The Law Society of Western Australia
The voice of the legal profession in Western Australia

30 November 2021

WorkCover WA
2 Bedbrook Place
SHENTON PARK WA 6008

By email: consultation@workcover.wa.gov.au

Dear Sir/Madam

WORKERS COMPENSATION AND INJURY MANAGEMENT BILL 2021

The Law Society has reviewed the *Workers Compensation and Injury Management Bill 2021 – (Consultation Draft Bill)* released for comment in August 2021 and notes that:

1. it includes a 2021 election commitment to increase the cap on medical and health expenses and extend the point at which a worker's income compensation payments step down, from 13 to 26 weeks; and
2. implements lifetime care and support arrangements for catastrophically injured workers, delivering on a commitment between the Commonwealth and State and Territory governments.

The Law Society also acknowledges the opportunity it had to meet with representatives of WorkCoverWA, including the Workcover CEO, with members of its Personal Injuries and Workers Compensation (PI&WC Committee) at its August meeting.

In the context of the above the main concerns of the Law Society relating to the Consultation Draft Bill are that:

- too many substantive matters are left to be prescribed by regulations;
- the meaning of 'reasonable administrative action' is problematic;
- the meaning of 'worker' has the potential to exclude claimants;
- provisions governing the request and disclosure of information present practical difficulties;
- limitations on statutory and common law settlement pathways are undesirable;
- the new definition of 'suitable employment' is a fundamental shift of responsibility from insurer to employer which will have negative ramifications for workers; and
- the continuation of a separate Costs Committee for Workers Compensation which does not require a lawyer with relevant expertise in its membership is unsound.

The details of these concerns are set out in the attached submission.

If you have any queries please contact Mary Woodford, General Manager Advocacy and Professional Development on 9324 8646 or mwoodford@lawsocietywa.asn.au

Yours sincerely

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Submission: *Workers Compensation and Injury Management Bill 2021 – (Consultation Draft)*

Tuesday, 30 November 2021

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The Law Society OF WESTERN AUSTRALIA
The voice of the legal profession in Western Australia

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Introduction

The Law Society of Western Australia (the Law Society) is the peak professional association for lawyers in Western Australia. Established in 1927, the Law Society is a not-for-profit association dedicated to the representation of its members and the enhancement of the legal profession through being a respected leader and advocate on law reform, access to justice and the rule of law.

This submission is made in response to Workcover WA's invitation for written submissions on the *Workers Compensation and Injury Management Bill 2021 – (Consultation Draft).*

The Submission addresses particular clauses in the Consultation Draft which are of concern to the Law Society.

Terms used in this submission:

- WCIMA and 'the Act' mean the *Workers Compensation and Injury Management Act 1984* (WA)
- SRC Act means the *Safety, Rehabilitation and Compensation Act 1988* (Cth)
- Qld Legislation means *Workers' Compensation and Rehabilitation Act 2003* (Qld)
- RTWP means Return to Work Plan
- WC Policy means Workers Compensation Policy
- 2014 Report means *WorkCover WA, Review of the Workers' Compensation and Injury Management Act 1981: Final Report, June 2014*

General Comments

Overuse of Regulation making powers

The Law Society harbours concerns that too many substantive matters are left to subsidiary legislation. In particular, the following matters should be addressed in the primary legislation:

- Circumstances where settlements can occur without the acceptance of liability
- Who is and who isn't a worker for the purposes of the Act
- Provisions concerned with the authority for collection and disclosure of information

Sections 73 and 74 of the WCIMA

The consultation draft Bill fails to include provisions that are the equivalent of the current sections 73 and 74.

Sections 73 and 74 are important for workers, employers and insurers. They are intended to avoid uncertainties that might prejudice a worker where more than one employer or more than one insurer is involved in a claim. Some injuries occur over a period of time rather than on a specific date. Sometimes a business is taken over, resulting in a change in the employer of a worker, and often an employer will move its business from one licensed insurer to another. These are scenarios that need to be legislated for.

Whilst disputes under ss. 73 and 74 have not given rise to a great deal of actual WorkCover disputation over the years, the mere existence of these provisions has created a basis for insurers to resolve issues amicably and informally between themselves.

The expressions 'fresh injury' and 'the recurrence of an old injury' in the current provisions have caused some interpretation difficulties. They have never been very clearly defined, even with case law. The opportunity exists with modernisation of the Act to improve the readability and understanding of how these sections operate.

The table below sets out the current wording, along with the wording of suggested replacement provisions for the new Act.

The most appropriate location within the Bill for these provisions would be in Part 2 'Compensation for Injury', after clause 35.

So as to avoid confusion, clause 36 in the Bill (which deals with prescribed diseases and dust diseases) should become 38 and have its heading altered to make clearer what it is about. A better heading for clause 36 would be 'Claiming compensation for prescribed diseases involving more than one employer'.

