

Consultation Report

Consultation Report: *Personal Injuries (Liabilities and Damages) Act -
Assessments of Permanent Impairment*

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Legal Policy

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1. Introduction

The Department of the Attorney-General and Justice has been apprised of a number of issues with the application of the American Medical Association’s Guide to the Evaluation of Permanent Impairment (the AMA Guides) in assessing the degree of permanent impairment under the *Personal Injuries (Liabilities and Damages) Act*. The most recently published edition of the AMA Guides is the 6th edition; however the 4th and 5th editions are more widely used throughout other jurisdictions in Australia. There are three pieces of Northern Territory legislation that prescribe application of the AMA Guides; however, they differ as to which edition of the AMA Guides is to be applied, as outlined in the table below. Further, as a different government department is responsible for each Act, any steps toward prescribing a uniform version of the AMA Guides would require co-ordination between the three Departments.

Legislation	Prescribed Edition of AMA Guides	Responsible Agency
<i>Personal Injuries (Liabilities and Damages) Act</i>	6 th edition	Department of the Attorney-General and Justice
<i>Workers Rehabilitation and Compensation Act</i>	4 th edition	Department of Business
<i>Motor Accidents (Compensation) Act</i>	6 th edition	Department of Treasury and Finance

The Department of the Attorney-General and Justice has undertaken consultation with a group of targeted stakeholders to determine which edition of the AMA Guides is most appropriate for assessing permanent impairment in the Northern Territory. The purpose of this report is to outline the consultation process and feedback received and to make recommendations in relation to prescribing guidelines for the assessment of permanent impairment.

2. Summary of the issue

The issues to be considered are:

- which edition of the AMA Guides is most appropriate for evaluating permanent impairment in the Northern Territory; and
- whether the *Personal Injuries (Liabilities and Damages) Act*, *Workers Rehabilitation and Compensation Act* and *Motor Accidents (Compensation) Act* should take a consistent approach and prescribe the same edition of the AMA Guides for the purpose of evaluating permanent impairment.

3. Background

The AMA Guides is used to express the degree of bodily impairment, resulting from an injury, as a percentage value. The value indicates the extent of a person’s physical or functional loss of capacity following an injury or illness, with 0% representing a normal healthy person (where there is no permanent impairment). The AMA Guides provides a structured set of medical criteria to establish a rating of permanent impairment for the purpose of assessing an injured person’s non-economic loss.

Within the Northern Territory, both the *Personal Injuries (Liabilities and Damages) Act* and the *Motor Accidents (Compensation) Act* appear to require the use of the 6th edition (being the latest published edition) of the AMA Guides, whereas the *Workers Rehabilitation and Compensation Act* prescribes the 4th edition.

3.1 Personal Injuries (Liabilities and Damages) Act

The Department of the Attorney-General and Justice is responsible for the administration of the *Personal Injuries (Liability and Damages) Act*.

The *Personal Injuries (Liabilities and Damages) Act*, which commenced on 1 May 2003, modified the common law relating to the entitlement to damages for personal injuries, clarified principles of contributory negligence, fixed reasonable limits on certain awards of damages for personal injuries and provided for periodic payments of damages for personal injuries.

The *Personal Injuries (Liabilities and Damages) Act* has very broad application. It applies to personal injuries or deaths arising from negligence, regardless of the possibility that the cause of action may be found in a statute or in some other area of the common law. However, certain claims that are regulated by other statutory schemes are excluded, such as workers’ compensation under the *Workers Rehabilitation and Compensation Act*, motor accident claims under the *Motor Accidents (Compensation) Act*, and claims for damages for a personal injury that is a dust-related injury.

Section 25 of the *Personal Injuries (Liabilities and Damages) Act* empowers the court to award damages for non-economic loss after determining a person’s degree of permanent impairment. Section 26(3) of the *Personal Injuries (Liabilities and Damages) Act* states that evidence of impairment can only be given by a medical practitioner who has assessed the degree of permanent impairment in accordance with the prescribed guides. Prescribed guides are defined in section 18 to mean ‘if no guides are prescribed by the Regulations – the American Medical Association Guides to the Evaluation of Permanent Impairment (as modified by any regulation) as published from time to time’. As such, the most recent edition of the AMA Guides, currently the 6th edition, is applicable to claims under the *Personal Injuries (Liabilities and Damages) Act*.

