

ASSESSMENT OF WHOLE PERSON IMPAIRMENT (WPI)

Executive summary

1. This submission is intended to respond to the Independent Reviewer's request for icare's views on the measures used to assess impairment in the NSW workers compensation scheme.
2. Personal injury schemes in NSW currently use various methods to assess whole person impairment (**WPI**). WPI is used to set various entitlements based on the meeting of certain thresholds (see icare's accompanying submission on potential amendments to workers compensation legislation).
3. Medical costs are also impacted by the assessment methods used in personal injury schemes (see icare's submissions on the management of medical costs for injured workers dated 2 February 2020).
4. Accordingly, it is important to consider whether the measures currently used to assess impairment in the NSW workers compensation scheme remain appropriate, and icare welcomes the opportunity to provide submissions on this topic.
5. As detailed below, icare's view is that the *American Medical Association's Guides to the Evaluation of a Permanent Impairment (AMA Guides)*, different editions of which are currently used in the NSW personal injury schemes managed by icare, remain the most appropriate for use in the NSW workers compensation scheme, in particular in light of the consistency and reliability it ensures across providers.
6. icare recommends that the relevant guidelines be amended to require use of the most recent version of the AMA Guides, AMA 6, as it provides a more unified methodology, supporting consistency in impairment ratings and more precise documentation of the functional outcomes used to modify impairment ratings, and also recognises that medical treatments for injured workers should typically result in improved patient outcomes rather than increased impairment.
7. Adoption of AMA 6, which places a greater emphasis on functional assessment, will also avoid the need for further tailoring individual assessments beyond the approach set out in the current guidelines. In icare's view, bespoke individual assessments of this nature would not promote equity in threshold assessment across the scheme, which plays an important role in determining access to benefits.

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8. icare also recommends further reforms to reinforce the intent of only allowing one WPI assessment. Such reforms are likely to contribute to greater certainty in the valuation of future liabilities within the scheme and also significantly reduce administrative costs associated with the current practice of allowing more than one WPI assessment in certain circumstances.

Method of WPI assessment

Current assessment methods

9. As outlined in the NSW workers compensation guidelines for the evaluation of permanent impairment, the *American Medical Association's Guides to the Evaluation of a Permanent Impairment, 5th Edition (AMA 5)* is currently used in workers compensation.¹ In contrast, the Compulsory Third Party and Lifetime Care and Support schemes use the *American Medical Association's Guides to the Evaluation of a Permanent Impairment, 4th Edition (AMA 4)*, noting that both AMA 5 and AMA 4 have been tailored for use within NSW in the relevant schemes.
10. The method of assessment in the AMA 5 Guide attributes greater degrees of impairment for subsequent interventions in the management of an injury. This provides a potential perverse incentive for injured workers to undergo low value medical treatments, such as surgery, in order to reach impairment benchmarks.²
11. The more contemporary *American Medical Association's Guides to the Evaluation of Permanent Impairment, 6th Edition (AMA 6)* seeks to rectify the issues identified in each previous edition, aligning medical treatments with improved patient outcomes rather than increased impairment and reflecting a wider evolution of concepts and approaches in clinical medicine and science.
12. As detailed further in icare's submissions on the management of medical costs for injured workers dated 2 February 2020, icare recommends that the NSW workers compensation guidelines for the evaluation of permanent impairment be amended to require the use of the

¹ <https://www.sira.nsw.gov.au/resources-library/workers-compensation-resources/publications/health-professionals-for-workers-compensation/workers-compensation-guidelines-for-the-evaluation-of-permanent-impairment>

² Busse et al, *Comparative Analysis of Impairment Ratings From the 5th to 6th Editions of the AMA Guides*, JOEM 60 No 12 December 2018

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AMA 6 Guide for assessment of permanent impairment. In particular, it provides a more unified methodology, supporting consistency in impairment ratings and more precise documentation of the functional outcomes used to modify impairment ratings, and also recognises that medical treatments for injured workers should typically result in improved patient outcomes rather than increased impairment.³

13. With the move to simplify the dispute resolution system across personal injury, icare's view remains that it is timely to assess the use of AMA 6 across the relevant schemes as a means of aligning medical treatments with improved patient outcomes rather than increased impairment. icare recognises that further work will be required to ensure AMA 6 is suitable for use across the schemes.

