AUSTRALIAN MEDICAL ASSOCIATION
ABN 37 008 426 793
T I 61 2 6270 5400
F I 61 2 6270 5499
E I ama@ama.com.au
W I www.ama.com.au
39 Brisbane Ave Barton ACT 2600
PO Box 6090 Kingston ACT 2604

# SUBMISSION

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# AMA submission to Comcare on the draft *Guide for rehabilitation assessments and requiring examinations*

**By email: schemepolicyanddesign@comcare.gov.au**

## Introduction

The AMA appreciates the opportunity to provide a submission to this important consultation.

The draft *Guide for rehabilitation assessments and requiring examinations* (the guide) was developed in response to provisions of the *Fair Work Amendment (Closing Loopholes) Act 2023* (Closing Loopholes Act). Once approved by the Australian Government Minister for Employment and Workplace Relations, it will be a legislative instrument made under the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act).

The purpose of the guide is specified in subsection 57A(2) of the SRC Act as amended by the Closing Loopholes Act, which states that 'the object of the guide is to 'support ethical, transparent and accountable decision making' under subsections 36(1), 36(3) and 57(1) of the SRC Act, 'including appropriate consideration of the employee's personal circumstances'. Rehabilitation organisations governed by the SRC Act are required to comply with the guide once it is approved by the Minister.

The AMA notes that provisions for the guide were included in the Closing Loopholes Act following media reports critical of Comcare's decision making in relation to rehabilitation assessments and requiring examinations, and a 2022 report of the Commonwealth Ombudsman on Comcare's management of medical examinations.[i]

Having reviewed the draft guide and considered input provided by AMA members, the AMA is of the view that to meet its stated purpose, some sections of the draft guide require modification or the inclusion of additional provisions. Suggested inclusions and amendments are discussed in detail below.

## Sections of draft instrument

### Section 4 – Definitions

Definition of the term 'day'

**Recommendation: The term 'day' should be defined or replaced.**

This is because:

- 'day' is not defined in the SRC Act
- its meaning directly affects
  - whether any time limits specified in the guide are reasonable
  - the capacity of employees and treating practitioners to understand and meet their obligations or exercise their agency effectively under the instrument.

The term 'day' could be defined as, or replaced with, the term 'calendar day.' Alternatively, it could be replaced with the term 'business day' which is defined under the *Acts Interpretation Act 1901* Section 2B as 'a day that is not a Saturday, a Sunday or a public holiday in the place concerned.'

Use of the term 'independent medical practitioner'

The Ombudsman's 2022 report on Comcare's management of medical examinations refers to public allegations[ii] that Comcare indulges in 'doctor shopping', or the selection of certain doctors likely to provide a report that can be used to deny, reduce or cease compensation payments. The report also notes that the term 'independent' is not defined in the SRC Act.

Given these concerns, the Ombudsman's report argued that in a written agency-wide policy statement, Comcare should 'provide assurance that its decisions are appropriate and consistent' by clarifying what it means by 'independent' and 'outlining how decision-makers should take that meaning into account when selecting medical practitioners to undertake examinations.' [iii]

The Ombudsman also recommended that such guidance should specify 'any rules or preferences for checking qualifications or previous conduct complaints' before appointing 'independent' medical assessors.

The AMA notes that while the guide does define 'independent medical practitioner,' the definition provided — 'a medical practitioner other than a treating practitioner'[iv]— does not address the Ombudsman's concerns. Nor does the guide provide any other guidance as to how Comcare decision-makers should interpret the term 'independent' or ensure the 'independence' of the assessor before arranging medical examinations.

**Recommendation: The guide should provide a definition of 'independent' medical practitioner that clearly explains what independent means.**

**Recommendation: In line with the Ombudsman's recommendations, the guide should also provide additional guidance for Comcare decision-makers on how to choose a truly 'independent' medical practitioner' and specify rules for checking qualifications or previous conduct complaints before appointing 'independent' medical assessors.**

### Section 6 – Application of approved Guide

In its overview of the consultation draft guide, Comcare has advised that under relevant legislation, rehabilitation authorities will have to comply with the approved guide from 14 June 2024. It has also noted that this presents the question of how to deal with rehabilitation assessments and medical examinations arranged prior to 14 June 2024 but due to take place after that date.

