



Law Council  
OF AUSTRALIA

*Federal Litigation and  
Dispute Resolution Section*

30 July 2021

Comcare  
Attention: PI Review, Scheme Management Group  
GPO Box 9905  
Canberra ACT 2601

Also by email: [PI.Review@comcare.gov.au](mailto:PI.Review@comcare.gov.au)

Dear Comcare

### **Draft Permanent Impairment Guide consultation**

1. The Commonwealth Compensation and Employment Law Committee (**CCELC**) of the Law Council of Australia's Federal Litigation and Dispute Resolution Section thanks Comcare for the opportunity to provide feedback in relation to its draft of Edition 3 of the *Guide to the Assessment of the Degree of Permanent Impairment* (**approved Guide**).
2. This response has been prepared by the CCELC, whose members had access to the stakeholder consultation papers and other information available publicly on the Comcare website. The CCELC is comprised of a range of legal practitioners (barristers and solicitors) who act for either or both sides in contested matters, including claims for permanent impairment and non-economic loss, under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (**SRC Act**).

### The CCELC's position

*The position of the CCELC is that there would appear to be no clear policy justification to prepare a new version of the approved Guide based on the methods set out in the draft of Edition 3 of the approved Guide.*

*The CCELC submits that it would be preferable for Comcare to update Edition 2.1 of the approved Guide, taking into consideration the constructive feedback provided by Chapter III Courts and the Administrative Appeals Tribunal in relation to Edition 2.1, rather than adopting the proposed methods set out in the draft of Edition 3 of the approved Guide or merely re-enacting Edition 2.1.*

### Rationale for the CCELC's position

3. The CCELC notes that Edition 2.1 of the approved Guide is due to expire (sunset) on 1 April 2022.
4. In anticipation of that circumstance, Comcare has prepared the draft of Edition 3 of the approved Guide which is said to be based on the national guide template as developed through a national process facilitated by Safe Work Australia (**SWA**).

5. The draft of Edition 3 of the approved Guide is said to adopt the fifth edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment (AMA5)* in most cases. However, the draft of Edition 3 of the approved Guide is said to adopt, amend or replace certain methods set out in the AMA5. In some circumstances, the draft operates to override the AMA5; presumably, the intention in doing so is to ensure harmonious operation of the draft of Edition 3 of the approved Guide with the provisions of the SRC Act and extant authority.
6. It is said in Comcare's Stakeholder Consultation Paper of June 2021 that applying the above approach represents best practice for the assessment of the degree of impairment in Australia because:
  - a. AMA5 impairment tables have been reviewed/or modified by expert Australian medical specialists, Associations and Colleges to align with clinical practice in Australia;
  - b. the methods and criteria for the assessment of the degree of impairment provides greater clarity and consistency across workers compensation schemes in Australia;
  - c. five workers compensation schemes in Australia have adopted the national guide template, with amendment (as necessary) to enable their workers compensation laws;
  - d. SWA continues to monitor and evaluate the effectiveness of the national guide template.
7. However, the CCELC does not agree that the approach adopted in the draft of Edition 3 of the approved Guide represents best practice based on all or any of the reasons set out at paragraph 6 above. Despite those reasons, the CCELC observes that:
  - a. Edition 2.1 of the approved Guide was in many respects based on the AMA5, and was prepared taking into consideration medical opinion from expert Australian medical specialists and Associations, who had provided input and assistance over a number of years, as well as a range of legal and other practitioners;
  - b. there is no policy justification to provide greater consistency across workers compensation schemes in Australia, especially where the permanent impairment compensation scheme provided by the SRC Act has unique features (such as the exclusion of common law rights, except in rarest of circumstances), and each jurisdiction has had to amend the national guide template "to enable their workers compensation laws" in any event;
  - c. the issue of whether other workers compensation schemes have adopted the national guide provides no justification for changing the methods of assessing permanent impairment and non-economic loss under the unique scheme provided by the SRC Act;