	Existing section 73	**Recommended replacement**
Not in the Bill	73. Worker entitled but dispute between employers (1) Where there is a dispute between employers as to liability but no dispute that the worker is entitled to compensation from some employer for a fresh injury or the recurrence of an old injury the employer of the worker at the time of the latest injury or recurrence is liable to pay compensation under this Act until the question of which employer is liable or how liability is to be apportioned between employers has been resolved. (2) The worker or his dependants, if so required by the employer first liable to pay compensation, shall furnish to him the name and address of any employer in whose employment the worker was when any like injury previously occurred, as he or they may possess. (3) If the worker has filed an application for compensation, the respondent employer shall join as a party any other employer whom he alleges is wholly or	36. Apportionment of compensation between more than one employer (1) In this section ***apportionable injury*** means: (a) a disease, or the recurrence, aggravation or acceleration of a pre-existing disease, that occurs over a period of time spanning a worker's employment by more than one employer; or (b) a personal injury by accident that results from a worker's continuous or repeated exposure to conditions that result in injury where such continuous or repeated exposure occurs during a worker's employment by more than one employer. (2) In this section the compensation payable in respect of an apportionable injury includes any provisional payments that the employer is or may become liable to pay under Subdivision 3. (3) The employer liable to deal with a claim and make payments of compensation in respect of an

	partially liable to pay the compensation. (4) If the worker has not filed an application the employer first liable to pay compensation may apply for determination by an arbitrator of the question of whether some other employer is wholly or partially liable to pay compensation. (5) If an arbitrator finds that it was a recurrence and not a fresh injury or partly a recurrence and partly a fresh injury, the arbitrator may order that other employer to pay to the applicant employer the whole or a part of the amount of compensation paid to the worker and to pay any further compensation to which the worker is entitled. (6) If the dispute between employers is in respect of liability to pay compensation for noise induced hearing loss under section 24A or 31E, WorkCover WA shall provide an arbitrator dealing with the dispute with copies of the results of any relevant audiometric tests stored by WorkCover WA under clause 5(2) of Schedule 7.	apportionable injury under this section is the employer who was the employer of the worker at the end of the period of time in which the apportionable injury is alleged to have occurred. (4) If the worker makes an application for determination by an arbitrator of a question about liability for compensation pursuant to section 31 in respect of an apportionable injury, the employer liable under subsection (3) to deal with the claim may join as a party to the dispute any other employer it alleges may be wholly or partially liable to pay the apportionable compensation. (5) If the employer liable pursuant to subsection (3) to deal with a claim accepts liability to compensate a worker in respect of an apportionable injury, or becomes liable to make provisional payments, that employer may apply for determination by an arbitrator of the question of whether some other employer is wholly or partially liable to pay such compensation. (6) In an application made by a worker under subsection (4), or by an employer under subsection (5), an arbitrator may make an order requiring: (a) payment of compensation by any employer that is a party to the proceedings; (b) reimbursement of compensation by one employer to another employer where both are a party to the proceedings; or (c) the apportionment of liability to pay compensation between any employers that are party to the proceedings. (7) The employer liable pursuant to

		subsection (3) to deal with a claim in respect of an apportionable injury may request the worker to provide details of the worker's previous employers during the period of time in which the apportionable injury is alleged to have occurred. The worker must provide such information in writing to the employer making the request within 14 days. (8) This section does not apply to claims for: (a) disease compensation as defined in section 38(1); or (b) noise-induced hearing loss. (**Note**: 38(1) is currently in the Bill as 36(1).)
Not in the Bill	**Existing section 74** 74. Worker entitled but dispute between insurers (1) Where a worker is entitled to compensation for a fresh injury or the recurrence of an old injury from an employer but there is a dispute between insurers as to liability to indemnify that employer, the insurer of the employer of the worker at the time of the latest injury or recurrence is liable to indemnify the employer until an arbitrator has otherwise determined. (1a) An employer or insurer may apply for determination by an arbitrator of a dispute between insurers notwithstanding any term or condition of any policy of insurance providing for some other means of settling disputes. (2) An arbitrator shall determine which insurer is liable or how liability is to be apportioned and may make such order as the arbitrator thinks proper for the reimbursement of one insurer by another and for the indemnity of the employer in respect of his	**Recommended replacement** 37. Apportionment of compensation between more than one insurer (1) In this section ***apportionable injury*** means: (a) a disease, or the recurrence, aggravation or acceleration of a pre-existing disease, that occurs over a period of time during a worker's employment with an employer; or (b) a personal injury by accident that results from a worker's continuous or repeated exposure to conditions that result in injury where such continuous or repeated exposure occurs during a worker's employment by an employer, during which employment the employer was insured by more than one licensed insurer. (2) In this section the compensation payable in respect of an apportionable injury includes any provisional payments that the

