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Dear Ms Lowe-Carlus,

REVIEW OF COMCARE'S PERMANENT IMPAIRMENT GUIDE - OPTIONS PAPER

I am pleased to enclose a submission on the Review of Comcare's permanent impairment guide - Options paper

Yours sincerely,

A handwritten signature in black ink, appearing to read "Bill Grant".

Bill Grant
Secretary-General

31 August 2009

Review of Comcare's Permanent Impairment Guide

Submission on the Options Paper

19 August 2009

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Introduction

The Law Council of Australia welcomes the opportunity to participate in the Policy Review of the Impairment Guide and, in particular, the Options Paper prepared by Comcare.

The introduction of the *Safety, Rehabilitation and Compensation Act 1988* on 1 December 1988 effectively curtailed the rights of public sector workers to sue at common law for injuries suffered in the course of their employment as a result of the negligence of their employers or other employees.

In place of this loss, the Act was claimed to have a more generous series of benefits including a broader and more generous regime of payments for permanent impairment which included a component for non-economic loss.

Nearly 21 years on, the maximum amount payable under the Comcare Scheme is below that available in New South Wales, Victoria, South Australia and, in practice, Queensland. It should be noted that only two other jurisdictions have no access to common law rights.

In addition, the introduction of a second edition of the *Guide to the Assessment of the Degree of Permanent Impairment* from 1 March 2006 has led to a dramatic fall in claims, both in terms of applications but also success rates, which are around 20-25 per cent of applications for physical injuries.¹

These statistics are concerning and make the review of the Permanent Impairment regime timely and necessary.

The Law Council believes that the appropriate general principle is that benefits should compensate injured workers for loss to the maximum extent possible having regard to ensuring that the scheme remains financially viable and there remain incentives to return to work.

The Comcare Scheme has had the benefit of reduced rates of injury (as have all schemes) and changes to aspects of the scheme (definitions, journey claims etc) have continued to reduce claims and scheme costs.

In the absence of actuarial information it is the view of the Law Council that a more generous permanent impairment scheme is affordable, consistent with original policy intent and would not destabilise the Scheme's financial viability.

The issue then becomes whether to increase access to permanent impairment entitlements or to maintain current barriers but increase the quantum of entitlements paid to those seriously injured enough to overcome those barriers.

It is difficult to adequately address this policy issue without access to actuarial modelling. However, the Law Council believes there is a capacity to increase access and find a staggered means to increase the lump sum for those most severely injured.

¹ See Attachment 5 of the Options Paper. This is consistent with anecdotal evidence.

Access to Common Law

The issue of permanent impairment is inextricably linked to access to common law rights for injured workers.

As previously noted, Queensland, New South Wales and Victoria have higher permanent impairment entitlements than the Comcare Scheme but still provide injured workers with access to common law actions. It is therefore not a question of either permanent impairment benefits or common law access.

The Comcare Scheme is unique in providing both a threshold to make common law claims and limiting the right to a (capped) claim for general damages only.

As a simple matter of justice it is difficult to see why the Commonwealth should shield itself from injured employees who have been injured by its negligence (except where this leads to death.

Nor is there a good reason why such workers ought not to be able to pursue this course rather than stay on benefits if they choose to do so.

Queensland provides sufficient evidence that it is possible to run a financially viable scheme that allows full common law access.

The Adequacy of Current Impairment Benefits

The Law Council notes that the current level of permanent impairment benefits is relatively lower than the major State schemes.

There does not appear to be any logic behind the decision in 1988 to make the maximum amount payable for permanent impairment 90 per cent of the death benefit. There seems little point in reproducing what may well have been a historic accident.

It does seem reasonable to consider that someone with a 100 per cent impairment would be suffering an experience worse than death.

In these circumstances the use of 100 per cent of death benefits as the quantum seems to have an element of logic to it.

Ultimately this is a matter for actuarial modelling, but in its absence, the Law Council opposes option one and slightly favours option three over option two in paragraph 1.2 of the Options Paper.

There is no justification given for not indexing the common law in subsection 45(4) of the Act apart from a general prejudice against this type of action.

There are already barriers to common law action (the 10 per cent threshold) and limitations (only for damages) that provide significant disincentives and workers, injured in circumstances involving negligence, ought not to face a further limitation.

The amount in subsection 45(4) should be raised to the maximum amount of the permanent impairment sum and indexed.

