

**Government Response to Legislative Council General Purpose Standing Committee
No. 1 Report into Serious Injury and Death in the Workplace.**

Committee Recommendation	Government Response
<p>Recommendation 1 (Page 18)</p> <p>That as a priority WorkCover address the inadequacies in data collection and reporting identified in this report.</p>	<p>Recent WorkCover initiatives to address the data issues identified in the report include:</p> <ul style="list-style-type: none"> • As part of its commitment to continuous improvement in data collection and reporting WorkCover has created a new Knowledge Management Group; • As part of the Workers Compensation Scheme Design project WorkCover has established a number of priority initiatives including creation of a corporate data repository that will enable the publishing of timely and objective data on Scheme, agent and industry performance; and • WorkCover has been accessing data from state and national sources including the National Coronial Information System, NSW Police, RTA and the NSW Fire Brigade Service to capture additional data and identify the causes of work related incidents.
<p>Recommendation 2 (Page 20)</p> <p>That a national database on workplace injuries and fatalities be developed in accordance with the recommendations of the House of Representatives Standing Committee on Employment and Workplace Relations in its June 2003 report entitled <i>Back on the Job: Report into aspects of Australian workers' compensation schemes</i>.</p> <p>That the database record the cause of death in relation to workplace fatalities, to assist in targeting measures to improve workplace safety, and that in particular, consideration be given to improved information collection on the role of fatigue in accident and injury causation</p>	<p>The National Occupational Health and Safety Advisory Council (NOHSC) has been developing a national database as part of the Comparative Performance Monitoring (CPM) Report process.</p> <p>WorkCover will continue to work closely with NOHSC concerning the establishment of a national database.</p>

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<p>Recommendation 3 (Page 20)</p> <p>That the national database on workplace injuries and fatalities be developed using nationally consistent definitions, especially as it relates to employees and fatalities, and including definitions relevant to the road transport industry.</p>	<p>Part E of the Comparative Performance Monitoring (CPM) Reports provide jurisdictional comments on comparative performance monitoring data and indicate that:</p> <ul style="list-style-type: none"> • The ability to make fair and definitive comparisons between jurisdictions is a continuing issue and ongoing attention to improving the comparability of data is essential to the future of CPM; and • Caution should be taken against too literal comparisons between jurisdictions as the systems vary so greatly that comparative data is not possible. Standardisations are applied to data to smooth out these differences and users are urged to consider the jurisdictional differences and all relevant explanatory notes when CPM data is used. <p>WorkCover will nevertheless work with other jurisdictions to ensure that CPM uses nationally consistent definitions where it is possible and meaningful to do so.</p>
<p>Recommendation 4 (Page 33)</p> <p>That as a priority WorkCover undertake regular unannounced inspections of building and construction sites where the cost of the work exceeds \$250,000 to target principal contractors and any sub-contractors. That these regular unannounced inspections ensure that the principal contractor has prepared and is observing an OH&S management plan, and that any sub-contractor has prepared and is observing a written safe work method statement.</p>	<p>WorkCover continues to conduct random unannounced 'blitzes' of commercial building and construction sites to ensure compliance with all obligations under the OHS legislation.</p> <p>WorkCover inspections examine, amongst other things, compliance with Clause 226 and 227 of the <i>OHS Regulation 2001</i> which specifically relate to the responsibilities of principal and sub contractors at places of work at which the cost of construction work exceeds \$250,000. The responsibilities relate to the preparation and implementation of a safety management plan by the principal contractor and the provision of safe work method statements by the sub-contractor monitored by the principal contractor.</p> <p>As a representative sample, in 2002/03 the construction team identified 5,019 breaches of the OHS legislation. 1967 or approximately 39% of these breaches were identified as a result of random unannounced 'blitzes' by WorkCover.</p>

