



WORKCOVER BOARD – GOVERNING LEGISLATION

Workers Rehabilitation and Compensation Amendment Bill 66 of 2016

Abstract

Comments from Medical Practitioner, Dr Peter Sharman, Occupational Physician in relation to governing legislation for the Tasmanian WorkCover Board - May 2017

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Executive Summary

There are escalating concerns about “Work Disability” across Australia with estimated costs to industry of \$25 billion per annum, in addition to the escalating costs borne by our health care system. These issues will become increasingly important with an ageing workforce and the need to manage degenerative and metabolic disorders in an employment context.

There are concerns within the Tasmanian medical and rehabilitation community about the Tasmanian Workers Compensation System with inadequate attention to ‘health outcomes’ for injured workers. There has not been consultation with stakeholders about proposed changes to the structure and arrangements for appointments to the WorkCover Board, which go well beyond Red Tape Reduction.

The broad concept of a “skills-based” WorkCover Board is supported by the current wording of the amendment legislation however the legislation in its current form lacks detail about the principles of a multidisciplinary board and the type of expertise required to address the challenges within the worker’s compensation system that currently exist and for the future. A broad set of skills, particularly in relation to evidence-based management of work disability and data analysis, is necessary to meet those challenges.

Some Tasmanian Statutory Authority Boards already reflect the principle of a “skills-based” board in their governing legislation and include detail about the types of expertise required. Interstate WorkCover Boards (or their equivalents) are also constituted using “skill-based” principles although representatives of workers and employers still have a role. Western Australia has an underwritten Workers Compensation Scheme like Tasmania. Their model suggests a ‘hybrid’ approach with provision for appointment of a person experienced in “worker’s interests” and “employer’s interests” to the Board, in addition to a requirement for more specific technical skills.

It is vitally important that the future WorkCover Board have a range of skills, knowledge and experience to fulfil its legislated functions, including:

- Policy relating to workplace health & safety legislation and rehabilitation and compensation legislation
- Prudent management of finances under the Board’s control
- Develop strategies related injury prevention and development of safe and healthy workplaces
- Facilitate arrangements for effective injury management and support for Return to Work (RTW) for injured workers
- Monitor performance of service providers, including licenced insurers and self-insurers
- Collect and publish statistics relevant to the functions of the Board
- Education about Workplace Health & Safety Legislation

To align with these functions, it would be prudent to include in the legislation reference to the principle of a multidisciplinary board with reference to the types of expertise necessary to fulfil those functions. For example, it would be useful to specify, not only insurance (including self-insurance) expertise, accounting/financial management expertise, practicing medical, rehabilitation and legal expertise, but also include a person with expertise in the evidence base related to management of work-related injury and advocates (or at least a person “experienced in injured workers interests” and a person “experienced in employers interests”) for the “consumers” of the system i.e. injured workers and employers.

The legislation should also specify that appointees have current up-to-date knowledge preferably from recent practice in their relevant discipline. There should also be provision for “merit-based” appointment with consultation with representative groups and provision to allow for 3-yearly review of appointments.

Background

The **Workers Rehabilitation and Compensation Amendment Bill 66 of 2016** is due to be debated shortly in the Legislative Council. I wanted to bring to the attention of the Legislative Council my perspective as a medical and rehabilitation practitioner working within the system that operates under the legislative framework of the Workers Rehabilitation and Compensation Act, overseen by the WorkCover Board.

There are escalating concerns about “Work Disability” across Australia. Tasmania is not immune to this impact on its workforce with associated costs to industry and effects on productivity, in addition to the costs on our health care system. These issues will become increasingly important with an ageing workforce and the need to manage age-related degenerative and metabolic disorders (including diabetes and obesity) in an employment context.

Australia’s leading researcher in this field, Professor Alex Collie at Monash University, has recently authored an article “Work Disability in Australia”. He estimates that the direct cost to Australian society of income replacement alone for Work Disability is about \$25 billion per annum. Claims for income benefits are made through a maze of insurance schemes including the Disability Support Pension, Workers Compensation, Life Insurance and Motor Accident Insurances Schemes. He argues that given the scale of this public health problem there should be a well-coordinated, evidence based approach to prevention and management, but this does not currently exist in Australia.

