



LEGISLATIVE COUNCIL

STANDING COMMITTEE ON LAW AND JUSTICE

MEDIA RELEASE

REVIEW OF WORKCOVER AUTHORITY OF NSW Final report

FOR IMMEDIATE RELEASE

17 September 2014

The Upper House's Standing Committee on Law and Justice today tabled its first review of the WorkCover Authority of NSW, entitled *Review of the exercise of the functions of the WorkCover Authority*.

The review was undertaken as part of the committee's oversight role under the *Safety, Return to Work and Support Board Act 2012*, and has occurred two years after significant reforms were made to the workers compensation scheme. These reforms not only changed the governance structure of WorkCover but greatly altered the eligibility requirements and entitlements of the workers compensation scheme in New South Wales.

Committee Chair, the Hon David Clarke, commented: "Everyone has the right to go to work safe in the knowledge that if they are injured in the course of their employment they will be provided with the necessary support and protection to re-enter the workforce and participate in the community. Providing such support is a key goal of any workers compensation scheme, together with ensuring the long term financial sustainability of the scheme."

"There has been ongoing debate in the community about the effectiveness and fairness of the reforms since they were implemented in 2012. While the reforms have enhanced the financial sustainability of the scheme, review stakeholders identified a number of areas where the reforms have limited the assistance available to injured workers."

Changes to the workers compensation landscape continued over the course of the review, with the NSW Government recently announcing a five per cent reduction in premiums and foreshadowing further scheme reforms pertaining to broader access to medical and related treatment for scheme participants. "These changes are welcomed by the committee" said Mr Clarke.

Mr Clarke commented: “Review stakeholders also identified a number of concerns regarding WorkCover’s ability to undertake its multiple roles in the regulation, implementation and enforcement of the scheme and work health and safety legislation.”

“The report has made a number of recommendations to improve the performance of WorkCover, provide enhanced support to injured workers and preserve the ongoing financial sustainability of the scheme.”

A copy of the committee’s recommendations and summary of key issues is attached. The report is on the committee’s website at www.parliament.nsw.gov.au/lawandjustice. Hard copies are available on request.

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*For further comment please contact
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Summary of key issues

A committee of the Legislative Council is required by the *Safety, Return to Work and Support Board Act 2012* to supervise the exercise of the functions of the WorkCover Authority of NSW (hereafter referred to as WorkCover). Since November 2012, the Standing Committee on Law and Justice has been designated by the Legislative Council to undertake this role. This report is the culmination of the committee's first review of WorkCover, during which we received 43 submissions and held three public hearings.

A key factor underpinning the review was the ongoing repercussions of the 2012 reforms to the workers compensation scheme, which were enacted in response to the scheme operating with an estimated deficit of \$4 billion. The deficit however remains contested, as it included long term projections that made multiple assumptions during the Global Financial Crisis regarding likely future investment returns and the discount rate.

The reforms included the consolidation of the governance structures of the Safety Return to Work and Support agencies, including WorkCover, and the establishment of the Safety Return to Work and Support Board. Amendments were also made to the eligibility requirements and entitlements provided to injured workers under the workers compensation scheme.

Since the implementation of the reforms, there has been a significant improvement to the scheme's financial sustainability. As of May 2014, the scheme's surplus has grown to approximately \$1.3 billion.

During the review, the Minister for Finance and Services, the Hon Dominic Perrottet MP, announced that as a consequence of the improved financial position some of the 2012 reforms would be rolled back. This includes ensuring access for injured workers to hearing aids, prostheses and home and vehicle modifications and related treatment until retirement age, and extending medical benefits for workers with whole person impairment of between 21 per cent to 30 per cent until retirement age. These changes are limited to those workers who received an injury and made a formal claim on or before 1 October 2012.

In July 2014, the Centre for International Economics released a report entitled *Statutory review of the Workers Compensation Legislation Amendment Act 2012*. The report was prepared in response to a requirement in the *Workers Compensation Act 1987* that a review of the 2012 amendments be conducted to determine if the amendments were achieving their stated policy objectives. Much of the evidence presented by the statutory review reflects the evidence received during our own review. We consider that there are benefits to reading both reports in conjunction.

We believe that the findings and recommendations contained in both reports will assist the NSW Government to further refine the workers compensation system to provide better support to injured workers, lower premiums for businesses and protect the scheme's long-term financial sustainability.

This summary outlines the key issues raised during the review and discussed in this report.

Conflicts of interest

One of the central issues explored during the review was the conflicts of interest that arise from the multiple roles carried out by WorkCover in the regulation, implementation and enforcement of the workers compensation scheme and work health and safety legislation.