	liability under this Act.	employer is or may become liable to pay under Subdivision 3. (3) The insurer liable to deal with a claim and to indemnify an employer in respect of any liability to pay compensation for an apportionable injury under this section is the insurer who was the insurer of the employer at the end of the period of time in which the apportionable injury is alleged to have occurred. (4) If the worker makes an application for determination by an arbitrator of a question about liability for compensation pursuant to section 31 in respect of an apportionable injury, the insurer liable under subsection (3) to deal with the claim may join as a party to the dispute any prior insurer of the employer that it alleges may be wholly or partially liable to indemnify the employer. (5) If the insurer liable pursuant to subsection (3) to deal with a claim accepts that the employer is liable to compensate a worker in respect of an apportionable injury, or becomes liable by way of indemnity to make provisional payments on behalf of the employer, that insurer may apply for determination by an arbitrator of the question of whether some other insurer is wholly or partially liable to indemnify the employer. (6) In an application made by a worker under subsection (4) or an insurer under subsection (5), an arbitrator may make an order requiring: (a) payment of compensation by any insurer that is a party to the proceedings; (b) reimbursement of compensation by one insurer to another insurer where both are a party to the

		proceedings; or (c) the apportionment of liability to indemnify the employer between any insurers that are party to the proceedings. (7) The insurer liable pursuant to subsection (3) to deal with a claim in respect of an apportionable injury may request WorkCover WA to provide details of the employer's previous insurers during the period of time in which the apportionable injury is alleged to have occurred. WorkCover WA may, for the purposes of this section, provide such information to the insurer upon request. (8) This section does not apply to claims for: (a) disease compensation as defined in section 38(1); or (b) noise-induced hearing loss. (**Note**: 38(1) is currently in the Bill as 36(1).)

Part 1 - Preliminary

Clause 7 - Exclusion of injury: reasonable administrative action [WCIMA s. 5(1) and (4)]

The Law Society has concerns about the breadth of "administrative action" and in particular "counselling action". It is the society's view that just about any conversation could constitute informal counselling. It is too broad in scope and left unchecked would result in a loophole that is open to abuse.

A good example in the Commonwealth Comcare scheme *is Reeve v Commonwealth Bank*. The employer argued in that case that administrative action referred to "…*every instruction given by the employer or action taken by the employer which relates to the performance of the worker's duties, whether directly or indirectly*"[1].

Whilst the decision ultimately set some boundaries, it shows how far employers will argue what constitutes administrative action. The society is concerned that if the bill does not confine what counselling action is, and what is not excluded with a degree of precision (the SRC Act is a good example of what not to do) there will be a significant increase in the prospect of unjust results because of how wide the net is cast and how far it will be pushed.

[1] See *Commonwealth Bank of Australia -v- Reeve* [2012] FCAFC 21

The explanatory memorandum to the *Safety, Rehabilitation and Compensation and Other Legislation Amendment Bill 2007* considered three options which were broadly – no change, an exhaustive list of exclusory provisions or a non-exhaustive list of exclusory provisions. Ultimately the Commonwealth went with option 3 which *Reeve* amongst other cases shows the problems which have occurred. The explanatory memorandum describes option 2 as:

> *An exhaustive list, as under Option 2, would provide certainty about particular actions and decisions which constitute reasonable administrative action. A list would also provide for clarity of workers' compensation eligibility and thus minimise the scope for uncertainty and disputation.*

The Law Society proposes that consideration be given to option 2.

Also, the proposed exclusion for administrative action has no application to workers who are working directors under the Act. The wording needs to be broadened to encompass this scenario. Other changes to the wording are also suggested for greater clarity.

The following alternative wording, is recommended:

7. Exclusion of injury: reasonable administrative action

(1) In this section —
administrative action includes any of the following actions and anything done in connection with—

- *a) an appraisal of the worker's performance;*
- *b) disciplinary or counselling action;*
- *c) the worker being suspended or stood down;*
- *d) reclassification or transfer of the worker;*
- *e) a decision not to give a promotion to the worker;*
- *f) a decision with regard to an application by the worker for leave;*
- *g) a decision not to confer to the worker, or allow the worker to retain, a benefit in connection with the employment;*
- *h) and, if the worker is a working director –*
- *i) liquidation or winding up of the employer;*
- *j) solvency of the employer;*
- *k) breach of, or any investigation into a breach of, a director's duty under any law.*

disciplinary or counselling action includes both formal and informal disciplinary or counselling
action provided that it relates to the performance or conduct of the worker and is carried out by a person who is authorised by the employer to manage the performance or conduct of the worker.

(2) A psychological or psychiatric disorder, including any physiological effect of the disorder on the nervous system, that a worker experiences is not an injury from employment if it results wholly or predominantly from —

(a) administrative action, not being administrative action of a kind described in subsection (1)(a), (b), (c), (d), (e), (f) or (g) that is unreasonable and harsh on the part of the employer; or
(b) the worker's expectation of administrative action or of a decision by the employer in relation to administrative action.