There are concerns within the Tasmanian medical and rehabilitation community that the existing Board has not given adequate weight to “health outcomes” in the Tasmanian Workers Compensation System. There is reliance by the current Board on limited published data interpreted as indicating an adequately performing system, whereas many health professionals are witnessing a high rate of poor health and RTW outcomes in the 5-10% of cases that become “complex”. Researchers are highlighting the deficiencies of the existing data gleaned primarily from insurance and financial systems and highlighting the negative impact of compensation systems on health outcomes.

Minister Barnett’s Draft Second Reading Speech includes the following:

“Madam Speaker, the amendments have been presented following comprehensive consultation with key stakeholders of the rehabilitation and compensation sector together with the broader community. ”

While there has been comprehensive consultation with key stakeholders in relation to the “Red-Tape Reduction” measures, I am not aware that there has been such consultation in relation to the most significant aspect of this amendment bill, the proposed changes to the structure and

arrangements for appointments to the WorkCover Board, which go well beyond Red Tape Reduction. To quote from the Draft Second Reading Speech:

“Madam Speaker, the form and function of the WorkCover Tasmania Board will be refined and provisions which have proved particularly onerous or unnecessarily complex will be amended. The membership and voting structure of the Board will be redesigned to ensure all members are equipped with the necessary skills and experience to advise and make decisions.”

Changes to the structure of the Board are necessary as outlined in the bill fact sheet:

“Amend the membership and voting structure of the WorkCover Tasmania Board to ensure the Board is equipped with the necessary skills and experience to provide advice and make decisions on the broad range of matters within its scope. ”

The Clause Notes to the amendments however state:

“After commencement of the Act, the Board will comprise of two Departmental staff (including the Secretary) and five persons appointed by the Minister.”

The major concern about the Amendment Bill is not the change to a “skills-based” board or changes to voting rights per se, but the absence of detail in the legislation about the type of expertise required on the Board and provisions related to Board positions. There is no detail about the necessary expertise of the five persons to be appointed by the Minister, except the retention of the following broad requirement of Section 9(5) of the Act:

“In nominating a person for appointment as a member of the Board, the Minister or the Secretary, as the case may be, is to take into account –

- a) The functions of the Board; and*
- b) The skills required of a member to enable the Board to carry out its functions effectively”*

The changes, as they stand, could lead to a future minister appointing a Board with a narrow set of skills, to the detriment of an effective workers’ compensation scheme for Tasmania and the challenges faced for the future. A broad set of skills, particularly in relation to evidence-based management of work disability and data analysis is necessary to meet those challenges.

Discussion

Current Tasmanian WorkCover Board Governance

The current functions of the WorkCover Board, as defined in existing legislation are set out below:

10. Functions of Board

In addition to the functions conferred or imposed on it by any other provision of this Act or any other Act, the Board has the following functions:

- (a) to make recommendations to the Minister on –
 - (i) the policy and objectives of legislation relating to workers rehabilitation and compensation and workplace health and safety in this State; and
 - (ii) the amendment or replacement of that legislation;
 - (b) to monitor and report to the Minister on the operation and effectiveness of that legislation and on the performance of the systems to which the legislation relates;
 - (c) to monitor and review the Department in connection with the exercise of powers and the performance of functions under this Act and the *Workplace Health and Safety Act 1995*;
 - (d) to control and administer the Fund;
 - (e) to promote the prevention of injury at the workplace and the development of healthy and safe workplaces;
 - (f) to promote and support the purpose and principles of *Part XI*;
 - (g) to review and monitor the performance of licensed insurers and self-insurers and the operation of the Nominal Insurer;
 - (h) to review and monitor premium rates and, so far as is practicable, ensure insurance arrangements are efficient and competitive;
 - (i) to collect and publish statistics on any matter the Board considers necessary or relevant to the performance of its functions under, or the administration of, this Act;
 - (j) to promote understanding of this Act and the *Workplace Health and Safety Act 1995* through education and any other appropriate means;
 - (k) to advise the Minister on any matter relating to this Act that the Minister refers to the Board;
 - (l) to issue guidelines for the assessment of permanent impairment under this Act;
 - (m) such other functions as may be prescribed.
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The proposed amendments to Section 10 above include deletion of (c) and (h) and changes to (f) as follows:

“to promote and support injury management and to encourage and support the return to work of injured workers as soon as possible”

The current Board consists of 2 voting members from the TCCI and 2 from Unions Tasmania, with non-voting legal, insurer and medical representatives with the Secretary of Justice as Chairperson. The voting rights and Union and Employers representative roles are delineated in the current legislation.