3.2 Workers Rehabilitation and Compensation Act

The Department of Business is responsible for the administration of the *Workers Rehabilitation and Compensation Act*.

Section 71 of the *Workers Rehabilitation and Compensation Act* provides a mechanism by which workers may receive a lump sum payment for compensable injuries or illness which result in permanent impairment. Section 72(3B) provides that an assessment of the level of permanent impairment must be properly conducted in the first instance by a medical practitioner and in accordance with prescribed guides.

Regulation 9 of the *Workers Rehabilitation and Compensation Regulations* prescribes the 4th edition of the AMA Guides for the assessment of permanent impairment under the Act.

It should, however, be noted that the Workers Rehabilitation and Compensation Legislation Amendment Bill 2015 was assented to on 23 April 2015, but is yet to fully commence. Amongst other matters, the Bill amends section 70 of the *Workers Rehabilitation and Compensation Act* to allow the Work Health Authority to approve guides for the evaluation of permanent impairment instead of guides being prescribed by regulation. The purpose of the amendment is to allow for greater flexibility in the adoption of nationally consistent guides to the assessment of permanent impairment, particularly the National Guide currently being developed through Safe Work Australia (discussed further below at 3.5).

3.3 Motor Accidents (Compensation) Act

The Department of Treasury and Finance is responsible for the administration of the *Motor Accidents (Compensation) Act*.

The *Motor Accidents (Compensation) Act*, which came into operation on 1 July 1979, established a no-fault compensation scheme, which, among other benefits, provides compensation for loss of a limb or other permanent impairment.

Section 4C(2) of the *Motor Accidents (Compensation) Act* states that ‘permanent impairment’ is to be determined ‘in accordance with the edition of the American Medical Association Guides to the Evaluation of Permanent Impairment prescribed by regulation’.

Regulation 4(1) of the *Motor Accidents (Compensation) Regulations*, as in force at 1 July 2014, prescribes the 6th edition of the AMA Guides for the purpose of evaluating permanent impairment under the *Motor Accidents (Compensation) Act*.

3.4 American Medical Association’s Guides to the Evaluation of Permanent Impairment

The AMA Guides has been the subject of significant criticism as it is highly complex and can provide markedly fluctuating impairment assessments when the same claimant is assessed by different medical practitioners.

The AMA Guides is currently in its 6th edition, however the Department of the Attorney-General and Justice understands that there are very few (if any) medical practitioners resident in the Northern Territory who can competently use the 6th edition of the AMA Guides; rather, the majority use the 5th edition. Further, the 5th edition of the AMA Guides is generally preferred as it retains the underlying philosophy of the 4th edition with a much improved layout.

Across Australian jurisdictions, there does not appear to be any uniform prescription of the AMA Guides. Like the Northern Territory, other jurisdictions do not apply the same guidelines across all civil liability, workers’ compensation and motor accident legislation, with the main exception being Victoria (which prescribes the 4th edition across all three regimes). In the majority of jurisdictions, the 4th or 5th editions of the AMA Guides (or guidelines based on those editions) are used to assess non-economic impairment. However, there are a number of jurisdictions that do not prescribe a particular edition or guide and instead provide that in determining damages for non-economic loss, the court may refer to its earlier decisions or that of other courts (see, for example, section 99 of the *Civil Law (Wrongs) Act 2002* (ACT)).

3.5 Safe Work Australia

In December 2010, Safe Work Australia endorsed a *National Workers’ Compensation Action Plan 2010-13*. This action plan included a project that Safe Work Australia investigate and report on options for nationally consistent arrangements for assessment of permanent impairment. As a result, Safe Work Australia produced a discussion paper to the Strategic Issues Group on Worker’s Compensation with recommendations regarding the development of a nationally consistent guide for the assessment of permanent impairment (the National Guide).

The proposed National Guide is based on the 5th edition of the AMA Guides, as amended by WorkCover NSW. In developing the National Guide, Safe Work Australia sought to produce an assessment tool that aligns as closely as possible with Australian practice and to develop an introductory chapter, using the WorkCover NSW Guide as a template, to apply to all jurisdictions. Prior to the adoption of this version of the AMA Guides by Safe Work Australia as a base-model, it was already in use for the evaluation of workers’ compensation claims in South Australia, Western Australia and the Australian Capital Territory.