Clause 8 - Injury from employment: work related attendances [WCIMA s. 19(1)]

The Law Society broadly supports this amendment but is concerned that the way (b) is drafted it will exclude those workers who have exhausted the prescribed amount for medical and health expenses. The Law Society suggests the following amendment:

(b) while the worker attends at a place for any treatment of an injury or other purpose the cost of which is payable as compensation in respect of the injury or would be payable as compensation but for the worker exhausting the medical and health expenses general limit amount as defined in Clause 70. Clause 12 - Meaning of "worker" and "employer" [new provision]

The Law Society is gravely concerned about the change in definition of worker. The meaning of worker has long been litigated; however, we have experienced relative harmony in the last 15 years. The white paper proposed that "some" contract for service employees would be affected in the changes. The reality is with this change all contract for service employees would be affected.

Whilst WorkCover have been unable to provide the Law Society with the number of workers who would fall under this category, the Law Society estimates that it could be in the tens of thousands.

Contract for service workers are already vulnerable workers without superannuation, holiday pay or sick leave. The Law Society is concerned that this amendment will further encourage employers to enter sham employment arrangements with these workers to avoid insurance premiums.

We were advised by WorkCover that the proposed amendment has been adopted on the QLD legislation. Whilst the PAYG part has been adopted, the QLD legalisation does include a wider definition of worker and we would encourage the wider definition to be adopted.

The Law Society proposes an addition to the amendment, based on the QLD legislation as follows:

(4) A person who works a farm as a sharefarmer is a worker if—
(a) the sharefarmer does not provide and use in the sharefarming operations farm machinery driven or drawn by mechanical power; and
(b) the sharefarmer is entitled to not more than 1/3 of the proceeds of the sharefarming operations under the sharefarming agreement with the owner of the farm.

*(5) salesperson, canvasser, collector or other person (**salesperson**) paid entirely or partly by commission is a worker, if the commission is not received for or in connection with work incident to a trade or business regularly carried on by the salesperson, individually or by way of a partnership.*

(6) A contractor, other than a contractor mentioned in Clause 12A(4), is a worker if—
(a) the contractor makes a contract with someone else for the performance of work that is not incident to a trade or business regularly carried on by the contractor, individually or by way of a partnership; and
(b) the contractor—
(i) does not sublet the contract; or
(ii) does not employ a worker; or
(iii) if the contractor employs a worker, performs part of the work personally.

(7) A person who is party to a contract of service with another person who lends or lets on hire the person's services to someone else is a worker.

(8) A person who is party to a contract of service with a labour hire agency or a group training organisation that arranges for the person to do work for someone else under an arrangement made between the agency or organisation and the other person is a worker.

(9) person who is party to a contract of service with a holding company whose services are let on hire by the holding company to another person is a worker.

12A. Persons who are not workers

(1) A person is not a worker if the person performs work under a contract of service with—
(a) a corporation of which the person is a director; or
(b) a trust of which the person is a trustee; or
(c) a partnership of which the person is a member; or
(d) the Commonwealth or a Commonwealth authority.

(2) A person who performs work under a contract of service as a professional sportsperson is not a worker while the person is—
(a) participating in a sporting or athletic activity as a contestant; or
(b) training or preparing for participation in a sporting or athletic activity as a contestant; or
(c) performing promotional activities offered to the person because of the person's standing as a sportsperson; or
(d) engaging on any daily or other periodic journey in connection with the participation, training, preparation or performance.

(3) A member of the crew of a fishing ship is not a worker if—
(a) the member's entitlement to remuneration is contingent upon the working of the ship producing gross earnings or profits; and
(b) the remuneration is wholly or mainly a share of the gross earnings or profits.

(4) A person who, in performing work under a contract, other than a contract of service, supplies and uses a motor vehicle for driving tuition is not a worker.

(5) A person participating in an approved program or work for unemployment payment under the Social Security Act 1991 (Cwlth), Clause 601 or 606 is not a worker.

(6) A person is not a worker if—
(a) the person works for another person under a contract; and
(b) a personal services business determination is in effect for the person performing the work under the Income Tax Assessment Act 1997 (Cwlth), Clause 87-60.

Part 2 - Compensation for injury

Clause 20 - Employer must inform worker of right to claim compensation [New provision]

This is a significant new provision which the Act has never previously had or needed and is opposed for the reasons which follow.

Further, this new clause does not appear to be a recommendation from the 2014 review.

There is new and undefined language such as “becoming aware” and “may have suffered an injury” that is likely to be problematic.

For example, does a co-worker overhearing something constitute the employer “becoming aware”?

This clause will also present employers with a significant administrative burden.

Finally, the fine is significant and occurs, presumably, per breach.

The Law Society recommends that this clause is abandoned.