With my role as a medical practitioner working within the scheme to support recovery and rehabilitation of injured workers and my involvement in various committees relevant to these matters, I am aware that the current Board arrangements seem to have impeded evidence-based reform. I have seen evidence of Board disinterest and, at times, undue resistance to evidence-based reform. (Refer Appendix 1). This probably reflects an imbalance in expertise, deficiencies in skills/expertise/current knowledge or issues with voting rights, particularly in relation to injury management and rehabilitation practice, research knowledge and data analysis. While some

measures have been proposed and apparently accepted to address these imbalances, there have been delays in implementation.

From the perspective of the medical and rehabilitation professions, these concerns apply particularly to the Board functions relating to injury management and return to work, as defined in the WorkCover Board's 5th (and last) listed Strategic Objective - "A Fair and Equitable Compensation System".

This issue may have been recognized by the current government with their proposals for a change to a skill-based board, however the way the current amendments are framed has the potential to make the situation worse, depending on the approach taken to implementation.

Tasmanian Statutory Boards

It is instructive to consider the governing legislation relevant to other Statutory Boards in Tasmania.

Review of the legislation relating to Statutory Boards in Tasmania indicates that there are both “Skills-based” and “Representative” Board structures in such organisations.

The Guardianship and Administration Board, for example, provides an example of a “skills-based” board as follows:

“Board Members are appointed on the basis of their understanding of the underlying principles of the Act, excellent oral and written communication skills and analytical skills. Our Board Members have an extensive range of skills, qualifications and experience with people with disabilities across the health, disability, aged and community sectors, or have legal skills and experience. Having a multi-disciplined Board ensures that not only legal issues raised in the Applications before the Board are determined, but a holistic approach to decision-making can be achieved”

and

“Members of the Board are persons appointed by the Governor of Tasmania for their skills and expertise in making decisions about persons with disabilities. The Act requires that there be 5 members of the Board and a President and Deputy President. The President is a lawyer and other members may have skills and experience in accounting, social work, legal practice, health and welfare services.”

The Parole Board is also constituted using similar principles:

“(a) One person is to be a person who has practiced as a legal practitioner or barrister of the Supreme Court or of a Supreme Court of any part of the Commonwealth other than this state for at least 7 years and has never been suspended from practice, had his or her name removed from, or struck off, the roll of that Court or has been disbarred: and

(b) Two are to be persons whom the Governor is satisfied or experienced in matters associated with sociology, criminology, penology or medicine or who possess any other knowledge or experience that the Governor considers is appropriate for the purpose

The Local Government Board provides an example of a representative Board:

“Under Section 210(2) of the Act, the Board consists of:

- *The Chairperson*
- *One person nominated by the Local Government Association of Tasmania (LGAT)*
- *One person nominated by the Local Government Managers Australia (Tasmania) (LGMA)*
- *The Director of Local Government or his or her nominee”*

Interstate WorkCover Authorities

In WA and NT (the 'Underwritten' jurisdictions) the WorkCover Authorities oversee private insurance arrangements for worker's compensation coverage, similar to that in Tasmania.

The governing legislation in WA states:

WorkCover WA Board

The WorkCover WA Board, under section 95 of the *Workers' Compensation and Injury Management Act 1981*, consists of the Chairman and six members:

- One person appointed by the Governor on the recommendation of the Minister as a member and chairman of the Board and referred to as a nominee member.
- The Chief Executive Officer of WorkCover WA.
- The Chief Executive Officer of the department of the public service of the State principally assisting the Minister charged with the administration of the *Occupational Safety and Health Act 1984*.
- Four people appointed by the Governor, on the recommendation of the Minister, as members of the Board and referred to as nominee members of whom: one is a person experienced in employers' interests; one is a person experienced in workers' interests; one is a person experienced in insurance matters; and one is a person experienced in accounting and financial management.