Concerns were raised regarding the potential conflict between WorkCover's roles as both the nominal insurer through its management of the Workers Compensation Insurance Fund, and as the regulator of the workers compensation scheme. As the regulator WorkCover is responsible for ensuring compliance with the relevant workers compensation legislation through education, engagement and enforcement, while as the nominal insurer it is responsible for the commercial roles of managing funds and appointing and overseeing the scheme agents that issue insurance policies and manage claims.

In order to address this issue, the committee has recommended that the Minister for Finance and Services, in consultation with the WorkCover Independent Review Office (WIRO) and other relevant stakeholders, consider the establishment of a separate agency or other administrative arrangements to clearly separate the roles of regulator and nominal insurer in the workers compensation scheme, and implement that model as soon as practicable.

The second area of concern regarding potential conflicts of interest relates to WorkCover's role in reviewing work capacity assessments. It was argued that WorkCover's role as both the nominal insurer and the decision maker for merit reviews of work capacity decisions raises questions over the independence and impartiality of the merit review process. WorkCover has indicated that it is reviewing the segregation of functions and delegations around its role in work capacity decisions. The committee considers that WorkCover should complete this review in consultation with relevant stakeholders, including worker and employer representatives, and publish the findings as soon as practicable.

The third area of concern involves WorkCover's multiple roles in the work health and safety sphere, with WorkCover acting as both the work health and safety regulator and as an advisor to workplaces. While synergies can be achieved in having a single organisation perform both regulatory and advisory roles in the work health and safety sphere, clear protocols must exist to minimise the possibility of conflicts of interest occurring. The committee therefore recommends that WorkCover, in consultation with key stakeholders, review the procedures currently utilised to distinguish between the two functions and implement protocols to minimise conflicts occurring.

WorkCover Independent Review Office

The WIRO was created during the 2012 reforms to the workers compensation scheme as an independent body to deal with individual complaints and provide greater accountability to the workers compensation system. The WIRO is also responsible for the management of the Independent Legal Assistance and Review Service, which provides free independent legal advice to injured workers in circumstances where there is a disagreement with insurers regarding entitlements.

Despite being established as an independent body, the WIRO does not have budgetary independence from WorkCover. Instead, the WIRO must seek approval from WorkCover for all of its expenditure.

The committee believes that the WIRO performs a vital function in the workers compensation scheme, and should be able to undertake its role with complete independence from WorkCover. As such, we have recommended that the *Government Sector Employment Act 2013* be amended to designate WIRO as a separate agency, and that it receive funding for its operations accordingly.

Further, we believe that the NSW Government should consider expanding the operational parameters of the WIRO to include work health and safety, and review the resources of the Office to ensure it has the extra capacity to undertake this additional responsibility.

Medical treatment

The 2012 reforms to the scheme significantly altered access to medical treatment for injured workers by restricting the timeframe in which assistance is available. Further, workers suffering industrial hearing loss had their entitlements to lifetime assistance for hearing aids, batteries and repairs reduced to an entitlement to one set of hearing aids and 12 months of batteries and repairs.

The Minister for Finance and Services has announced that medical benefits for workers with whole person impairment assessments of between 21 and 30 per cent will be extended until retirement age, and that access to hearing aids, prosthesis, home and vehicle modifications and related treatment will be reinstated for scheme participants until retirement age. These changes are limited to those workers who received an injury and made a formal claim on or before 1 October 2012.

We consider that this decision goes some way towards restoring the balance between the financial sustainability of the scheme and providing enhanced support for injured workers. However, noting the actuarial evidence as to the relatively minimal cost to the scheme, the committee believes that medical benefits for hearing aids, prostheses, home and vehicle modifications should be restored for all injured workers for life. Once these benefits have been restored, the NSW Government should review the viability of restoring all lost medical benefits for injured workers.

Considerable concern was also expressed about the requirement to have pre-approval from an insurer before medical treatment can be received, particularly as the pre-approval requirement may result in costly delays to an injured worker receiving the appropriate treatment.

Requiring insurer approval before the costs of a medical treatment are incurred is not an unreasonable expectation. However, insurers must provide a decision regarding treatment as soon as practicable to ensure that injured workers are able to promptly access necessary treatment. We further note that there are clearly cases where seeking pre-approval is not practical or reasonable and there should be some flexibility built into the system to accommodate this. We have recommended that the NSW Government consider amendments to the scheme to allow for the payment of medical expenses where, through no fault of the injured worker, it was not reasonable or practical for the worker to obtain pre-approval before undertaking necessary treatment.

We also believe that WorkCover should provide statistical details in its annual report on the frequency that insurers exceed the legislated timeframe for making decisions regarding treatment and the penalties applied. The committee encourages WorkCover to be more vigilant in enforcing this aspect of the workers compensation scheme, and intend to keep a watching brief on this issue.

