

4<sup>th</sup> November 2021

State Insurance Regulatory Authority

Via email: [Policy&Design@sira.nsw.gov.au](mailto:Policy&Design@sira.nsw.gov.au)

## **Consultation on the McDougall Review, COVID-19 and Future Opportunities for personal injury schemes**

### **Introduction**

AMA (NSW) is a medico-political organisation that represents over 9,000 doctors in New South Wales (NSW), including doctors-in-training, career medical officers, staff specialists, visiting medical officers and specialists and general practitioners in private practice. Our members perform an important role in the workers compensation system by facilitating the treatment and recovery of those injured following workplace accidents.

Patients injured at work represent a particular and complex challenge. Doctors are required to deal with scheme agents and employers who may have limited interest in the wellbeing of patients nor in assisting the employee to return to work.

The role of a treating doctor is first and foremost to provide comprehensive high-quality treatment to the patient and return the patient to good health. Returning the patient to work is also an important priority for treating doctors and the patient given the health benefits associated with work.

### **The reasonably necessary test**

*What are the advantages and disadvantages of replacing the words 'reasonably necessary' in section 60 of the Workers Compensation Act 1987 with the words 'reasonable and necessary'?*

*Are there alternative tests that align more closely with the principles of value-based healthcare or evidence-based medicine?*

AMA (NSW) is concerned that a change to a test of reasonable and necessary will limit the options for injured workers and in fact further compromise the ability of a worker to return to work as soon as possible. The focus of any workers compensation scheme must be the worker, ensuring that workers have access to the best care, and that the best care is able to be delivered within recommended clinical timeframes to ensure patients have the best possible chance of returning to work.

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The reasonably necessary test is consistent with the objectives of the workers compensation scheme. Those objectives include assisting to secure *‘the health, safety and welfare of workers’* and to provide *‘prompt treatment of injuries, and effective and proactive management of injuries, and necessary medical and vocational rehabilitation following injuries in order to assist injured workers and to promote their return to work as soon as possible’* (section 3, *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act)).

While the Hon Robert McDougall QC observed that the ‘reasonably necessary’ test was unlikely to be ‘straightforward’ and allegedly the ‘reasonable and necessary’ test is more readily comprehensible, AMA (NSW) submits that reasonably necessary test is readily understood.

As set out in the decision of *Diab v NRMA Ltd* [2014] NSWWCPCPD 72 at 86 in which the Workers Compensation Commission noted, citing the NSW Court of Appeal decision in *Moorebank Recyclers Pty Ltd v Tanlane Pty Ltd* [21012] NSWCA 445 that reasonably necessary does not mean absolutely necessary, and ‘reasonably necessary’ is a lesser requirement than ‘necessary’. It was determined in *Diab* that a arrange of treatments may be reasonably necessary and a worker only needs to establish that the treatment claimed is one of those treatments. As opposed to the reasonable and necessary test, the reasonably necessary test is not simply a question of whether it is better that the worker have the treatment or not.

The Commission went on to note that because a treatment, such as surgery, carries with it the risk of a less than ideal result, this does not mean that the treatment is not reasonably necessary. Each case will depend on its facts.

In contrast the ‘reasonable and necessary’ test imposes a higher threshold. As such, delays in approval of treatment are anticipated as insurers will require additional information to satisfy themselves that the proposed treatment is necessary, and may further compromise return to work rates because workers will be unable to access the treatment they need to return to work.

There was no evidence before the McDougall Review that the reasonably necessary test has contributed to the rising healthcare costs in the workers compensation scheme. The test has been a feature of the workers compensation scheme since 1987. The escalation of healthcare costs since 2016 coincide with the reforms that established icare, not the reasonably necessary test. Since 2018 SIRA has identified deteriorating return to work rates.<sup>1</sup>

AMA (NSW) submits that the reasonably necessary test is aligned to the principles of value-based healthcare and evidence-based medicine and has served injured workers well since 1987. In the absence of any evidence that the test has contributed to increasing medical costs, ‘low-value’ or potentially ‘harmful’ medical treatments the test should remain.

### **Impact of COVID-19 on personal injury schemes**

*How can the needs and interests of scheme participants be balanced during COVID-19 so that there are optimal outcomes for injured people and scheme sustainability for policyholders?*

*Should there be a statutory review of, or limits (such as time limits), placed on measures taken in response to the COVID 19 pandemic like the workers compensation COVID-19 presumption?*

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<sup>1</sup> <https://www.sira.nsw.gov.au/fraud-and-regulation/research/reversing-the-trend-improving-return-to-work-outcomes-in-nsw>

### *What alternative measures may be appropriate?*

AMA (NSW) is concerned about the effect on the COVID-19 pandemic on the ability of patients workers to access treatment, including injured workers. The shutdown of elective surgery in 2020 and again in 2021 has resulted in many surgeries being cancelled and rescheduled at a later date.

By virtue of section 59A of the Workers Compensation Act 1987, those injured workers whose compensation period has expired before their surgery or other treatment could be rescheduled will not have the costs of their care met under the workers compensation scheme.

The impact of the COVID-19 Pandemic on the health system is a matter over which patients, including injured workers, have had no control. Had the pandemic not occurred and surgeries not been cancelled, these injured workers would have been able to access the treatment approved by the insurer.

Injured workers may be faced with the same outcome may result if an insurer fails to approve a claim in a timely manner or if the approved treatment is not readily available to the injured worker, for example, the injured worker lives in a rural or regional area where services are not as readily available as they are in metropolitan areas.

An amendment to the Workers Compensation Act that to the effect that compensation is not payable in respect of any treatment **requested** after the expiry of the compensation period would strike a better balance for injured workers while containing costs.

There may need to be further checks and balances – that is, that the period of extension is defined with limited discretionary review beyond the granted extension. Discretion may be warranted in some circumstances, for example, the extent of the wait list for elective surgery may be unknown and / or further shut down of health services should COVID-19 again place strain on the health system cannot be accurately predicted.

Alternatives include:

- Rather than general exceptions, the provision of an avenue through which injured workers prejudiced by the operation of section 59A may seek an extension of time.
- An exception for COVID-19 only – an extension for person affected by the pandemic but not otherwise?

In circumstance where the proposal is to permit treatment that has already been approved, rather than additional treatment the costs consequences should not be significant.

### **Recommendations regarding medical treatment fees**

We note Justice McDougall has made recommendations regarding medical treatment fees. From our meetings with Justice McDougall, it was apparent that he had made limited inquiries into the issues relating to medical treatment. He appeared to rely on the report previously commissioned by SIRA into fees, a report which clearly noted that the issue with medical costs largely arose as a result of delays in return to work and in allied health utilisation costs. Justice McDougall has made recommendations that the medical treatment fees be reviewed with no consideration of the processes involved in the medical care of injured workers nor the likely implications of delaying access to care. We therefore reject the recommendation and the basis under which it was made.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Fiona Davies". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

***Fiona Davies***  
***Chief Executive Officer***  
***AMA New South Wales***