
Review of Comcare Permanent Impairment Guides

Submission to Comcare

24 April 2009

Introduction

1. The Law Council welcomes the opportunity to participate in the review of the Comcare “Guide to the Assessment of Permanent Impairment”.
2. In past submissions the Law Council has been critical of the current second edition of the Guide for its complexity and unfairness and has made a number of specific suggestions regarding versions of its tables. It is noted that the current policy review deals with the philosophical parameters of the Guide and is intended to inform a subsequent more detailed Options paper.
3. The Law Council wishes to be involved in responding to this Options paper in the future.
4. The Law Council notes the remarkably short time frame provided to respond to the Discussion Paper. As the subsequent Options paper is likely to be more detailed the Law Council asks, in advance, whether the timetable set allows greater time to respond to the specific questions raised in the Issues Paper.

Legislation

Should we be compensating injured employees for permanent impairment? If so, why is it not sufficient to reimburse weekly benefits, medical benefits and the like? If not, why not?

5. Injured workers should be compensated for permanent impairment. It is not sufficient for injured workers to be only compensated for out-of-pocket expenses such as wage loss and medical expenses.
6. A lump sum for permanent impairment has been a feature of workers compensation systems in Australia since the early Workers Compensation Acts of the various State jurisdictions. It was a feature of the 1906 English Act upon which this legislation was based.
7. The rationale for lump sum compensation is that the loss suffered by an injured worker at work, particularly a more serious injury, is not restricted to wage loss or consequential medical expenses. It can involve a loss of function or use which impacts on both that worker’s capacity for future work and their everyday lives. This was recognised in the expansion of the permanent impairment provisions in the Safety Rehabilitation and Compensation Act 1988 (the SRC Act) in respect of the type of injuries and the circumstances in which payments were made. It is also explicitly acknowledged in section 27 of the SRC Act, which provides compensation for non-economic loss.
8. However, the Law Council considers that the expansion of the permanent impairment provisions was at the expense of the common law rights of public sector employees, who lost much of their capacity to claim fair and equitable compensation for life-changing injuries caused by negligent employers by operation of sections 44 and 45 of the SRC Act.
9. Lump sum provisions for permanent impairment are a current feature of workers compensation systems in all Australian jurisdictions and should properly remain so whilst workers are made of “flesh and blood” and are not simply “widgets” in workplace systems.

Why is there a threshold for permanent impairment claims? What are the positive and negative aspects of having a threshold for permanent impairment claims? If the threshold for permanent impairment claims was to be reduced, what should the threshold be?

10. The philosophical rationale for a threshold is to distinguish between serious impairment and those losses that can be considered of minor nuisance value only. The practical rationale is fiscal – to limit the cost to the government of properly compensating injuries through lump sum compensation.
11. The introduction of thresholds inevitably produced injustices in respect of those who fall short of that threshold but nevertheless appear to have subjectively suffered significant loss. This injustice is heightened when the threshold is entirely based on loss of range of movement rather than taking into account more subjective factors. For example, the loss of capacity to properly bend one's wrist may have greater subjective consequences for a policeman, labourer or tradesman than a clerical officer.
12. The Law Council suggests that Comcare should consider modelling a number of options from a 5% threshold to no threshold but with section 27 entitlements cutting in at 5 per cent or 10 per cent.

Should there be different thresholds, e.g. for different injury types?

13. The Law Council considers that WPI thresholds are arbitrary, to the extent that they attempt to objectively determine the loss of a worker suffered due to injury in the workplace. The use of a whole person level of impairment inevitably means that small but significant losses (eg. to finger and toes, hearing or eyesight) translate to negligible "whole person impairment" calculations.
14. The Law Council considers that some types of injury should remain compensable regardless of whether they meet a whole person threshold. Presently, fingers and toes are excluded on the grounds that, whilst the loss of one digit may be negligible on a whole person impairment scale, the impact on the capacity of person to perform basic functions may be seriously curtailed. Consideration should also be given to reducing the threshold for sensory loss, including loss of hearing, smell, taste and touch (with the loss of sight to be compensable in all circumstances).
15. This issue would be most effectively resolved by removing thresholds altogether, rather than engaging in the somewhat arbitrary process of identifying certain injuries for greater or lesser impairment thresholds.

If the threshold was reduced to be the minimum measurable level of impairment, what would the impact of this change be?

16. For the reasons outlined above, the cost impact of this change can only be evaluated through actuarial analysis. However, removal or reduction of the threshold would remove or diminish many of the criticisms of the harsh impact of the thresholds on injured workers.

The current guide

What is the fairest and most equitable basis for assessing the permanent impairment associated with psychological conditions?

17. It has long been accepted that individuals can suffer work-related psychological conditions which are as functionally debilitating as physical impairment. It is therefore appropriate that psychological conditions involving long-term morbidity should be compensable by way of permanent impairment payment.
18. The Law Council has previously been critical of Table 5.1 of the Guide, echoing criticism of psychiatrists and psychologists who have attempted to use it, that it is a crude, mono-dimensional guide to measure impairment resulting from psychological injury.
19. The attempt to measure psychological impairment in the Guide to the Assessment of Rates of Veterans Pensions (GARP) is more sophisticated and may provide a more effective measure for the purposes of any future WPI Guide.
20. Table 5.1 requires review in any future guide in consultation with relevant medical professionals.

How useful is Comcare's "stand alone" guide – does it add complexity to the assessment of permanent impairment?

21. Whilst the 2nd Edition is overly complex and has a number of deficiencies making it difficult to use, the Law Council is of the view that there is a need for a stand-alone Guide to assess permanent impairment.
22. In fact, the Law Council is of the view that work should be commenced on a stand-alone Guide for all Australian jurisdictions for compensation purposes. Such a project could be conducted under the auspices of Safe Work Australia.

