider), for a rehabilitation assessment (including an examination) under section 36 or an examination under section 57.

Reference: ss57A(3)(a)-(b)

The Guide must:

(a) provide that, for the purposes of a rehabilitation assessment or examination of an employee:

- (i) information in relation to the employee should be sought from the employee's treating practitioner; and
- (ii) the employee's treating practitioner and the information (if any) provided by the treating practitioner should be relied on as much as possible before a referral is made to an independent medical practitioner, or other qualified person, in relation to the employee

(b) specify the circumstances in which it is appropriate to require an employee to undergo a rehabilitation assessment or examination

Note 1: For the purposes of paragraph (a), an employee's treating medical practitioner may be nominated to conduct a rehabilitation assessment or examination of the employee.

Response

2. What type of limitations should apply, or considerations be made, to the frequency and number of rehabilitation assessments or examinations that an employee may be required to undergo?

Reference: ss57A(3)(c)

The Guide must:

(c) specify limitations on the frequency and number of rehabilitation assessments or examinations that an employee may be required to undergo

Response

3. What relevant qualifications should be held by the person(s) conducting rehabilitation assessments and examinations under section 36?

Note: The SRC Act already provides for a legally qualified medical practitioner (LQMP) or a suitably qualified person(s) to conduct a rehabilitation assessment (including an examination) under section 36, and this may include the treating LQMP.

Reference: ss57A(3)(d)

The Guide must:

(d) specify the qualifications of the person or, if required under section 36, the panel of persons who may conduct a rehabilitation assessment or an examination of an employee

Note 2: For the purposes of paragraphs (d) and (e), if a relevant authority requires an employee to undergo an examination under subsection 57(1), the examination must be conducted by one legally qualified medical practitioner nominated by the relevant authority.

Response

4. Please comment on any considerations for the requirement to seek and take into account the views of an employee about the selection of the person(s) who will conduct the rehabilitation assessment (including an examination) under section 36 or an examination under section 57.

Reference: ss57A(3)(e)

The Guide must:

(e) require the rehabilitation authority or the relevant authority (as the case requires) to seek, and take into account, the views of an employee, who is required to undergo a rehabilitation assessment or examination, about the selection of the person or, if required under section 36, the panel of persons who are to conduct the rehabilitation assessment or examination

Response

5. The Guide must require a notice of rights to be given to the employee. We note this is already a requirement for section 36 determinations and that section 57 will be added to the list of determinations subject to notice requirements in section 61 from 14 June 2024. Comcare anticipates that the notice of rights for an assessment (which may include an examination) under section 36 and examination under section 57 will be updated to reflect the legislative amendments.

If you have any questions or concerns, please comment below.

Reference: ss57A(3)(f)

The Guide must:

(f) require that an employee who is required to undergo a rehabilitation assessment or examination be given a notice of the employee's rights relating to the rehabilitation assessment or examination.

Response

6. Are there 'any other relevant matters' you would like considered for inclusion in the Guide?

Reference: ss57A(4)

The Guide may provide for any other relevant matter.

Response

General questions

7. Please share your views about any risks or unintended consequences Comcare should consider when developing the Guide.

Response

8. Please share your views about any operational considerations for rehabilitation authorities and relevant authorities that Comcare should consider when developing the Guide.

Response

9. The Guide presents an opportunity to support employees, rehabilitation authorities and relevant authorities when arranging rehabilitation assessments and examinations. Are there any additional factors Comcare should consider when developing the Guide?

Response