

Consultation Draft: Guide for Arranging Rehabilitation Assessments and Requiring Examinations

Submission to Comcare, Australian Government

18 April 2024

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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 people of the Eora Nation.

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input to Comcare on the Consultation Draft of the ‘Guide for Arranging Rehabilitation Assessments and Requiring Examinations’ (‘Consultation Draft’) pursuant to the *Safety, Rehabilitation and Compensation Act 1988* (Cth).
2. ALA members welcomed the opportunity to also have input in March 2024 to Comcare’s initial consultation on the development of this guide.² The ALA refers Comcare to parts of that submission for re-consideration, including but not limited to the following:
 - not flying employees to see Independent Medical Examiners (IMEs);
 - providing a brief to IMEs and to employees to ensure that all information is complete and accurate; and
 - that further assessments should be undertaken by an assessor who was previously used, so that the employee is not required to recount the circumstances of their injury again (or to avoid the suggestion of doctor shopping).
3. The ALA’s submission will address feedback on the proposed section 4, Part 1 and Part 2 of the Consultation Draft.

Definitions

4 Definitions

employee’s circumstances, in relation to an employee who suffers an injury, includes: ...

4. The ALA notes that the above phrase serves as the opening for the definition of “employee’s circumstances”. What follows is a proposed list of 10 circumstances.
5. We submit that the last part of this opening phrase should be amended from “includes” to “includes (but are not limited to)”, in order to avoid a construction which may unintendedly limit the definition of “employee’s circumstances” only to those 10 circumstances.

² See: Australian Lawyers Alliance, Submission to Comcare, *Developing a ‘Guide for Arranging Rehabilitation Assessments and Requiring Examinations’* (4 March 2024) <www.lawyersalliance.com.au/documents/item/2686>.

3 Requiring rehabilitation examinations

(3) The rehabilitation authority:

- (a) must take into account the views of the employee (if any) provided by the employee in accordance with subsection (2) about the selection of the assessor or panel (***employee's preferred assessor***) who is to conduct the rehabilitation examination; ...

Definition

(6) In this section:

employee's preferred assessor has the meaning given by paragraph (3)(a).

10 Requiring medical examinations

(3) The relevant authority must take into account the views of the employee (if any) provided by the employee in accordance with subsection (2) about the selection of the medical practitioner (***employee's preferred practitioner***) who is to conduct the medical examination. ...

Definition

(6) In this section:

employee's preferred practitioner has the meaning given by paragraph (3)(a).

6. The ALA notes that there is no appropriate definition of “employee’s preferred assessor” provided in proposed subsection 3(a) of Part 1 of the Consultation Draft, despite proposed subsection 3(6) in Part 1 and proposed subsection 10(6) in Part 2 referring to proposed subsection 3(a) for guidance on the definition of “employee’s preferred assessor”.
7. The ALA submits that “employee’s preferred assessor” must be defined.

Part 1—Rehabilitation assessments and rehabilitation examinations

8. This section of the ALA’s submission will address feedback on Part 1 of the Consultation Draft.

Proposed section 2(2)(a)

2 Arranging rehabilitation assessments and examinations

(2) If, in the opinion of the rehabilitation authority, there is insufficient or inconsistent information regarding a matter specified in subsection (1), to the extent the matter is relevant to the employee’s rehabilitation, the rehabilitation authority must:

(a) request, verbally or in writing, the employee's treating practitioner to provide information regarding that matter; ...

9. The ALA submits that the "request" referred to in subsection 2(2)(a) of the Consultation Draft must be made in writing and not verbally for transparency, record/data keeping and for ease of reference for treating practitioner and employee.

Proposed section 3(1)(a)

3 Requiring rehabilitation examinations

(1) The circumstances in which it is appropriate for the rehabilitation authority to require the employee to undergo a rehabilitation examination are where:

- (a) in the opinion of the rehabilitation authority, there is insufficient or inconsistent information regarding the matters specified in subsection 2(1), to the extent the matters are relevant to the employee's rehabilitation, such that a rehabilitation examination is required ...

10. If this occurs, the ALA submits that the rehabilitation authority should seek a further response from the treating practitioner in order to seek more information or to clarify the inconsistency.

Proposed section 3(2)(b)

3 Requiring rehabilitation examinations

(2) Before the rehabilitation authority requires the employee to undergo a rehabilitation examination, the rehabilitation authority must: ...

- (b) specify that the employee's views must be provided to the rehabilitation authority by a date being not less than 3 days after the date of the request.

11. With regard to clients' experiences, the ALA submits that the proposed period of three days for an employee to provide their views to the rehabilitation authority is too short.

12. The ALA recommends that this provision should instead prescribe a period of seven days, which would be a more realistic timeframe for an employee to provide their views.