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<p data-bbox="193 282 555 315">Recommendation 5 (Page 34)</p> <p data-bbox="193 349 687 613">That the Department of Commerce undertake frequent, random and unannounced audits of contractors and subcontractors on Government projects under clause 15.5 of GC21, to ensure they are continuing to meet their obligations under clauses 15.1 to 15.4 of GC21.</p>	<p data-bbox="719 282 1406 546">State Projects and Regional Services (SPRS) of the Department of Commerce has a thorough program of OHS audits and inspections on a state-wide basis across the building and engineering construction contracts it administers. In the year ending 30 June 2004, 862 OHS audits and inspections were carried out. A similar number will be carried out in 2004/5 on both a scheduled and unannounced basis.</p> <p data-bbox="719 584 1401 714">Each Region and Branch ensures that corrective actions identified in the audits and inspections are brought to the attention of the principal contractor for their attention and are rectified.</p> <p data-bbox="719 752 1385 1050">Where there is a significant breach or unsatisfactory performance by the principal contractor or any of the subcontractors on their site, in addition to the risk being fixed on site, the Department also prepares an unsatisfactory Contractor Performance Report (CPR). Unsatisfactory CPRs lead to consideration of restricting future tendering opportunities for principal contractors. The Department holds the principal contractor accountable for the performance of the subcontractors.</p> <p data-bbox="719 1088 1378 1249">The Office of Government Business Executive Safety Management Committee, along with the regional and branch management teams all monitor the results of the audits and inspections and identify any necessary systems improvements.</p>
<p data-bbox="186 1317 547 1350">Recommendation 6 (Page 36)</p> <p data-bbox="186 1384 679 1615">That the Government review the <i>OH&S Regulation 2001</i> to provide clearer definitions of the obligations of the three parties involved in a labour hire relationship: the labour hire company, the host organisation and the on-hired employee.</p>	<p data-bbox="713 1317 1398 1581">The <i>Occupational Health and Safety Act 2000</i> provides that it must be reviewed as soon as possible after 26 June 2006. It is anticipated that the <i>Occupational Health and Safety Regulation 2001</i> will be reviewed or remade before 1 September 2006, because under section 10 (2) of the <i>Subordinate Legislation Act 1989</i> the Regulation will automatically lapse on 1 September 2006 unless it is reviewed or remade beforehand.</p> <p data-bbox="713 1619 1374 1787">These statutory reviews will include consideration of clearer definitions of the obligations of the three parties involved in a labour hire relationship: the labour hire company, the host organisation and the on-hired employee.</p>

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<p>Recommendation 7 (Page 42)</p> <p>That the Government investigate including in the <i>OH&S Regulation 2001</i> clearer definitions of the obligations of the parties involved in an apprentice hire relationship between a Group Training Organisation, a host employer and an apprentice.</p>	<p>These definitions will be considered as part of the statutory reviews of the OHS legislation (Please see response to recommendation 6 above).</p>
<p>Recommendation 8 (Page 44)</p> <p>That the Government examine the provision of additional funding to the Building Trades Group Drug and Alcohol Program, and that WorkCover examine whether it can provide any further support to the program and similar programs in other industries.</p>	<p>The NSW Department of Commerce fully supports the BTG Drug and Alcohol Program. The Department's Heritage and Building Services Group, which employs building trades and labouring staff and apprentices, continues to work with the BTG Drug and Alcohol Program for the welfare of its staff.</p> <p>In response to recommendation 5.1 of the 2003 Alcohol Summit the NSW Government has established a Working Group on Alcohol Related Injury and Trauma in the Workplace, convened by the Department of Commerce and WorkCover.</p> <p>The Working Group is considering what more should be done to help ensure that workplaces, where alcohol could be a factor, are healthy and safe. It includes employer and employee representation, and will report to Government with a range of measures to reduce alcohol related risks and injuries in the workplace.</p> <p>Since 2002, NSW Health has provided \$546,000 to Foundation House an 8 bed residential and outpatient treatment service. Ongoing funding opportunities are being examined. In addition, WorkCover is examining possible support, in conjunction with the BTG.</p>
<p>Recommendation 9 (Page 45)</p> <p>That WorkCover conduct a study on the effects of fatigue on workplace safety in the building and construction industry and other industries, to determine whether further measures should be adopted.</p>	<p>WorkCover will give further consideration to this recommendation as part of the finalisation of its corporate research program, including the new WorkCover Research Centre of Excellence at the University of Newcastle, which was launched by the Minister for Commerce on 3 September 2004.</p>