Other alternatives

14. icare notes that there are other alternatives for the evaluation of permanent impairment, which could be applied to align entitlements for injured workers. These include:
 - a. the Functional Independence Measure⁴ (**FIM**), which the Lifetime Care and Support Scheme currently uses as one of its eligibility criteria. A score of five in at least one area covered by the form indicates a need for functional support. The FIM is only effective for serious injuries and is difficult to align with a financial benefit;
 - b. the International Classification of Functioning, Disability and Health (**ICF**), which replaces the World Health Organisation's (**WHO**) earlier International Classification of Impairments, Disabilities, and Handicaps (**ICIDH**) framework and emphasises the interplay between the body, the person and broader social and environmental factors in determining the content of disability. The ICF functional assessment may be particularly helpful for brain injuries, although is not appropriate for determining if a certain level must be achieved to meet a threshold; and
 - c. utilisation of WPI as a threshold for non-economic loss benefits, with the financial allocation based on a standard common law assessment or other assessment tool based on the ICF. However, there are inherent problems with self-reported assessment tools in maintaining consistency of benefits.

³ See Recommendation 6 of and Appendix C to icare's submission to the Regulatory requirements for health care arrangements in the NSW workers compensation and CTP schemes dated November 2019

⁴ FIM is a trademark of Uniform Data System for Medical Rehabilitation, a division of UB Foundation Activities, Inc.; the Australasian Rehabilitation Outcomes Centre (**AROC**) holds the territorial licence for the FIM in Australia

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15. Notwithstanding these alternatives, icare's view is that the AMA Guides for WPI assessment (different editions of which are currently in use in icare's schemes), specifically AMA 6, remains the most appropriate for use in the NSW workers compensation scheme, in particular in light of the consistency and reliability it ensures across providers and the limitations of other tools. The AMA Guides are used in other personal injury schemes both nationally and internationally, and hence may be considered the 'gold standard' in WPI assessment (depending on the edition, as described further above).

Bespoke individual WPI assessments

16. Bespoke individual assessments are tailored assessments to respond to the individual needs of the worker.
17. Currently, in the NSW workers compensation scheme, all WPI assessments are individualised and required to give consideration to the worker's individual circumstances including the nature of their injury, any impacting comorbidities, current status and impairment, consistently with the principles of assessment as outlined in the *NSW workers compensation guidelines for the evaluation of permanent impairment*.⁵ Irrespective of the version of the AMA Guides used for the assessment, the assessment therefore remains tailored in its approach.
18. icare's view is that further tailoring individual assessments beyond the approach set out in the current guidelines would not promote equity in threshold assessment across the scheme, which plays an important role in determining access to benefits. Further, if icare's recommendation to use AMA 6 is adopted, this allows for a complete individual functional assessment that will avoid the need for bespoke individual assessments of this nature.
19. In particular, one of the revisions made in AMA 6 as compared to previous editions was to give greater weight to functional assessment, recognising that the highest level of independence with which a given activity is consistently and safely performed is considered the functional level for that individual. Importantly, AMA 6 methodology allows the use of

⁵ See paragraph [1.6] in Part 2 of *NSW workers compensation guidelines for the evaluation of permanent impairment*, 4th edition, published in April 2016 (<https://www.sira.nsw.gov.au/resources-library/workers-compensation-resources/publications/health-professionals-for-workers-compensation/workers-compensation-guidelines-for-the-evaluation-of-permanent-impairment>)

reliable results from multiple functional assessment tools to adjust the impairment percentage to reflect different functional outcomes.⁶

Number of permitted WPI assessments

Background

20. Currently, injured workers are in most cases entitled to only one assessment of WPI under section 322A of the *Workplace Injury Management and Workers Compensation Act 1998* (the **1998 Act**) for the purpose of threshold assessment.
21. There is an exception for injured workers whose weekly entitlements were due to cease pursuant to section 39 of the *Workers Compensation Act 1987* (the **1987 Act**) and had not had the opportunity to seek a current assessment before the Workers Compensation Commission (**WCC**).⁷ Under the *Workers Compensation Amendment (Transitional Arrangements for Weekly Payments) Regulation 2016*, such workers are allowed one further assessment of WPI before the WCC.
22. Currently, in practice, icare's experience is that the WCC permits further assessments in certain circumstances where the worker can establish a deterioration in WPI. The WCC has also confirmed that proactive complying agreements⁸ and consent orders⁹ before the WCC do not constitute the permitted single assessment. This means that in practice, as long as claims management providers are proactively assessing the degree of WPI, there is more than one assessment available in the scheme.