Comcare suggests that one way to deal with this issue would be to insert provision for a buffer period between 14 June 2024 and commencement of its provisions. It has also asked for stakeholder views on what a reasonable commencement date might be and raised 1 July 2024 as one commencement date possibility.

The AMA considers 1 July a reasonable commencement date. It is important that application of the approved Guide commences as soon as possible to help improve public confidence in the decisions rehabilitation authorities make in relation to matters covered under s 36 and 57 of the SRC Act.

**Recommendation: The requirement for rehabilitation providers to comply with the approved guide should commence from 1 July 2024.**

## Schedule 1, Part 1 – Rehabilitation assessments and examinations

### Section 2 – Arranging rehabilitation assessments and examinations

Section 2(2)(c) of the guide specifies an unacceptably short timeframe of seven days for a treating doctor to provide an opinion.

Given that the time of many medical practitioners is booked out weeks in advance, the inadequate timeframe provided makes it extremely difficult for the treating practitioner to provide a comprehensive report within the time allowed.

This is particularly problematic if the employee's 'circumstances' (as defined in the draft guide's definition section) are complex, and the treating practitioner needs to seek further information from the rehabilitation authority, the employee or other health practitioners or service providers to provide an opinion that will meet the rehabilitation authority's requirements.

The short timeframe provided virtually ensures that Section 3(1) of the guide will be activated and that Comcare will require the employee undergo an assessment or examination with its preferred 'independent' medical practitioners or panel. This is unacceptable.

**Recommendation: Subsection 2(2)(c) of the draft guide should be amended to provide the treating practitioner at least 14 days (or 10 business days) to provide an opinion.**

### Section 3 – Requiring rehabilitation examinations

Subsection 57(1) of the SRC Act says that the rehabilitation authority 'may require the employee to undergo an examination by one legally qualified medical practitioner nominated by the relevant authority.'

The Closing Loopholes Act inserts a subsection 57(1A) into the SRC Act which specifies that in deciding whether to require this examination by a medical practitioner or panel it nominates, the rehabilitation authority must comply with the guide (once approved).

However, the relevant section of the draft guide (Section 3) is poorly drafted and uses legal terminology that may be difficult for employees and treating practitioners to understand.

One issue likely to cause confusion is that the organisation of the material in Section 3 seems to conflate processes involved in deciding two separate issues: whether a rehabilitation examination will be required, and if it is required, the process of choosing an assessor or assessors.

For example, subsection 3(2) suggests that 'before the rehabilitation authority requires the employee to undergo a rehabilitation examination,' it must seek the employee's views about the selection of the assessor or panel that is to conduct the examination. This wording implies that the employee's views about potential examination assessors will affect the rehabilitation authority's decision about whether to require such an examination at all. This issue alone makes subsection 3(2) unacceptable as drafted.

**Recommendation: Section 3 of the guide should be re-drafted, possibly into two separate sections — Section 3 *Requiring rehabilitation examinations,* and a new Section 4 *Choosing rehabilitation assessor(s)* — to make it clear that these are two separate decisions.**

A second problem is that subsection 3(2)(b) gives the employee an unacceptably short deadline to put forward his or her views as to appropriate assessors — three days from the date of the authority's written or verbal request for those views.

In many cases, this will be an insufficient amount of time to allow the employee to consult their solicitor to get the names of suitably qualified assessors, particularly if the request is made on a Friday, or if the employee does not immediately see any written request to this effect from the authority. A requirement that the employee respond to such a request within seven days would be more reasonable.