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<p>Recommendation 10 (Page 51)</p> <p>That the Government seek to amend the OH&S legislation to facilitate a greater role for WorkCover in the prevention of serious injuries and fatalities in the road transport industry in NSW.</p>	<p>In March 2004 WorkCover, NSW Police, the Roads and Traffic Authority and the Department of Environment and Conservation adopted Interagency Guidelines for the Prevention and Investigation of Long Haul Vehicle Trucking Accidents.</p> <p>Following the Road Freight Safety Forum, which WorkCover convened, in November 2003, a draft MOU between the NSW Government and the transport industry, is being finalised. The MOU sets out 7 strategies for improving road and workplace safety outcomes in the road freight sector.</p> <p>The Government is currently consulting unions and employers about an amendment to the <i>OHS Regulation 2001</i> to enable WorkCover to investigate whether the lack or failure of systems of work contribute to a crash, where, for example, the control over, maintenance or performance of those systems is removed or delegated from the direct employee/employer relationship by way of a contract for consignment, delivery or purchase.</p> <p>In addition, WorkCover has recently been successful in prosecuting a transport company following the death of a truck driver. Issues raised in the case include fatigue and rostering.</p>
<p>Recommendation 11 (Page 52)</p> <p>That WorkCover engage the active cooperation of the other agencies involved in road accident investigations (the NSW Police, the NSW Ambulance Service, the NSW Fire Brigade Service and the NSW Roads and Traffic Authority) in identifying work-related crashes, with the aim of maximising the capture of fatigue and work related road transport accidents in WorkCover data.</p>	<p>WorkCover has been accessing data from state and national sources including the National Coronial Information System, NSW Police, Roads and Traffic Authority, NSW Fire Brigade Service and the Department of Environment and Conservation to capture additional data and identify the causes of work related incidents including fatigue.</p> <p>In March 2004 WorkCover, NSW Police, the Roads and Traffic Authority and the Department of Environment and Conservation implemented Interagency Guidelines for the Prevention and Investigation of Long Haul Vehicle Trucking Accidents.</p> <p>The Guidelines include the exchange of information, notifying agencies about heavy vehicle accidents, coordinating enforcement activities and developing awareness and education campaigns such as the recent long haul trucking forum.</p>

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<p>Recommendation 12 (Page 53)</p> <p>That WorkCover become more involved with the NSW Roads and Traffic Authority, the TWU and employees in seeking to prevent workplace injuries in the road transport industry resulting from drug and alcohol consumption. That involvement may include developing guidelines on in drug and alcohol testing in the road transport industry.</p>	<p>In response to recommendation 5.1 of the 2003 Alcohol Summit, the NSW Government has established a Working Group on Alcohol Related Injury and Trauma in the Workplace, convened by the Department of Commerce and WorkCover.</p> <p>The Working group is considering what more should be done to help ensure that workplaces, where alcohol is a factor, are healthy and safe. It includes employer and worker representatives appointed in consultation with the Workers Compensation and Workplace Occupational Health and Safety Advisory Council, and will report to Government with a range of measures to reduce alcohol related risks and injuries in the workplace.</p> <p>In addition WorkCover will continue to work with the RTA and employee and employer organisations on strategies to further prevent workplace injuries in the road transport industry resulting from drug and alcohol consumption.</p>
<p>Recommendation 13 (Page 61)</p> <p>That NSW Health, in conjunction with WorkCover, undertake further study of the costs and benefits of introducing retractable needles across the NSW health system.</p>	<p>NSW Health is in the initial stages of designing a short-term multi-site trial of a range of safer sharps technology including needleless IV delivery systems, safer syringes, blunt needles and sheathable scalpels.</p> <p>Pending finalisation of the study design as well as cooperation from hospitals and sponsors of such equipment it is anticipated that the trial will commence in the current financial year. The trial will consider the effectiveness, ease of use, cost and availability of each device.</p>