Separate Payments for PI and NEL

Permanent Impairment schemes purport to measure the objective loss of movement or function without regard to the vocational, social or personal consequences of this loss.

Although the non-economic loss tables were a somewhat crude measure they did attempt to add a subjective, individual dimension to the loss of range of movement or function.

Whilst the Law Council is sympathetic to allowing some flexibility in the assessment of impairment (ie along a range) this would only provide a more accurate measure of the objective level of impairment.

Flexibility of assessment could be allowed whilst maintaining the non-economic loss approach and option one in paragraph 2.1 of the Options Paper is the preference of the Law Council.

Irrevocable Election

The Law Council has no difficulty with the requirement of an irrevocable election as long as it is clear that 'time', in a Limitation Act sense, does not run until an election has been made and that the election itself need not be made until Comcare has made a determination as to the level of permanent impairment.

However, such an election should allow that injured worker to sue at common law 'at large' and not be restricted to capped general damages only. In other words, subsection 45(4) of the Act ought to be abolished.

The Reasonableness of Current Impairment Thresholds

With respect, the statement at paragraph 2 under this section "In 1988, when the 10 per cent threshold was implemented, it was difficult to assess an impairment below 10 per cent" is nonsense.

The existing evidence² suggests that the effect of implementing the second edition of the Guide has been that fewer injured workers meet the 10 per cent threshold.

Although it is possible that employees are suffering from more minor injuries, on balance it is likely that the criteria to meet this threshold have become more difficult.³

All thresholds produce some injustice and for this reason the Law Council is, in general, opposed to them. Nevertheless the Law Council is prepared to consider actuarial advice regarding the cost to the Comcare Scheme and its viability.

Subject to that actuarial advice, the Law Council favours options one or two in paragraph 4.2 of the Options Paper. In respect of the latter options (5 per cent) it is unclear how

² This includes the trialling of the Guide and the experience of military compensation, where a version of the first edition of the Guide is still used, as well as comparing old tables such as 9.6 with their new equivalents 9.15 – 9.17. In addition the data from Comcare for the periods 2004 onwards also supports this conclusion.

³ This is consistent with the military compensation experience and the trials of the new Guide.

many permanent impairment claims are made within the first 12 months, but given the exceptions this is probably not a great impost.⁴

As the Law Council suggested in its earlier submission, it would be possible to have a differential, higher threshold for non-economic loss entitlements.

In addition, there might be a further loading if an impairment reaches 30 per cent, similar to the approach in Queensland.

The question of deterioration of a condition produces some of the greatest injustices and is probably responsible for the High Court approach in Canute.⁵ The threshold for deterioration should be reduced in any event.

Similarly, the exception of digits (fingers and toes) and conditions such as hearing loss ought to be maintained.

Multiple Injuries / Canute

With the proviso that the threshold for deterioration should be reduced to 5 per cent (without recourse to the combined tables), the Law Council agrees to Comcare's preferred option in paragraph 5.3 of the Options Paper.

Pre-Existing Conditions

The Law Council supports, in principle, a clear mechanism for excluding pre-existing conditions whilst recognising that this has the potential to lead to greater levels of disputation.

The Law Council is of the view that the statement in the Guide and the approach adopted in Jordan⁶ is a clear mechanism for excluding pre-existing conditions. It therefore prefers option one in paragraph 6.2 of the Options Paper.

General Review of the Guide / Stand Alone Guide

Given the uncertainty surrounding the 6th Edition of the AMA Guide, the next edition of the Comcare Guide should predominantly be based on the 5th Edition.

It remains the Law Council's view that the guide should be a stand-alone guide, and not simply a clone of the AMA Guides, and should be based on Australian clinical practice and experience.

Ultimately the Law Council is of the view that an Australian Guide should be developed for use in all jurisdictions. It is accepted that Comcare ought not to shoulder this burden but it seems an appropriate task for Safework Australia.

A further advantage of a stand-alone guide is its ready availability. A search of library catalogues reveals a diminishing number of libraries hold successive editions of the guide,

⁴ The requirement that an impairment is 'permanent' probably has this effect as a matter of practice.

⁵ Canute v Comcare [2006] HCA 47

⁶ Jordan v Australian Postal Corporation [2007] DFCA 2028

to the point where there are about ten libraries that hold the 6th Edition. Social inclusion requires that injured workers, their doctors and their lawyers have access to the Guide.