Work capacity decisions and access to paid legal representation

Work capacity decisions are the result of work capacity assessments, which are conducted by insurers. A work capacity assessment is a review of an injured worker's functional, vocational and medical status that helps inform decisions by the insurer about the worker's ability to return to work.

There are three stages of review that an injured worker may pursue if they are dissatisfied with the outcome of a work capacity decision: firstly, an internal review by the insurer, followed by a merit review by WorkCover, and lastly, a procedural review by WIRO.

Significant delays are currently being experienced in the merit reviews undertaken by the WorkCover Merit Review Service. These delays are particularly troubling given that the two other levels of review for work capacity decisions are being finalised well within the required timeframes. The committee is hopeful that the employment of additional resources to clear the backlog of reviews awaiting determination, together with an operational review of the Merit Review Service, will result in improvements to this area. We intend to keep a watching brief on this matter.

In regard to paid legal representation, following the 2012 reform process a legal practitioner acting for a worker is no longer entitled to be paid or recover any amount for costs incurred in connection with a review of a work capacity decision of an insurer.

As a consequence, there has been a decline in the number of lawyers practicing in the field of workers compensation law, leaving injured workers vulnerable and without adequate representation in what is a highly complex area of law. The committee believes that the NSW Government should consider amending the *Workers Compensation Act 1987* to allow legal practitioners acting for an injured worker to be paid or recover fair and reasonable fees for the work undertaken in connection with a review of a work capacity decision of an insurer, subject to an analysis of its financial impact.

Return to work provisions

The *Workplace Injury Management and Workers Compensation Act 1998* states that an employer must provide suitable work if a worker who has been incapacitated as a result of an injury is able to return to suitable work and requests to return to work. This can either be on a full-time or part-time basis.

Concerns were raised that some employers may fail to understand or adhere to their obligations to provide suitable employment, and that there is a lack of enforcement in instances where employers fail to meet these obligations.

Facilitating a smooth return to suitable employment for injured workers is a crucial aspect of successful rehabilitation following an injury. The committee believes that WorkCover should review the mechanisms contained in the *Workplace Injury Management and Workers Compensation Act 1998* to ensure compliance with the return to work provisions, including the use of incentives to encourage compliance and deterrents for non-compliance. Further, WorkCover should undertake an education campaign to inform employees and employers of their rights and obligations in regard to returning to work following an injury.

Stakeholder engagement, access to information and guidelines

The committee received evidence that many stakeholders were frustrated with WorkCover's consultation processes, arguing that there was a lack of genuine consultation between WorkCover and stakeholders, with the exception of scheme agents. This frustration was exacerbated during the 2012 reform period. A need to improve WorkCover's public information sources was identified, with enhancements suggested to the level, quality and access to information provided by WorkCover in its annual reports, statistical bulletins, website and customer service hub.

The committee has made a number of recommendations to address these concerns, including the establishment of a WorkCover advisory committee in line with the *Safety, Return to Work and Support Board Act 2012* and the *Work Health and Safety Act 2011*. Such a committee will provide an important forum for informed debate about workplace health and safety and workers compensation issues, and should be comprised of representatives of workers and employers together with any other relevant stakeholders.

We have also made recommendations to reconvene industry reference groups, such as a legal reference group and a disability industry reference group, as these groups offer important expertise in their fields and can be of great assistance to WorkCover in developing practices and procedures.

Another key issue is the development, accuracy and applicability of the guidelines that facilitate the operation of the workers compensation scheme. We have recommended a comprehensive review of all guidelines that apply to the scheme, in consultation with relevant stakeholders, with the intent of simplifying and consolidating these guidelines.

Other issues raised during the review include WorkCover's role in implementing work health and safety legislation, the current auditing requirements faced by self insurers, and the potential for an expanded Comcare scheme to change the makeup of the New South Wales workers compensation scheme. All of these issues are explored in more detail throughout this report.

Summary of recommendations

Recommendation 1

That the Minister for Finance and Services, in consultation with the WorkCover Independent Review Office and other stakeholders, consider establishing a separate agency or other administrative arrangements to clearly separate the roles of regulator and nominal insurer in the workers compensation scheme, and implement that model as soon as practicable.

Recommendation 2

That the WorkCover Authority of NSW consult with stakeholders, including worker and employer representatives, during its review of the segregation of functions and delegations around its role in work capacity decisions, and that it publish the review's findings.

Recommendation 3

That the WorkCover Authority of NSW, in consultation with stakeholders, review the procedures currently utilised to distinguish between the work health and safety regulatory and advisory roles of WorkCover, and implement protocols to minimise potential conflicts of interest.

Recommendation 4

That the NSW Government amend Part 3 of Schedule 1 of the *Government Sector Employment Act 2013* to designate the WorkCover Independent Review Office as a separate public sector agency.