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<p>Recommendation 14 (Page 68)</p> <p>That WorkCover introduce improved systems to incorporate feedback from Inspectors about emerging issues, and to assess current satisfaction levels of Inspectors.</p>	<p>WorkCover's OHS Division maintains a structured staff-meeting program across the Division to facilitate regular interaction between management and all levels of the division's staff.</p> <p>The OHS Division executive management team including the General Manager attends these meetings. Agendas are structured to provide opportunity for all staff to hear and discuss reports from the management of the Division.</p> <p>Staff are encouraged to discuss current emerging issues and provide input to the decision-making processes. To support this environment the OHS Division Senior Management have committed to a Management Charter which encourages staff input to management and operational issues and fosters an open and accountable management.</p>
<p>Recommendation 15 (Page 76)</p> <p>That the Government consider how best to include enforceable agreements in the compliance regime contained in the <i>OH&S Act 2000</i>, as an addition to prosecution for breaches of the <i>OH&S Act 2000</i>, with the terms of the agreement filed before the Chief Industrial Magistrate's Court or Industrial Relations Commission so that in the event the offender does not comply with the agreement, a prosecution may proceed.</p>	<p>The Government will consider the inclusion of enforceable agreements as part of the statutory review of the OHS legislation (Please see response to recommendation 6 above).</p>
<p>Recommendation 16 (Page 78)</p> <p>That WorkCover NSW examine the possibility of splitting its inspectorate into education and prosecution branches, or other ways to minimise confusion regarding the roles of inspectors.</p>	<p>WorkCover is establishing a new Business Assistance Unit that will provide arms length advice, support and education to businesses on OHS, workers compensation and injury management, particularly small and medium sized enterprises (SMEs).</p>

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<p>Recommendation 17 (Page 80)</p> <p>That the Government continue to fund the WorkCover Assist program at least at the same level as currently funded for an additional three years beyond the current 2004 deadline.</p>	<p>The Government will give consideration to this recommendation as part of the evaluation of the effectiveness of the 2004 program.</p>
<p>Recommendation 18 (Page 86)</p> <p>That WorkCover commit to prosecuting employers and co-workers alleged to have breached OH&S law and to have placed workers at excessive risk of serious injury or fatality, even where that risk has not resulted in a serious injury or fatality. That WorkCover commence these proceedings in the Industrial Relations Commission.</p>	<p>WorkCover, in accordance with its Compliance Policy and Prosecution Guidelines, prosecutes for breaches of the OHS legislation.</p> <p>The risk of injury is a primary factor in determining whether a prosecution is in the public interest, and whilst incidents of serious injury and death weigh in favour of a prosecution the absence of such consequences do not mitigate against the commencement of proceedings. Each case is considered on its particular facts.</p> <p>Where the decision is taken to prosecute in cases where the risk was one of serious injury or death then such proceedings will be commenced in the Industrial Relations Commission in Court Session in recognition of the seriousness of the matter.</p>
<p>Recommendation 19 (Page 94)</p> <p>That the Government take urgent steps to amend the <i>OH&S Act 2000</i> to redress the anomaly whereby an employer can effectively avoid prosecution for a breach of the Act through non-reporting of a serious incident in the workplace for two years.</p>	<p>The Government proposes to extend the time in which WorkCover can bring prosecutions under the OH&S Act following non-reporting of a serious incident.</p>
<p>Recommendation 20 (Page 102)</p> <p>That the Premier's Department make public the report of the Intergovernmental Working Party on Public Safety when completed, and take urgent steps to finalise, through the Working Party, the responsibilities of government agencies, including WorkCover, in relation to public safety.</p>	<p>The Office of Protocol and Special Events in the NSW Premier's Department is coordinating the interagency working party (which includes WorkCover) that is considering the findings of the Senior Deputy State Coroner regarding the death of Jessica Michalik at the Big Day Out in January 2001.</p> <p>The working party will meet again in the near future with a view to finalising a response to the Coroner's findings.</p>