Clause 28 - Worker may give claim to insurer if employer defaults [New provision]

This clause establishes a legislative pathway for a worker to liaise directly with an insurer.

However, it is conditional on the Employer’s non-compliance or “default”.

It may not always be clear to a worker that the employer has, in fact, defaulted.

How would a Worker know that the Employer has defaulted? If the answer is that they would have heard nothing about their claim, there may be other reasons for that. For example, an insurer’s default.

Further, a question might arise as to whether any deeming provision activates in circumstances where on an Employer’s default a worker fails to employ Clause 28.

The Law Society recommends that this provision be abandoned due to the uncertainty it will generate, especially in regard to provisional payments.

Clause 33 - Worker to provide information about other employment [WCIMA s. 59]

This clause dramatically revises Clause 59.

It appears to apply to any worker who has made an incapacity claim whether accepted or not.

Critically, there is no requirement that an Employer is to advise a Worker of their obligations under clause 33.

Coupled with this is a penalty fine of $5,000.00 (as opposed to the present $500.00).

The content of the Notice and the time for issuing the Notice is silent and deferred to regulations.

Given the significant fine to be imposed on a worker for non-compliance, it is recommended that the requirement of an employer to notify be re-instated.

The Law Society recommends that the existing section 59 be carried over into the Bill, subject to the introduction of a prescribed form for requests.

Clause 34 - Authority for collection and disclosure of information [New provision]

The first difficulty with this proposed section is its high dependency on presently unwritten regulations.

For example, at Clause 34(1) “*authorised discloser*” is defined to be any person specified in regulations. Will these regulations include a previous employer? A general practitioner (or other

such medical practitioner)? An allied health professional? A marriage counsellor? An insurer against whom a previous claim has been made? A Coroner?

The possibilities are endless, if the intention is to have a "*one-size-fits-all*" scheme for collection and disclosure of information.

For another example, see Clause 34(1) and the definition of an "*authorised recipient*". Again, this is to be specified in the regulations. Information pertaining to injuries is inherently private. The regulations would have to provide for an insurer, their lawyer, the insured, an IME (possibly multiple IMEs), a rehab provider etc.

Without the regulations it is presently impossible to understand the reach of Clause 34. See also Clause 34(3) as the "*form and manner of collection*" and the "*limitations on the relevant information*".

The second difficulty is the definition of "*relevant information*" being that "*relating to…the injury….the claim or injury management*". The words "*relating to*" are undefined. Does a clinical note of a pre-existing symptom "*relate to*" a "*worker's injury*" if it predates that injury by 1 year or 2 years?

The third difficulty with the proposed Clause 34 is the absence of a procedure to enable an interested person from challenging the request or, indeed, the sufficiency of provided documents.

The present scheme, whilst imperfect, allows for permission to be provided by a worker and for an Arbitrator to determine questions of relevancy weighed against the dispute resolution imperatives of the Act. Each claim has its own peculiarities that can be determined on a case-by-case basis. An Arbitrary scheme applying to all claims is inadvisable and likely to cause unfairness, privacy breaches and prejudice to scheme participants.

The Law Society recommends deletion of Clause 34 in favour of the present scheme.

Clause 64 - Reducing or discontinuing income compensation on basis of worker's return to work [WCIMA s. 61]

Please see discussion on Clause 165 below.

Clause 65(6) - Reducing or discontinuing income compensation on basis of medical evidence [WCIMA s. 61]

This clause enables a Conciliation Officer to suspend/reduce payments on a worker's responsive Section 61 application.

The difficulty is that upon receipt of a s.61 Notice the worker must confer and bring an application within 21 days.

Once the application is brought it will proceed to Conciliation Conference.

The time sensitive nature of the process together with doctors' wait lists, makes it likely that a worker will not have obtained a responsive medical report by the first conciliation conference.

Thus, the only evidence before the Court will be from the employer.

Giving the Conciliation Officer power to order interim suspensions will likely lead to unfairness and is inconsistent with present practices.

The Law Society recommends that Clause 65(6) be omitted from the Bill.

Clause 69 - Power of arbitrator to review disputed income compensation payments [WCIMA s. 62]

This clause introduces a new term into Clause 62 applications, namely, “adjusted”.

The present language is “reduced or increased”.

It is recommended that existing language is maintained.

It is also recommended that Clause 69(2) ends after ‘as the arbitrator considered appropriate’ and the words ‘having regard to the past or present condition of the worker’ be deleted as these words unnecessarily limit the arbitrator. The reason for this is that the Law Society considers that s.60 in the Act is an important provision which is not replicated in the Bill. The position of the Law Society is that an equivalent provision to s.60 should be included.

Clause 148 - Restrictions on when application for registration of 11 settlement agreement can be made [WCIMA s. 67(1)]

Settlement of claims without (or during) legal proceedings is beneficial to all scheme participants.