In the more populous mainland states, claims agents manage worker's compensation on behalf of the Government Worker's Compensation Scheme. In NSW, the functions equivalent to those of the Tasmanian WorkCover Board have been broken up into 3 separate organisations, SafeWork NSW, State Insurance Regulatory Authority (SIRO) and iCare. iCare delivers insurance and care services under the NSW Workers Compensation scheme and the Motor Accident Insurance Scheme. The iCare Board governing legislation states:

5 Board of directors of ICNSW

- (1) There is to be a board of directors of Insurance and Care NSW.
- (2) The ICNSW Board is to consist of the following directors:
 - (a) the chief executive of ICNSW,
 - (b) up to 8 other directors appointed by the Minister (the **appointed directors**).

Note. Schedule 1 contains provisions relating to the board of directors of ICNSW.
- (3) The appointed directors are to be persons who, in the opinion of the Minister, together have skills and experience relevant to the administration of State insurance and care schemes and that will assist ICNSW in exercising its functions.
- (4) A person who is an appointed member of the SIRA Board is ineligible to be appointed as a director of the ICNSW Board.
- (5) In exercising his or her functions as a director of the ICNSW Board, the director is to exercise the degree of care and diligence that a reasonable person in a like position would exercise in the circumstances. ^

In South Australia, the equivalent of the Tasmanian WorkCover Board, The RTW SA Board has the following governing legislation:

Division 2—The board of management

5—Constitution of board of management

- (1) The Corporation is managed by a board of management.
- (2) The board consists of 7 members appointed by the Governor on the recommendation of the Minister.
- (3) At least 3 members of the board must be women and at least 3 members must be men.
- (4) The Governor will, on the recommendation of the Minister, appoint 1 member of the board to chair its meetings.
- (5) The Minister may grant a member of the board leave of absence from the board and appoint a suitable person to act as a member of the board during that period of absence.
- (6) A person appointed to the board—
 - (a) must have such qualifications, skills, knowledge or experience as are, in the Minister's opinion, relevant to ensuring that the board carries out its functions effectively; and
 - (b) must at all times act professionally and in accordance with recognised principles of good corporate governance.

This governing legislation suggests a “skills-based” rather than “representative” Board structure in the jurisdictions referred to above, with the WA model suggesting a hybrid approach to some extent with provision for appointment of a person experienced in “worker’s interests” and “employer’s interests”. While there maybe appointments based on Union and Employer representation on these Boards, the governing legislation itself does not require this.

Recommendations

It is vitally important that the future WorkCover Board have a range of skills, knowledge and experience to fulfil its legislated functions, including:

- *Policy relating to workplace health & safety legislation and rehabilitation and compensation legislation*
- *Prudent management of finances under the Board's control*
- *Development of strategies related injury prevention and development of safe and healthy workplaces*
- *Facilitate arrangements for effective injury management and support for Return to Work (RTW) for injured workers*
- *Monitoring of performance of service providers, including licenced insurers and self-insurers*
- *Collect and publish statistics relevant to the functions of the Board*
- *Education about Workplace Health & Safety Legislation*

To align with the Board Functions as detailed in the legislation, it would seem prudent to include in the legislation reference to the intention to appoint a multidisciplinary board and refer to the types of expertise necessary to fulfil those functions. For example, it would be useful to specify, not only insurance (including self-insurance) expertise, accounting/financial management expertise, practicing medical, rehabilitation and legal expertise, but also include a person with expertise in the evidence base related to management of work-related injury and advocates (or at least a person "experienced in injured workers interests" and a person "experienced in employers interests") for the "consumers" of the system i.e. injured workers and employers. The legislation should also specify that appointees have current up-to-date knowledge preferably from recent practice in their relevant discipline. All Board members should have voting rights, in accordance with usual principles.

There should also be provision for "merit-based" appointment including consultation with representative groups and provision to allow for 3 yearly review of appointments to ensure an appropriate mix of up-to-date skills is retained by the Board and avoid the automatic reappointment of Board members without critical appraisal of the skills needed in a dynamic and changing environment. Measures need to be retained to address potential for duality of interest for WorkCover Board members.