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<p>Recommendation 21 (Page 102)</p> <p>That the CEO of each Government Agency be responsible for the development and implementation of guidelines outlining the responsibility for public safety. These guidelines should be developed in full consultation with WorkCover, the Premier's Department, employers and the Labor Council of NSW.</p>	<p>The Government will give further consideration to this recommendation in considering its response to the Coroner's findings regarding the death of Jessica Michalik at the Big Day Out in January 2001.</p>
<p>Recommendation 22 (Page 105)</p> <p>That WorkCover closely examine its procedures for determining whether to initiate prosecution for ways the process can be streamlined so as to reduce the length of time between an accident and commencement of prosecution. Such a review should not initiate any measures that would inhibit the likely success of prosecutions.</p>	<p>WorkCover is actively examining its processes to achieve a reduction in the time taken from the date of incident to the commencement of proceedings.</p> <p>The current intensive investigative and case management processes for workplace fatality matters have assisted the timely and thorough investigation of breaches of the OHS legislation.</p>
<p>Recommendation 23 (Page 113)</p> <p>That the legal panel appointed by the Minister for Commerce to advise the Government on the OH&S legal framework specifically address the suitability of a guideline judgment in relation to penalties for breach of the <i>OH&S Act 2000</i>.</p> <p>Following the advice from the legal panel, that the Minister for Commerce apply to the Attorney General for a guideline judgment under s125 of the <i>OH&S Act 2000</i>.</p>	<p>The Legal Panel's report was published on 1 June 2004 and subject to extensive consultation with employer and worker representatives.</p> <p>The Panel's report made several recommendations that would make a guideline judgment unnecessary.</p> <p>However, the Government has released a draft consultation Bill which includes amendments to ensure an application for a guideline judgment is possible.</p>

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<p>Recommendation 24 (Page 114)</p> <p>That WorkCover offer victims and/or their families the opportunity to make a victim impact statement whenever the requirements of the Part 2 of the <i>Crimes (Sentencing Procedure) Act 1999</i> are satisfied, and that such statements be tendered at the appropriate time during court proceedings for consideration by the court in sentencing the offender.</p>	<p>Section 27(2A) of the <i>Crimes (Sentencing Procedure) Act 1999</i> allows a victim statement to be received by the Industrial Relations Commission where an offence under Division 1 of Part 2 of the <i>OHS Act 2000</i> results in the death of, or actual physical bodily harm to, a person. Section 27(2A) commenced on 1 September 2001 at the same time as the <i>OHS Act 2000</i>.</p> <p>Since the commencement of these provisions 14 victim impact statements have been tendered in matters dealing with offences under the <i>OHS Act 2000</i>. WorkCover's new Counsellor and Liaison Officer offered to prepare statements in an additional 5 matters.</p> <p>WorkCover's new Counsellor and Liaison Officer will continue to co-ordinate the provision of counselling and liaison services, including the offer of support for the making of victim impact statements following conviction and prior to sentence.</p>
<p>Recommendation 25 (Page 122)</p> <p>That WorkCover report to Parliament each year the names of former directors of "phoenix" companies that have been disqualified from holding office by ASIC, when acting on information referred to it by WorkCover.</p>	<p>Options concerning the implementation of this recommendation (including the information concerning matters referred to ASIC being included in WorkCover's annual report) are currently being considered by WorkCover.</p>
<p>Recommendation 26 (Page 144)</p> <p>That as a matter of urgency, discrete and specific offences of "corporate manslaughter" and "gross negligence by a corporation causing serious injury" be enacted in the <i>Crimes Act 1900</i> (NSW).</p>	<p>The Minister for Commerce referred this recommendation to the Legal Panel advising the Government on the OHS framework.</p> <p>The Legal Panel's report was published on 1 June 2004 and subject to extensive consultation with employer and worker representatives.</p> <p>The Government's response to that report was announced on 27 October 2004.</p>

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<p>Recommendation 27 (Page 144)</p> <p>That the Government refer to the NSW Law Reform Commission and the Panel of Review a request to examine the broader issues of corporate liability for non-workplace and workplace deaths generally, including harsher penal sentences.</p>	<p>Please see response to recommendation 26 above.</p>
<p>Recommendation 28 (Page 149)</p> <p>That the Government amend the <i>OH&S Act 2000</i> to incorporate sentencing options in addition to fines, including in particular:</p> <ul style="list-style-type: none"> • incapacitation (disqualification or dissolution) • correction orders • community service orders and publicity orders. 	<p>Since 2000 the <i>OHS Act 2000</i> has provided for orders for restoration; orders for costs and expenses of investigation; orders to publicise or notify an offence; and orders to undertake OHS projects may be made in addition to any penalty that may be imposed or any other action that may be taken in relation to the offence (Division 2 of Part 7).</p> <p>WorkCover in appropriate matters provides submissions to the Court as to the making of the orders.</p>
<p>Recommendation 29 (Page 149)</p> <p>That the Government adopt and give consideration to how best to implement the NSW Law Reform Commission's Report No 103 – <i>Sentencing Corporate Offenders</i>, particularly Recommendation 4.</p>	<p>The Government is currently giving consideration to this report and a response will be tabled in the near future.</p>
<p>Recommendation 30 (page 150)</p> <p>That any guideline judgement that applies to offences under the <i>OH&S Act 2000</i> include a range of sentencing options to complement fines when sentencing corporate offenders, particularly where a corporation's negligence has resulted in the death of a worker.</p>	<p>See response to recommendation 23.</p>