For injured workers, settlement provides an opportunity to exit the difficulties of the scheme (i.e., incurring the cost of lawyers, attending medico-legal appointments, participating in legal proceedings etc). For insurers, settlement enables cost and risk minimisation. For employers, settlement enables a return to productivity following the inherent disruption of a work-place injury.

Early settlement, as a form of dispute resolution, reduces the burden on the scheme and is consistent with the objectives of the Act (i.e., quick, economical, informal etc).

Clause 148(1)(a) introduces a significant imposition to settlement.

The requirement that a settlement only occur where liability is accepted or determined will inevitably reduce settlements such that claims will proceed to litigation and then determination. This will increase costs for workers and insurers. This will burden the dispute resolution system.

Clause 148(1)(b) introduces another significant imposition to settlement in precluding settlements before the expiration of 6 months post injury. No argument has been advanced to support a 6-month milestone. Scheme participants should be free to negotiate terms inside 6 months should they chose to do so and in circumstances where early settlement is warranted.

Another significant difficulty exists with Clause 148(2) which provides for exceptions to be made in regulations.

Regulations are presently unwritten and compromises an understanding how Clause 148 will work in practice.

The Law Society recommends that the following special circumstances listed in the 2014 report should be exceptions that are included in the primary legislation:

- a claim by a worker under a temporary work visa (subclass 457) where return to work is not possible or the worker is required to return to their country of origin;

- the claim has been accepted and the worker is leaving the Commonwealth either permanently or indefinitely; 127 Review of the Workers' Compensation and Injury Management Act 1981: Final Report Part 2 Compensation
- a cross border claim where liability is contested in more than one jurisdiction
- a claim relating to an asbestos related disease;
- any claim where a medical practitioner certifies the worker's death is imminent;
- where the claim relates to a psychological injury and a medical practitioner certifies that delayed resolution of the claim is likely to be detrimental to the worker's health;
- a Conciliation Certificate of Outcome has been issued.

Part 3 — Injury management

Clause 165 (and 64) - Suitable employment

The definition of 'suitable employment' in clause 165 includes modified duties that are created specifically to accommodate an injured worker's restrictions.

According to the definition of 'return to work' in clause 5, an injured worker is taken to have made a 'return to work' if they are engaged in 'suitable employment'. In contrast under the current scheme, a worker undertaking a RTWP on restricted duties is still considered to be entitled to receive weekly compensation as they have not returned to work.

The intent of this change seems to be confirmed by the Guide to the amendments which says on p.22: "No income compensation is payable for a time during which a worker earns, or is able to earn, in suitable employment an amount equal to or greater than the amount of income compensation that would apply if the worker were totally incapacitated".

This represents a significant departure from the current scheme. It means that a worker on a RTWP with the employer, doing pre-injury hours, should no longer be in receipt of weekly payments because they are doing 'suitable duties'.

This change needs to be interpreted alongside Clause 64 which replaces the current Clause 61. It allows the employer to give a worker notice in an approved form of their income compensation payments reducing or discontinuing on the basis of the worker's return to work.

There are significant flow on effects from this change to the scheme that are best illustrated by an example. John is a patio installer whose job involves giving quotes and estimating and installing new patios. Because of an injury he is certified as unfit for lifting more than 5kg, which means he can do the estimating role, but no installations. Under a return-to-work program he is doing the estimating role only, plus some administrative duties, full time. The employer does not want to issue a notice under Clause 64 because it prefers to be indemnified by its insurer for the income compensation it is paying. It has to employ others to carry out the patio installations that John is unfit for. The insurer wants to issue a notice to John under Clause 64 because the worker has returned to suitable employment, and it no longer wishes to incur the expense of the claim. How is this conflict of interest between the employer and insurer to be resolved?

Further, John does not wish to be on income compensation payments because this is using up the prescribed amount and he wants to preserve his entitlements in case of future incapacity or for permanent impairment compensation. This could result in workers issuing applications under Clause 69 to have income compensation payments ceased, i.e., resumption of wages, with insurers consenting to the orders sought and the employer opposing.

The only kind of 'suitable duties' that the Bill envisages do not warrant payment of wages is for work that is 'token in nature' or does not involve 'useful work' (clause 165(4)). These terms are not

defined. Expect to see employers, workers and insurers in dispute as to whether the duties under a RTWP are useful or token.

The overall effect of John going back onto wages instead of income compensation when he can only do 30% of his normal job is that the employer bears the burden of his partial incapacity. This becomes a 'hidden' cost to the scheme. What was once an indemnified loss for employers (wages paid to restricted workers were recouped) is now effectively uninsured. Placing the burden of a restricted workforce on employers, particularly smaller employers who cannot afford the added cost of doing business, will likely result in more industrial action taken with dismissal of injured workers upon expiry of the 'employment obligation period'. Otherwise, John's claim could remain open for a very long time. He may never exhaust the prescribed amount if he remains on wages. One of the advantages of the current scheme is that the incremental 'use' of the prescribed amount in the course of a RTWP by a restricted worker places a finite life on the claim – weekly payments eventually run out and the resolution of the claim by redemption, while funds remain, is a means of enabling workers to exit the scheme.