Permanent impairment guides in other jurisdictions

Are the AMA guides the most effective way of assessing permanent impairment? What other options are available?

23. The AMA Guides are not the most effective way of assessing permanent impairment.
24. As the first chapter of the AMA Guides notes:

*"...the Guides is not to be used for direct financial awards nor as the sole measure of disability. The Guides provides a standard medical assessment for impairment determination and may be used as a component in disability testing."*¹
25. Each addition has become increasingly technical and complex in attempting to put different impairments on a comparable continuum, so that physicians can "converse" on similar terms. The Guide attempts to categorise conditions that rarely, if ever, are a product of workplace injuries and has a poor focus on some injuries that are more likely to be incurred in the workplace (e.g. spinal injuries and their sequelae). While the purpose of the Guides is diagnostic and standardising it does not set common

¹ American Medical Association, *Guides to Evaluation of Permanent Impairment*, 5th Edition, page 12.

points that might be used for setting thresholds. The Law Council also notes that the Guides are the workings of medical specialists in the United States. They provide a useful reference point, however the clinical debates of American doctors ought not to be the basis for compensating injured Australian workers.

26. Ultimately the better option is for there to be an Australian Guide designed for compensation purposes, which is fair and intelligible to doctors, lawyers, Comcare and injured workers. This would seem consistent with the approach that is intended to guide Comcare as set out in section 72 of the SRC Act.

If an AMA guide is regarded as the most effective assessment tool, to what extent does it need to be modified to reflect Australian conditions?

27. As outlined above, the Law Council does not regard the AMA Guide as the most effective assessment tool and supports a stand-alone Australian Guide.

Should the permanent impairment benefit package for slow onset conditions differ to the package offered for other conditions? If so, what do you consider the differences should be?

28. The Law Council considers that there should be a permanent impairment benefits package that compensates for conditions of gradual onset.
29. This can be achieved through provisions that allow accumulation of impairment ratings with deterioration as a result of the condition. This could be achieved through either an interim payment or, preferably, an accumulating total that is triggered by a 5 per cent or 10 per cent increase. For example, a worker who is initially assessed at 10 per cent and is offered a sum of \$29,000 may subsequently be assessed at 20 per cent impairment as a result of deterioration in their condition, resulting in a revised sum of \$54,000. This later sum might then be awarded, less the previous impairment sum for 10 per cent impairment of \$29,000, leading to a further payment of \$25,000.
30. Such a system would put a worker with a gradually developing condition in the same position as anyone else with the same level of impairment but would provide greater access to entitlements at an earlier stage of the development of the condition.

Should permanent impairment compensate holistically by combining all impairments resulting from multiple injuries which arise from a single occurrence (for example, a motor vehicle accident or a fall), or compensate separate injuries arising from a single occurrence separately? What are the impacts to claimants of each of these options? Are there any other options which should be considered?

31. The purpose of whole person impairment scheme is to map a diverse range of impairments into a single index (whole person impairment).
32. It is appropriate and desirable that a number of impairments are able to be combined to reach a total level of impairment, particularly if a threshold remains in the legislation. As a matter of principle, there should also be no difference between an injury leading to two impairments immediately and one leading to two over the passage of time. It is this principle that partly explains the High Court decision of *Canute v Comcare* (2006) HCA 47.
33. The problem is best overcome by adopting a combined tables approach (pre-*Canute*) but allowing accumulation without reference to combined tables except for the purposes of subsequent quantification of impairment entitlements.

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34. It also raises the issue of whether there needs to be a nexus between a particular injury and impairment. There is an argument that all injuries, regardless of date, could be added to produce one impairment.
 35. The Law Council agrees with the comments in the options paper regarding the case of *Jordan v Australian Postal Corporation* [2007] DFCA 2028. Besides such an approach being cumbersome, it involves a series of very subjective medical opinions and, meritably, greater disputation.
 36. Whilst acknowledging that entirely degenerative conditions should not be compensable, in circumstances where a bodily part or function was largely asymptomatic prior to injury, there should be a presumption that the condition or impairment was caused by the injury, with the onus on the employer or Comcare to show that degenerative factors were a significant component in the level of impairment.

Other observations

37. There are a number of cases in which the guide operates more broadly than its legislative intent.
38. These include:
 - (a) where it imports diagnostic criteria which are not the measure of levels of impairment – a good example of this is Table 9.13.3;
 - (b) where the Guide introduces criteria that essentially negate the entitlement to permanent impairment compensation for a 10 per cent impairment. An example of this is the introduction to tables 9.6.1, 9.6.2 and 9.7.
39. The examples above raise the policy issue as to the role of the Guide as a “gatekeeper” to entitlements. The Options Paper should consider this issue and appropriate alternatives which address the grievances of those whose entitlements are arbitrarily curtailed.
40. The Law Council believes that the limited access to common law is a result of the Guide and other sections of the SRC Act. There is a strong argument for better access to common law, not just for providing fairer entitlements for injured workers, but also for normative reasons in reinforcing good occupational health and safety practices.
41. Given the increases applicable in other jurisdictions the amount of entitlements under sections 24 and 27 needs to be reviewed.
42. Finally, the Law Council notes that any new guide should be intelligible to doctors, lawyers and injured people, as well as flexible enough to allow the exercise of discretion in the decision making process. Currently, the criteria in the guide are treated in a rigid and inflexible manner, which is contrary to what might be expected from beneficial legislation.
43. Unless there are further matters that require clarification, the Law Council welcomes the opportunity to contribute to the next phase of the review.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the “constituent bodies” of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.