**Recommendation: Section 3(2)(b) should provide the employee with at least seven days to provide the authority with the names of potential assessors.**

The AMA is also concerned that Section 3 of the draft guide provides rehabilitation authorities with a veritable smorgasbord of potential reasons for requiring the employee to undergo a rehabilitation examination by an 'independent' assessor(s) of its choice — reasons that are in some cases are so subjective and ill-defined that the employee may it find very difficult to challenge them successfully.

For example, under the draft guide, the rehabilitation authority can require that the employee undergo an examination by an independent assessor if:

- in its 'opinion,' information provided by the treating practitioner is 'insufficient' or 'inconsistent' (subsection 3(1)(a))
- in its 'opinion,' it is not 'reasonably practicable' (a term that is not defined) to use the employee's 'preferred assessor' because that preferred assessor isn't available as quickly as the authority's preferred 'independent' assessor(s), or charges more than the latter (subsections 4(b) (ii) and (iii))
- it is 'reasonable in the circumstances' (a term that again, is not defined) for the rehabilitation authority to do so (subsection 4(5))

In 2022, the Ombudsman's report on Comcare's management of medical examinations noted that Comcare had no requirement for its decision-makers to record reasons for s 57 decisions under the SRC Act, nor for them to communicate those reasons to claimants.[v] It also noted that Comcare has accepted the Ombudsman's recommendation that Comcare develop policy and supporting procedures to require its decision-makers to both record those reasons and to communicate them to claimants.[vi]

Given that the Closing Loopholes Act requires that Comcare comply with the guide (rather than any other internal policy directives it has in place) when making s 57 decisions under the SRC Act, these requirements to record reasons for s 57 decisions and to communicate them to claimants should be included in the guide.

**Recommendation: The draft guide should be amended to include a requirement that when making s 57 decisions under the SRC Act, Comcare decision-makers must:**

- **record the reasons for their decisions**

- **communicate those reasons to claimants.**

### Section 6 – Limitations on frequency and number of rehabilitation examinations

Subsection 6(1) of the draft guide is not drafted clearly. However, it appears to state that the employee can be required to undergo more than one rehabilitation examination, but at no more than 6-month intervals, unless a range of exceptions provided for in subsections 6(2) and 6(3) apply. These exceptions include cases where the employee has sustained multiple injuries or an injury requiring multidisciplinary treatment.

It is not clear why an employee with one injury should be required to undergo more than one rehabilitation examination every six months unless any of the caveats listed in subsections 6(2) or 6(3) apply.

**Recommendation: Subsection 6(1) should be redrafted to make it clear that:**

- **six monthly rehabilitation examinations are the normal expectation and practice**
- **the employee will not be required to undergo more than one rehabilitation examination during the six month interval following the last day on which the last examination took place unless any of the caveats in subsections 6(2) or 6(3) apply.**

### Section 7 – Other relevant matters

Subsection 7(3) appears to be unnecessary given earlier provisions of the guide that specify in more detail when, and under what circumstances, the rehabilitation authority is allowed to arrange a rehabilitation assessment or require the employee to undergo a rehabilitation examination by either the employee's treating practitioner or other qualified persons nominated by the authority.

**Recommendation: Subsection 7(3) should be removed from the draft guide.**

## Schedule 1, Part 2 – Medical examinations

### Section 9 – Arranging medical examinations

The AMA's concerns regarding the timeframe provided for the treating practitioner to respond in subsection 2(2)(c) also apply to the timeframe provided for treating practitioners to provide relevant information to the rehabilitation authority under subsection 9(2)(c). Seven days is insufficient, and this should be amended to provide at least 14 days or 10 business days.

**Recommendation: Subsection 9(2)(c) should be amended to provide the treating practitioner at least 14 days (or 10 business days) to provide the information requested by the relevant authority.**

### Section 10 - Requiring medical examinations

The AMA is concerned that like Section 3, Section 10 seems to conflate processes involved in deciding two separate issues: whether a claimant will be required to undergo a medical examination, and if it is required, the process of choosing an assessor or assessors.