The 'suitable employment' definition also creates a reasonable argument for insurers to decline claims for income compensation from the outset. So long as the worker is not certified as totally unfit or with reduced hours, the insurer may take the view that the worker can be accommodated by the employer in a specifically modified but useful role doing pre-injury hours. Declining liability for income compensation also avoids the new provisional payments and deemed liability acceptance provisions.

Another concern is Clause 165(2) which relates to the situation where the worker returns to work in suitable employment with a different employer. It is unclear as to how the employer at the time of the injury is supposed to verify what the worker is earning in the new employment. There is no new equivalent to the current Clause 59(5). Employers should be equipped with a means of obtaining wage details from a worker who has entered new employment and a specific form should be prescribed for this.

It is recommended that this clause be abandoned.

Clauses 160, 162 and 163

The former Act provision, section 156B gave the employer the right to apply for an order by an arbitrator requiring a worker to participate in a return-to-work program. The new clause 160 only gives the worker the right to apply to an arbitrator for orders in respect of a return-to-work program.

It is still necessary to have a provision that allows an employer to make such application. Clause 163 purports to give arbitrators the power to make orders that a worker comply with a duty under Clause 162, but nowhere is it stated that an employer can make such application seeking orders. Clause 163 should include as the first sub-paragraph:

(1) *An employer may apply for an order of an arbitrator in respect of a failure to comply with a duty of the worker under Clause 162.*

In addition, clause 160 should include:

(4) *An employer may apply for an order of an arbitrator in respect of the content of a return-to-work program if, after consultation with the injured worker and the worker's treating medical practitioner, the content or implementation of a return-to-work program cannot be agreed upon.*

Further, there needs to be an express provision that applications by workers and employers with respect to return to work programs proceed directly to an arbitrator and bypass the conciliation phase. The ineffectiveness of current injury management provisions has primarily been on account of the time and costs of going through the process of conciliation when by its very nature the dispute is not one that is amenable to resolution by such means.

Part 5 - Insurance

Clause 224 - Contractor remuneration information [New provision]

The new clauses 224 and 206 have the effect that if a principal can't prove that its contractors have a WC policy containing a principals indemnity endorsement then they must declare all of the contractors' workers' remuneration as if they were their own employees and be charged premium on such basis. This is an unnecessary burden to place on principals.

If a contractor holds a WC policy, the provisions of s.218 (former 175) will not operate. That is, there is no need for a worker to pursue a principal as a deemed employer if the contractor who employed the injured worker was insured. The worker's claim will just be made against their employer, being the contractor. That is the end of matter. Clause 218 doesn't come into play. There should be no difficulty with identifying who the employer of an injured worker is, particularly given the narrowing of the definition of 'worker'.

It unnecessarily complicates the scheme to introduce the concept of a 'principals indemnity endorsement' and creates an additional cost for contractors who will undoubtedly have to pay extra for getting the endorsement added to their WC policy. However, the endorsement serves no real purpose – they hold a WC policy, so the principal will not be called upon.

Potential costs aside, to require under Clause 224 that a principal declare the remuneration of the employees of contractors is a significant administrative burden. On a large project, there can be a large number of contractors, and those contractors may themselves each have a large workforce, with varying numbers of employees dedicated to the principal's project at any one time. This seems extremely onerous.

It should be enough for the principal to avoid having to declare contractors' employees' remuneration to simply be able to prove that each contractor holds a current WC policy. Clause 224(2) could be amended to read:

> *(2) A principal is not required to comply with a requirement under Clause 206 in respect of remuneration of a contract worker of the principal if the principal can show, upon applying for the issue or renewal of a workers' compensation policy, that the contractor who employs the worker holds a workers' compensation policy that is current during the relevant period.*

Principals could be further incentivised to ensure all contractors hold WC cover by removing the principals right of indemnity from the contractor under clause 220. If a principal engages a contractor and fails to ensure that the contractor holds WC insurance, what is the logic of allowing the principal to pursue the contractor for recovery of claim costs? The potential of having to bear the contractors' workers' claims themselves would make principals more vigilant about ensuring all contractors hold WC cover.

It is the position of the Law Society that this new position unnecessarily complicates current arrangements and if the Clause is maintained the Law Society recommends the amendment to clause 224 above.

Part 6, –Dispute Resolution

Clause 358 Publication of decision and reasons [new provision]

The Law Society supports the publication of decisions and reasons. Public decisions would be edifying for all parties to workers compensation matters. However, the total discretion of the Registrar to publish and redact information may dimmish the usefulness of this provision. Although it is sensible that some information on particularly sensitive matters be limited, this should not be cause to not publish any reasons whatsoever.