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<p>Recommendation 31 (Page 154)</p> <p>That WorkCover undertake an evaluation of the UK Corporate Health and Safety performances Index to assess its suitability as a model that could be applied in Australia to provide the public comparative information about the occupational health and safety performance of companies.</p>	<p>This evaluation is underway.</p>
<p>Recommendation 32 (Page 163).</p> <p>That Workcover give priority to completing and implementing its protocol for liaising with the families of deceased workers. This protocol should ensure that the families and victims are considered and consulted during an investigation and possible prosecution, that families are given a single point of communication with WorkCover, and that communication should occur regularly.</p>	<p>In January 2004 the Minister for Commerce and Industrial Relations endorsed WorkCover's new Workplace Fatalities Protocol with the NSW Police and Director of Public Prosecutions. The Protocol sets out clear guidelines for interagency investigation of workplace fatalities and serious injuries, and any subsequent prosecution action.</p> <p>WorkCover has also published a document entitled <i>Information for Families - Dealing with Workplace Death</i> and appointed a new Counsellor and Liaison officer to co ordinate the provision of counselling and liaison services to the families of deceased workers.</p> <p>The Counsellor will initiate contact with the families and where necessary will arrange for counselling to be provided to family members and be a point of contact within WorkCover for the duration of the investigation and prosecution process.</p>
<p>Recommendation 33 (Page 164)</p> <p>That WorkCover include in its protocol for liaising with the families of deceased workers the requirement that family members be informed about obtaining compensation and counselling, in addition to being kept informed of the progress of the investigation.</p>	<p>Please see response to recommendation 32 above.</p>

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<p>Recommendation 34 (Page 165)</p> <p>That the Government amend the <i>OH&S Act 2000</i> to require WorkCover to inform the relevant insurer when it becomes aware of a serious injury or fatality.</p>	<p>The <i>OH&S Act 2000</i> currently requires the occupiers of premises and employers to notify WorkCover <u>and</u> the relevant insurer of a serious incident or fatality within 48 hours.</p> <p>A new Counsellor and Liaison officer has been appointed to coordinate the provision of counselling and liaison services to families, including information concerning workers compensation entitlements. As part of this process the insurer will be notified to ensure that proactive claims management may commence as soon as possible.</p> <p>The effectiveness of these arrangements will be considered as part of the statutory review of the OHS legislation (please see response to recommendation 6 above).</p>
<p>Recommendation 35 (Page 166)</p> <p>That as part of its revised protocol for liaising with the families of deceased workers and injured workers incapable of acting on their own behalf, WorkCover should include a provision to identifying the insurer to non-insured family members of the worker(s).</p>	<p>The new Counsellor and Liaison officer will continue to co ordinate the provision of counselling and liaison services to families, including information and guidance material concerning workers compensation insurance and entitlements under the Uninsured Liability Insurance Scheme (ULIS).</p>
<p>Recommendation 36 (page 166)</p> <p>That the Government amend the <i>Workers' Compensation Act 1987</i> to allow funeral expenses to be paid separately and directly by insurers in all cases, with or without a compensating discount to the lump sum payout or weekly benefit.</p>	<p>The Government proposes to amend the <i>Workers Compensation Act 1987</i> to allow the payment of funeral expenses from the workers compensation scheme regardless of dependant status. The Government is also increasing the amount paid in respect of funeral expenses from \$4,400 to \$9,000.</p>