13. **We note this feedback also applies to proposed section 10(2)(b) in Part 2 of the Consultation Draft.**

Proposed section 3(4)(b)(i)

3 Requiring rehabilitation examinations

(4) The rehabilitation authority may require the employee to undergo a rehabilitation examination by an assessor or panel that is not the employee's preferred assessor where: ...

(b) in the opinion of the rehabilitation authority, it is not reasonably practicable to require the employee to undergo a rehabilitation examination by the employee's preferred assessor considering one or more of the following factors:

(i) the qualifications of the employee's preferred assessor compared with the qualifications of an independent medical practitioner or other qualified person; ...

14. The ALA is concerned that this will result in the rehabilitation authority obtaining a rehabilitation examination and assessment in place of an employee's treating practitioners (such as, their GP), despite that practitioner treating the employee and being best placed to comment on the injury.

15. The rehabilitation authority should only be obtaining another rehabilitation examination in circumstances where a treating practitioner is unable to comment or declines to comment on the questions sought to be answered by the GP or 'preferred assessor'.

16. **We note this feedback also applies to proposed section 10(4)(b)(i) in Part 2 of the Consultation Draft.**

Proposed section 6(1)

6 Limitations on frequency and number of rehabilitation examinations

(1) The employee shall not be required to undergo more than one rehabilitation examination in respect of the injury more frequently than at 6-month intervals, where each interval commences the day after the last day on which the last examination took place.

17. The ALA supports a minimum interval between rehabilitation examinations being set.

18. However, ALA members submit that in this context six months is too frequent to serve as the minimum interval. It will be costly for the relevant authorities and does not properly consider the risk of harm and/or distress caused to employees in these examinations/assessments. ALA

members report that examinations hinder an employee's ability to recover from their injuries, especially in cases of psychiatric injuries.

19. The ALA, therefore, maintains our position that 12 months should be the minimum interval between rehabilitation examinations.

20. **We note this feedback also applies to proposed section 13(1) in Part 2 of the Consultation Draft.**

Proposed section 6(3)(g) and (h)

6 Limitations on frequency and number of rehabilitation examinations

(3) The minimum interval specified in subsection (1) does not apply in relation to a rehabilitation examination if: ...

(g) a request for reconsideration of a determination is made in accordance with section 38 or 62 of the SRC Act and:

(i) in the opinion of Comcare or the relevant authority, as the case maybe, there is insufficient or inconsistent information regarding any matter relevant to the reasons for the request; and

(ii) a reviewable decision has not yet been made in relation to the request; or

(h) an application for review of a reviewable decision is made in accordance with section 64 of the SRC Act and:

(i) in the opinion of the person or body who made the reviewable decision, there is insufficient or inconsistent information regarding any matter relevant to the review; and

(ii) a final decision has not yet been made in relation to the review.

21. The ALA submits that this process is unnecessary. The authority ought to have obtained a clarification report on the papers or seek more information from the treating practitioner.

22. The ALA is concerned that these provisions do not specify that the rehabilitation examination is to be with the same assessor. It should be specified that the same assessor who has previously examined the employee is to be preferred, if an examination is required.

Part 2—Medical examinations

23. This section of the ALA’s submission will address feedback on Part 2 of the Consultation Draft.

Proposed section 10(4)(c)

10 Requiring medical examinations

(4) The relevant authority may require the employee to undergo a medical examination by an independent medical practitioner where:

(c) the employee has provided a report from, or seeks to rely on an opinion provided by, the employee’s preferred practitioner in support of:

(i) a claim; or

(ii) a request for reconsideration of a determination in accordance with section 62 of the SRC Act; or

(iii) an application for review of a reviewable decision in accordance with section 64 of the SRC Act.

24. The ALA understands that this provision provides that, if the employee obtains a report from a treating practitioner in support of a claim or appeal of a decision subject to a claim, the authority may require a medical examination by an IME.

25. The ALA submits that this provision is contrary to the intended purpose of enacting this guide, which is part of legislative changes in response to the Commonwealth Ombudsman’s 2022 investigation arising from complaints about employees being assessed by IMEs when making their claims and those employees being sent to various doctors in the process.

26. In the experience of ALA members, the relevant authority’s requirement for an employee to attend an IME begins when a claim is made.

27. The relevant authority should request and utilise the opinion of treating practitioners who are best placed to comment on the relevant history and on the cause of an injury which they are treating.

Conclusion

28. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input to Comcare on the Consultation Draft of the 'Guide for Arranging Rehabilitation Assessments and Requiring Examinations'.

29. The ALA is available to provide further assistance to Comcare on the issues raised in this submission.

A handwritten signature in black ink, appearing to read 'Shaun Marcus', is positioned above the typed name and title.

Shaun Marcus

National President,

Australian Lawyers Alliance