⁶ See Appendix C to icare's submission to the Regulatory requirements for health care arrangements in the NSW workers compensation and CTP schemes dated November 2019

⁷ Note that the WCC will shortly be replaced by the Personal Injury Commission: see <https://www.nsw.gov.au/media-releases/new-personal-injury-commission-passes-parliament>

⁸ Before a dispute is escalated to the WCC, an insurer and an injured worker may agree that the worker's injury results in a degree of permanent impairment greater than 10 per cent (for physical injuries) or 15 per cent (for psychological injuries) entitling the worker to lump sum compensation; section 66A(4) of the 1987 Act requires that this agreement be recorded in the form of a complying agreement with specified criteria

⁹ When a dispute is before the WCC, an insurer and an injured worker may agree that the worker's injury results in a degree of permanent impairment greater than 10 per cent (for physical injuries) or 15 per cent (for psychological injuries) entitling the worker to lump sum compensation; this is recorded by the WCC in consent orders, noting that the agreement has been reached between the parties and is not a determination by the WCC of the dispute

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Need for reform

23. The intent of only permitting a single WPI assessment was to help reduce disputes and administration costs while allowing the scheme to focus on the more seriously injured workers.¹⁰ This would also assist to provide greater certainty to the valuation of future liabilities within the scheme.
24. The current divergence between the intent and wording of section 322A of the 1998 Act, and the practice of allowing injured workers to access more than one WPI assessment (including through proactive complying agreements and consent orders) is leading to uncertainty, both in terms of the operation of the scheme and the valuation of future liabilities within the scheme.
25. This is especially in the context of legislative amendments since 2012 having placed a new emphasis on treatment and thresholds for WPI,¹¹ which arguably has created greater incentives for injured workers to have their WPI re-assessed because of the potential impact on their entitlements to weekly payments and medical expenses.
26. However, permitting more than one WPI assessment results in a significant increase in the volume of administrative work, which in many cases requires further action by multiple stakeholders across many business areas. icare's initial estimate is that each additional WPI assessment would require an additional six hours per claim. If 500 additional WPI assessments were received during a one-year period, this could potentially mean an extra 3,000 hours of administrative management required across all stakeholders. The ability to seek a further assessment also potentially prolongs the life of these WPI claims and therefore possibly impacts staff to claim ratios and resources. Further and subsequent

¹⁰ Second reading speech of the *Workers Compensation Legislation Amendment Bill 2012*

¹¹ For example, the 2012 reforms included the introduction of a five-year (260 week) cap on weekly payments for injured workers with an assessed level of WPI of 20 per cent or less. Further, following the amendments introduced by the *Workers Compensation Amendment Act 2015*, the medical benefit entitlements for injured workers vary depending on the assessment of their level of permanent impairment based on the following thresholds pursuant to section 59A of the 1987 Act:

- all workers (regardless of level of permanent impairment) are entitled to at least two years of medical benefits from when weekly payments cease being payable or from the date of claim if no weekly payments are made;
- workers assessed with more than 10 per cent permanent impairment are entitled to at least five years of medical benefits from when weekly payments cease to be payable;
- workers assessed as a worker with high needs and highest needs (more than 20 per cent and 30 per cent permanent impairment respectively) are entitled to medical benefits for life; and
- a minimum safety net weekly payment applies for the most seriously injured workers (with over 30 per cent permanent impairment)

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litigation in the WCC (soon to be replaced by the Personal Injury Commission) is also likely to result in additional legal costs.

Options for reform

27. icare considers that the legislation governing the number of assessments an injured worker can have through the WCC (soon to be replaced by the Personal Injury Commission) would benefit from greater clarity in order to be more consistent with the intent of section 322A of the 1998 Act. Consideration should be given to reforms to reinforce the intent of section 322A of the 1998 Act by encompassing proactive complying agreements and consent order arrangements within the permitted single WPI assessment and also improving the enforceability of the single WPI assessment.
28. For example, section 322A(1A) of the 1998 Act currently provides that a reference to the “*one assessment*” in subsection (1) includes an assessment of the degree of permanent impairment made by the WCC in the course of the determination of a dispute about the degree of impairment. Removal of subsection (1A) is one option to ensure that the intent of only allowing one WPI assessment under section 322A of the 1998 Act can be enforced, as currently it may encourage the escalation of disputes to the WCC for a determination about the degree of permanent impairment.
29. Such reforms are likely to contribute to greater certainty in the valuation of future liabilities within the scheme and also significantly reduce administrative costs associated with allowing more than one WPI assessment.
30. On the other hand, icare also appreciates that enabling a further assessment due to natural deterioration in certain cases provides further support to those workers and may lead to a more positive overall experience. Such considerations will also need to be taken into account in any reforms to the current practice.