In developing the National Guide, amendments were made to the 5th edition of the AMA Guides where it was considered desirable, based on expert opinion in the area and as a result of recommendations made by the Permanent Impairment Temporary Advisory Group. The key departures from the 5th edition of the AMA Guides relate to the chapters on vision (the chapter from the 4th AMA Guides was preferred and replaces the existing chapter), hearing (in line with Australian practice, the amended chapter uses National Acoustic Laboratory Tables to assess hearing loss), pain (chapter omitted completely) and psychiatric and psychological disorders (WorkCover NSW developed an Australian-specific chapter, which replaces the AMA Guides chapter on mental and behavioural disorders).

In developing a National Guide, Safe Work Australia is working toward finalising a template version of the National Guide, formalising agreements for the National Guide to be maintained over time and creating national training materials. The Department of the Attorney-General and Justice understands that Safe Work Australia intends to complete this work by mid-2015.

4.0 Consultation

The Department of the Attorney-General and Justice sought submissions regarding possible amendments to the mechanism of the assessment of permanent impairment in the relevant pieces of Northern Territory legislation. In August 2013, the Department of the Attorney-General and Justice sent letters to the following stakeholders:

- North Australian Aboriginal Justice Agency;
- Central Australian Aboriginal Legal Aid Service Incorporated;
- Northern Territory Legal Aid Commission;
- Department of Treasury and Finance;
- Territory Insurance Office
- Safe Work Australia;
- Northern Territory Law Society
- NT WorkSafe;

- NT Bar Association;
- Australian Medical Association Northern Territory Incorporated;
- Allianz Australia Insurance;
- CGU Workers’ Compensation;
- GIO General Ltd;
- QBE Insurance (Australia) Ltd;
- Westpac Banking Corporation;
- Catholic Church Insurance;
- Woolworths;
- Wesfarmers; and
- Nominal Insurer.

The Department of the Attorney-General and Justice received submissions from the following stakeholders:

- Central Australian Aboriginal Legal Aid Service Incorporated;
- Northern Territory Legal Aid Commission;
- Department of Treasury and Finance;
- Territory Insurance Office;
- Safe Work Australia; and
- Northern Territory Law Society.

Follow-up correspondence was sent to the Australian Medical Association Northern Territory Incorporated, recognising the particular value of consulting with the medical profession; however, at the time of writing this consultation report the Department of the Attorney-General and Justice had not received a response from the Australian Medical Association Northern Territory Incorporated.

5. Support for the proposed amendment

The majority of stakeholders who responded actively supported the proposal of uniform prescription of the AMA Guides across Territory legislation or else more general uniformity of the assessment of impairment if the AMA Guides is not used.¹ While there was no general consensus as to which edition of the AMA Guides should be prescribed, the 5th edition was generally preferred² along with the National Guide developed by Safe Work Australia, which is based on the 5th edition.³

Both the Territory Insurance Office and the Department of Treasury and Finance advised that they are reluctant to support the 5th edition of the AMA Guides outright, instead suggesting that the modified 5th edition is preferable as the National Guide has been developed with regard to Australian practices. The Department of Treasury and Finance also submitted that uniformly prescribing the National Guide would minimise differences between assessment outcomes (and thus compensation payments) and would maintain consistency with the national approach. Accordingly, the Territory Insurance Office and the Department of Treasury and Finance considered that it would be preferable to delay the prescription of the AMA Guides pending the finalisation of the National Guide by Safe Work Australia.

The Northern Territory Law Society and the Department of Treasury and Finance also expressed the opinion that no matter which edition was used there should be flexibility to allow for ease of amendments in the future. It was considered that the most effective manner for prescription of the AMA Guides would be by regulation.

It is worth noting that there was no support for prescription of the 6th edition of the AMA Guides.

¹ Department of Treasury and Finance; Central Australian Aboriginal Legal Aid Service Inc; Territory Insurance Office; Law Society Northern Territory.

² Central Australian Aboriginal Legal Aid Service Inc; Law Society Northern Territory; Northern Territory Legal Aid Commission (preference for 4th and 5th editions).