Recommendation 5

That the NSW Government expand the operational parameters of the WorkCover Independent Review Office to include work health and safety, and review the resources of the Office to ensure it has the extra capacity to undertake this additional responsibility.

Recommendation 6

That the NSW Government restore lifetime medical benefits for hearing aids, prostheses, home and vehicle modifications for all injured workers, noting the actuarial evidence as to the relatively minimal cost of restoring such benefits to the workers' compensation scheme, and that it promptly review the viability of restoring all lost medical benefits for injured workers under the scheme.

Recommendation 7

That the NSW Government consider amendments to the WorkCover scheme to allow for the payment of medical expenses where, through no fault of the injured worker, it was not reasonable or practical for the worker to obtain pre-approval of medical expenses before undertaking the treatment.

Recommendation 8

That the WorkCover Authority of NSW and WorkCover Independent Review Office collaborate to develop a process whereby disagreements over assessments of permanent impairment can be resolved through negotiation between an insurer and injured worker.

Recommendation 9

That the WorkCover Authority of NSW develop, through consultation with all stakeholders and their representatives, binding operational directives for the workers compensation nominal insurers' scheme agents or licenced insurers that ensure all parties are aware of their rights and responsibilities.

Recommendation 10

That the NSW Government consider amending section 44(6) of the *Workers Compensation Act 1987* to allow legal practitioners acting for a worker to be paid or recover fair and reasonable fees for the work undertaken in connection with a review of a work capacity decision of an insurer, subject to an analysis of its financial impact.

Recommendation 11

That the WorkCover Authority of NSW review the mechanisms used to ensure compliance with the return to work provisions contained in the *Workplace Injury Management and Workers Compensation Act 1998*, and consider introducing incentives to encourage compliance and penalties for non-compliance.

Recommendation 12

That the WorkCover Authority of NSW undertake an education campaign to inform employees and employers of their rights and obligations in regard to returning to work following an injury.

Recommendation 13

That the WorkCover Authority of NSW develop an engagement plan in consultation with all stakeholders and their representatives, and publish it as soon as practicable.

Recommendation 14

That the Minister for Finance and Services establish a WorkCover Authority of NSW Advisory Committee under section 10 of the *Safety, Return to Work and Support Board Act 2012* and Schedule 2 of the *Work Health and Safety Act 2011*. The advisory committee should be comprised of representatives of workers and employers, together with other relevant stakeholders.

Recommendation 15

That the WorkCover Authority of NSW establish a disability industry reference group as soon as practicable.

Recommendation 16

That the WorkCover Authority of NSW include more detailed information in its annual reports, including information on claims processes, injury management, fraud, premium auditing and return to work rates.

Recommendation 17

That the WorkCover Authority of NSW recommence publishing its statistical bulletins, and publish bulletins containing information from 2010 to September 2014, as a matter of urgency.

Recommendation 18

That the WorkCover Authority of NSW update its website as soon as possible following the conclusion of its current review of publically available information.

Recommendation 19

That the WorkCover Authority of NSW immediately update its 'Contact us' webpage, as well as any automated phone messages used by the customer service centre, to include information about the WorkCover Independent Review Office.

Recommendation 20

That the WorkCover Authority of NSW undertake a review of all guidelines that apply to the workers compensation scheme, in consultation with stakeholders, to simplify and consolidate the guidelines.

Recommendation 21

That the WorkCover Authority of NSW publish the external auditor's final report on the decision making process for prosecutions, and invite feedback on the report's recommendations from stakeholders.

Recommendation 22

That the NSW Government require that insurers offering workers compensation cover have applicants declare whether any proprietor, director, senior executive or public officer associated with the applying entity has:

- any outstanding workers compensation premiums, and/or
- been associated with a registered corporation, sole trader or partnership that either has outstanding premiums as a going concern, or been placed in administration or receivership in the past five years.

Recommendation 23

That the WorkCover Authority of NSW convene a roundtable of insurers, relevant employer organisations and unions to address phoenix companies and their impact on the economy. The roundtable should:

- outline the extent of the problem, the impact on work health and safety and the impact on the efficiency and cost of workers compensation
- outline the means of addressing phoenix operators including identifying offenders, reporting to the ACCC and ASIC, insurer vigilance, industry responsibility and regulatory responses, and
- report the outcomes of the roundtable to the Standing Committee on Law and Justice and the Minister for Finance and Services.

Recommendation 24

That the NSW Government review the regulatory requirements that apply to self insurers in New South Wales to ensure they do not require unnecessary documentation or expense.

Recommendation 25

That the NSW Government develop an actuarial and legal impact statement of an expanded Comcare scheme.

Recommendation 26

That the WorkCover Authority of NSW, in consultation with stakeholders, develop risk assessment practice guidelines for the disability sector, guidance material on workplace health and safety for disability service providers, and disability sector-specific training material for WorkCover inspectors.