- d. it is not established that SWA's monitoring and evaluation of the national guide template adds anything to the process of the broader management of claims for permanent impairment and non-economic loss under the SRC Act.
8. There would therefore appear to be no clear policy justification to prepare a new version of the approved Guide based on the methods set out in the draft of Edition 3 of the approved Guide. On the contrary, it would appear as though there are good reasons for Comcare to not prepare a new version of the approved Guide based on the draft in circumstances which include, but are not limited to, the following examples.
  - a. Edition 2.1 of the approved Guide is freely accessible from the Federal Register of Legislative Instruments, and (except in rare cases) provides a comprehensive assessment tool for the evaluation of claims for permanent impairment and non-economic loss. In practical terms, applicants, respondents and their representatives currently do not have to spend substantial sums of money in purchasing a copy of the AMA5 in order to evaluate claims for permanent impairment (except in rare cases). However, adoption of the draft of Edition 3 of the approved Guide would require such expense to be incurred and could pose an insuperable barrier to a self-represented person.
  - b. The methods set out in Edition 2.1 of the approved Guide, although not perfect, are largely well understood by the Administrative Appeals Tribunal and the legal representatives of both sides in contested matters under the SRC Act. Adoption of the draft of Edition 3 of the approved Guide would require the Tribunal and the parties' legal representatives, as well as many medical practitioners, to learn new methods, at potentially substantial cost.
  - c. The methods set out in the draft of Edition 3 of the approved Guide require parties and their representatives to interpret one document (the AMA5) by reference to another (the draft of edition 3 of the approved Guide). Such a process tends to lead to ambiguity and/or unnecessary complexity, which can operate as a bar in terms of access to justice for applicants and respondents alike. It can also lead to further litigation in the Tribunal and Chapter III Courts, where there is currently a line of authority which provides workable solutions for parties and their representatives.
  - d. Various of the proposed criteria seem questionable. For instance, the chapter relating to the evaluation of psychiatric and psychological disorders seems to rely on very subjective methods of assessment and may rely on outdated (possibly even gender stereotypical) examples: eg, "unable to read more than [unspecified] newspaper articles, follow a pattern for making clothes, tapestry or knitting".
9. Despite the above, the CCELC does not suggest that Edition 2.1 should merely be re-enacted on and from 1 April 2022.
10. Instead of simply re-enacting Edition 2.1 of the approved Guide, the CCELC submits that it would be preferable for Comcare to update Edition 2.1 of the approved Guide, taking into consideration the constructive feedback provided by Chapter III Courts and the Tribunal in relation to Edition 2.1.

11. The line of authority relevant to that task would include, but is not limited to, *Newport v Australian Postal Corporation* [2015] FACFC 194; (2015) 241 FCR 479 (**Newport**). In *Newport*, the Full Court of the Federal Court of Australia found that the Tribunal was unable to combine separate impairments arising from separate injuries where Edition 2.1 essentially provided that the “WPI rating for one extremity may be combined with a WPI rating for the other upper extremity”. That issue in the drafting of Edition 2.1 of the approved Guide would need to be rectified or, at least, clarified in the new version of the approved Guide.
12. The CCELC would, of course, be content to provide further examples, beyond the *Newport* example mentioned above, if Comcare were interested in adopting the CCELC’s preferred approach of updating Edition 2.1 of the approved Guide.
13. However, for present purposes, the CCELC respectfully does not support Comcare’s proposal to enact the draft of Edition 3 of the approved Guide. The CCELC’s position is that Edition 2.1 of the approved Guide could be updated to a better standard in such a manner as to ensure consistency and access to justice for all.

Thank you once again for providing the opportunity to provide feedback in relation to the draft of Edition 3 of the approved Guide. The CCELC would be available for further consultation by Teams or Zoom on further issues of detail, if that would be seen as helpful. Please contact me should you have any further queries.

Yours sincerely



**Michael Tidball**  
**Chief Executive Officer**