**Recommendation: Section 10 of the guide should be re-drafted, possibly into two separate sections — Section 10 *Requiring medical examinations,* and a new Section 11 *Choosing medical examiners* — to make it clear that these are two separate decisions.**

In addition, the AMA's concerns regarding the timeframe provided to employees in subsection 3(2)(b) also apply to the timeframe provided for the employee to provide his or her views to the authority about the selection of the medical practitioner who is to conduct a medical examination under subsection 10(2)(b). Three days is insufficient, and this should be changed to at least seven days.

**Recommendation: Subsection 10(2)(b) should be amended to provide the employee with at least seven days to provide his or views on who should conduct the medical examination.**

The AMA also wishes to comment on the 'Note' appearing under subsection 10(5), which is reproduced from the SRC Act subsection 57(2), and concerns what happens if 'the employee refuses or fails, without reasonable excuse, to undergo an examination' conducted by a medical practitioner who is not the employee's preferred medical practitioner.

What happens in this case is that the employee's rights to compensation or to institute or continue any proceedings under the SRC Act are suspended until that examination takes place.

The Ombudsman's 2022 report into Comcare's management of medical examinations observed that the term 'reasonable excuse' is not defined in the SRC Act, and that Comcare decides what is, or is not, a reasonable excuse.[vii]

The Ombudsman report argued that Comcare should expand its internal guidance for decision-makers on the circumstances that amount to a reasonable excuse, and in doing so, may wish to draw on case law definitions of 'reasonable excuse' from the Administrative Appeals Tribunal or Federal Court of Australia.[viii] It also argued that Comcare should require decision-makers to record and communicate to claimants 'reasons for decisions about whether or not a claimant provides a reasonable excuse for not attending a s57 examination.' [ix]

As discussed earlier in this submission, the AMA recommends that such a requirement to record and communicate reasons for decisions should be included in the guide.

In addition, given the punitive and potentially devastating consequences for claimants if Comcare decides that an excuse given in this circumstance is not 'reasonable', and given that Comcare *must* comply with the provisions of the guide, the AMA also believes that Comcare's guidance for decision makers on what constitutes a reasonable excuse should also be included in the draft guide.

**Recommendation: Comcare's guidance for decision makers with respect to the specific circumstances that constitute a 'reasonable excuse' for not attending a medical examination should be:**

- **expanded as recommended by the Commonwealth Ombudsman**
- **included in the draft guide.**

### Section 13 – Limitations on frequency and number of medical examinations

The AMA's comments and recommendations in relation to Schedule 1, Part 1, Section 6 also apply in relation to Section 13 of the guide.

**Recommendation: Subsection 13(1) should be redrafted to make it clear that:**

- **six monthly medical examinations are the normal expectation and practice**

- **the employee will not be required to undergo more than one medical examination during the six month interval following the last day on which the last medical examination took place unless any of the caveats in subsections 13(2) or 13(3) apply.**

**Contact**

president@ama.com.au

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[i] Commonwealth Ombudsman, (2022). Comcare's management of medical examinations: Comcare's administrative framework for managing medical examinations under Section 57 of the Safety, Rehabilitation and Compensation Act 1988, Report No. 05.2022, Retrieved 8 April 2024,

[ii] Clayton, R. (2021) '*Federal Government workers compensation authority Comcare accused of unethical behaviour',* ABC (Australian Broadcasting Corporation), 5 February, Retrieved 10 April 2024 from: Federal Government workers compensation authority Comcare accused of unethical behaviour

[iii] Commonwealth Ombudsman, (2022). Comcare's management of medical examinations: Comcare's administrative framework for managing medical examinations under Section 57 of the Safety, Rehabilitation and Compensation Act 1988, Report No. 05.2022, Retrieved 8 April 2024, p. 14.

[iv] The term 'treating practitioner' is defined in the guide as 'a medical practitioner or other health professional who is primarily responsible for the clinical management of the employee's injury.'

[v] pp. 14-16

[vi] p.4

[vii] p.38

[viii] p.38

[ix] p.38