Clause 402 - Costs Committee established [WCIMA s. 269]

The Law Society has always questioned the need for a body to make determinations for costs of legal services other than the Legal Costs Committee (which makes determinations for all other legal costs in this State). The only justification for a separate body would be that disputes about workers' compensation matters require special knowledge of the processes involved.

Given that, it is surprising that the current s269 does not ensure that the (WorkCover) Costs Committee contains at least one person with experience in WorkCover dispute resolution. The Law Society has in the past made submissions about the consequences of that.

The new clause 402 has modified s.269 but not in that respect.

We would propose that clause (3)(c) be modified so as to provide for only one member of the Legal Costs Committee and that there be added:

(d) *one member nominated by the Law Society as being a legal practitioner with experience in dispute resolution in relation to claims for compensation.*

Part 7 — Common Law

General

Comments are only made on provisions of the Bill that do not directly correspond with provisions of the WCIMA.

The *Workers' Compensation and Injury Management Act 1981* ("WCIMA") deals with the various issues that arise in relation to "common law" claims in Part IV entitled "Civil proceedings in addition to or independent of this Act." Part IV in turn consists of Division 1 – General, Division 1A – Choice of Law and Division 2 – Constraints on awards of common law damages.

Part 7 of the Bill deals with the various issues that arise in relation to "common law" claims in five Divisions: – 1 – General, 2 – Constraints on Common Law Proceedings. 3 – Prevention of Double Recovery, 4 – Remedies against Third Parties and 5 – Choice of Law.

Clause 412 References to employer include persons vicariously liable [WCIMA s. 93B(4)]

The Law Society has some discomfort with Clause 412(a) which is a new addition to the existing s.93B(4). Who exactly is 'vicariously liable for the acts of the employer'. is unsettled at law and inclusion of this provision could result in uncertainty for parties to workers compensation matters until an authoritative judicial interpretation of the provision is arrived at.

The Law Society recommends the existing formulation in section 93B(4) is retained.

Clause 416 - Damages to which this Division does not apply

The Division does not apply to damages award to a person who is the worker's "deemed employer", or against a person for who actions the deemed employer is vicariously liable. Like many clauses within the Bill, a provision is included enabling regulations to also exclude from the application of the Division, an award of damages of a certain class.

Clause 417 - Application of Division depends on when cause of action accrues

The provisions are retrospective. The Law Society, in principle, does not support retrospective legislation.

Clause 419 - No damages for noise-induced hearing loss

No damages for noise induced hearing loss, as distinct from the WCIMA which qualifies a similar provision by adding after "noise induced hearing loss,", the words "that is not an injury".

Clause 420 - No damages if compensation settlement agreement 17 registered

No damages can be awarded if a settlement agreement has been registered (excluding a settlement of dust diseases impairment compensation). That this provision may not apply to permanent impairment compensation is not made clear.

Clause 421 - Threshold requirements for commencement of proceedings and award of damages

Significant departure from the corresponding provisions of the WCIMA in providing that "court proceedings in respect of an award of damages must not be commenced…" Clause 93K(4) of the WCIMA provides that "damages ...can only be awarded if…". Clause 421 is said to apply to an award of damages by way of consent judgment "or settlement of an action". Therefore, there can be no consent judgment without an election by the worker.

Under s93L of the WCIMA the worker may elect on the basis of an agreement between the employer and worker as to the worker's level of permanent whole of person impairment. Under clause 421(1), the impairment must be assessed.

The Law Society does not have an issue with limits being placed on common law claims provided that the pathway for statutory claims and settlement pathways are available. If there are limitations on both statutory and common law settlements, the inevitable consequence will be that more matters are fully disputed, increasing pressure on a justice system already under strain and increasing costs for the parties. This in turn has deleterious consequences for access to justice.

Clauses 429 – 432

There is no material difference between the effect of these provisions and the effect of s.92. In particular, clause 432 is comparable to s92(f) in providing that in the event of a settlement of a common law action by agreement, the worker may not commence or continue proceedings in relation to compensation for the injury.

However, the combined effect of the provisions in Division 2 and Division 3 mean that a settlement agreement between a worker and an employer will not end a statutory claim for compensation unless an election for common law has been registered.

By contrast if the action for damages was brought against a third party and settled by agreement, then clause 432(1) would take effect. That is, the originally intended effect of s92(f) will be

preserved even though the primary use to which it has been put in recent years will no longer be available unless an election has been made.

Clause 439 – Applicable substantive law for work injury claims

Choice of law provisions are substantially the same as under the WCIMA, with the addition of clause 439(3)(c) providing that being a participant in a scheme for catastrophically injured workers does not exclude an entitlement to workers' compensation.

Jocelyne Boujos
President