³ Department of Treasury and Finance; Territory Insurance Office. Safe Work Australia did not indicate a preference but noted the ongoing development of a modified 5th edition.

6. Opposition to the proposed amendment

There was no opposition to the proposal to introduce a uniform assessment tool across legislation or to the use of the AMA Guides as the assessment mechanism.

7. Additional issues

In the future a different assessment guide may be published which is preferred by the Australian medical and legal professions. As such, it would be desirable to prescribe a uniform version of the assessment tool in a manner which would allow for ease of amendment in the future. In consultation, this particular issue was raised by the Northern Territory Law Society and the Department of Treasury and Finance, who considered that the assessment tool should be implemented through Regulations rather than legislative amendment.

Both the *Workers Rehabilitation and Compensation Act* and *Motor Accidents (Compensation) Act* provide that the edition of the AMA Guides is to be prescribed by regulation. The *Personal Injuries (Liabilities and Damages) Act* provides for the default guide to be the AMA Guides ‘as published from time to time’ if the relevant assessment tool is not prescribed by regulation. As such, all three Acts currently have the mechanism in place for prescribing the permanent impairment assessment tool by regulation, although, the *Personal Injuries (Liabilities and Damages) Act* has not done so and instead relies on the default prescription of the 6th edition of the AMA Guides in the Act. Further, as noted above at 3.2, the *Workers Rehabilitation and Compensation Legislation Amendment Act 2015*, when commenced, will provide for the Work Health Authority to approve guides for the evaluation of permanent impairment, instead of guides being prescribed by regulation.

8. Conclusion and Recommendations

The 5th edition of the AMA Guides was preferred by the majority of stakeholders, while some stakeholders preferred the 5th edition with amendments as developed by Safe Work Australia. Overall, stakeholders were of the view that no matter which version of the AMA Guides is prescribed, there should be uniformity across the legislation and ease of future amendment.

The consultation process has highlighted three key points in relation to the evaluation of permanent impairment in the Northern Territory:

- it is preferable to adopt a uniform assessment tool for evaluating permanent impairment across legislative schemes for injury compensation in the Northern Territory. There seems to be no rationale for prescribing different versions of the AMA Guides in each Act. Rather, it is preferable for the *Personal Injuries (Liabilities and Damages) Act*, *Workers Rehabilitation and Compensation Act* and *Motor Accidents (Compensation) Act* to prescribe the same assessment tool for evaluating permanent impairment to minimise disparities in assessment outcomes (and thus compensation payments) and to result in a larger pool of medical practitioners in the Northern Territory competent to administer an assessment.
- The National Guide being developed by Safe Work Australia is the most appropriate assessment tool for evaluating permanent impairment under injuries compensation legislation in the Northern Territory. The National Guide is based on the 5th edition of the AMA Guide (the preferred version of the AMA Guide by the majority of stakeholders) and is the result of extensive work by Australian medical specialists to ensure that the guide is aligned with clinical practice in Australia. It is apparent that the National Guide is also preferred by the Department of Business (responsible for the *Workers Rehabilitation and Compensation Act*) and the Department of Treasury and Finance (responsible for the *Motor Accidents (Compensation) Act*). Further, adopting the National Guide would ensure consistency with the approach to assessment of workers’ compensation claims nationally.
- The *Personal Injuries (Liabilities and Damages) Act*, *Workers Rehabilitation and Compensation Act* and *Motor Accidents (Compensation) Act* should provide a flexible means for prescribing the assessment tool for evaluating permanent impairment in order to allow for adoption of assessment tools, such as the National Guide, when they become available.

The Department of the Attorney-General and Justice recommends amending the *Personal Injuries (Liabilities and Damages) Act*, along the lines of the recent amendment to the *Workers Compensation and Rehabilitation Act*, so that the Minister responsible for administering the Act can approve guides for the evaluation of permanent impairment, to allow for flexibility and the adoption of the 5th edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment, incorporating modifications made by WorkCover NSW. It is anticipated that the National Guide will be implemented uniformly across all Australian jurisdictions. Therefore, uniformity in the evaluation of permanent impairment across not only the Northern Territory but also, throughout Australia as a whole, could be better served through the adoption of the National Guide.