The Law Council views with some caution the modified guidelines adopted in New South Wales. The instructions seem to contradict the whole person approach in negating the adding of impairments, are difficult to follow without access to the AMA Guide itself, and seem largely designed to reduce the ability of injured persons to meet the threshold.

The Law Council favours option two as outlined at paragraph 7.2 and 8.2 in the Options Paper.

Impairments Outside the Guide

The Law Council notes the issues raised in response to the Issues Paper and is content with Comcare's preferred option outlined at paragraph 9.2 of the Options Paper.

Slow Onset Conditions

The Law Council remains of the view that there should be a permanent impairment benefits package that compensates conditions of gradual onset at various stages of the development of the condition.

If this can be achieved at diagnosis this would be desirable and the Law Council welcomes the opportunity for further advice from an oncologist as proposed by Comcare in paragraph 10.3 of the Options Paper.

Psychiatric Conditions

The Law Council supports a new framework for assessing psychiatric impairment but is not yet convinced that PIRS is the best option – a view that appears to concur with the opinion of Dr Michael Epstein, Psychiatrist.⁷

Similarly the Law Council does not believe that GEPIC has been trialled sufficiently to endorse that approach.

In addition, both GEPIC and PIRS are not directly comparable as they focus on other issues such as employability which compensated in other parts of the Act.

At this stage the best option is to assess whether Table 5.1 might be improved or replaced.

There appears to be no real justification to raise the threshold for psychiatric injuries apart from the fact that other jurisdictions do so. In those jurisdictions, that is because it is a threshold to access full common law claims.

It is difficult to understand why mental injury ought to be compensated differently from physical injury.

The Law Council favours option three at paragraph 11.2 in the Options Paper and is opposed to any increase in the threshold for psychiatric impairment claims.

⁷ His point 6, page 39 of the Options Paper.

The Ten Per Cent Threshold

The Law Council has previously expressed its concern about the lack of alignment between tables and the ten per cent threshold.

We strongly support Comcare's proposed option in paragraph 12.2 of the Options Paper that all tables should delineate the threshold point (assuming there is a threshold).

Review of Percentage Amounts

The Law Council supports Comcare's view in paragraph 13.2 of the Options Paper that there is some value in allowing flexibility in percentage ranges subject to the comments above that there is a measure indicating the threshold.

Movement of the AMA Guide

The Law Council supports the establishment of a Permanent Impairment Working Party as proposed. The success and legitimacy of the Working Party will depend on balanced representation of determining authorities and of injured workers in addition to medical specialists.

Most importantly, the Working Party should widely consult stakeholders and committees such as the Commonwealth Compensation Liaison Committee before changes are made.

Ongoing Training Package

The Law Council supports an ongoing training program that should include lawyers and other organisations that advocate on behalf of injured workers.

Miscellaneous Issues

In addition to the matters above, the Law Council believes specific tables need to be examined. In no particular order, they are:

- Spinal tables 9.15 – 9.17
- The interaction between spinal injuries and tables 9.6 – 9.7
- The interaction between spinal injuries and tables 9.13 – -9.14
- The criteria in table 7.2
- The criteria in table 7.3
- The percentage steps in table 12.11.2.1

Further, any future edition of the Guide should avoid the inclusion of diagnostic criteria before a particular Table can be used. Section 28 of the Act only permits Comcare to prepare a guide setting out, relevantly, 'criteria by reference to which the degree of the permanent impairment ... shall be determined' and the 'methods by which the degree of

permanent impairment ... shall be expressed as a percentage'. It follows that a condition that satisfies the definition of 'injury' under the Act, that results in permanent impairment, creates a liability in Comcare to pay compensation unless the degree of that impairment is less than 10 per cent when assessed in accordance with the Guide. In the case of Chronic Regional Pain Syndrome (CRPS), for example, Fig 9-E imposes additional criteria not appearing in the Act that must be satisfied before the Guide treats the diagnosed CRPS as an 'injury'. The role of the Guide is limited to the assessment of permanent impairment and not to the assessment of whether a person suffers an injury.

Conclusion

The Law Council trusts its observations are of assistance, but is unable to progress a preferred model in respect of many of the issues without actuarial modelling.

We advise that we will be formally requesting any actuarial advice obtained by Comcare and that we reserve our right to make further submissions upon receipt of this information.

We look forward to being involved in the ongoing development of the 3rd Edition of the Guide.

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.