



Workers Compensation and Injury Management Bill 2021 (Consultation Draft)

Australian Rehabilitation Providers Association (ARPA) WA Submission

| Bill Clause | Comments |
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| | <p>The Australian Rehabilitation Providers Association (ARPA) WA welcomes the opportunity to comment on the consultation draft of the Workers' Compensation and Injury Management Bill 2021.</p> <p>ARPA WA is the Workplace Rehabilitation Provider (WRP) industry representative body of accredited WRPs.</p> <p>Our Association supports the intention of the government to modernise the existing Act and to deliver on its election commitment to ensure injured workers receive an appropriate level of support to return to work from both a personal and financial position.</p> <p>Our members are committed to supporting all Western Australians enjoy the health and wellbeing benefits associated with work. We also have a practical understanding of the negative impacts associated with any long term work absence, work disability or unemployment.</p> <p>General</p> <p>In order for the dignity of work to be respected and protected, workers require robust and practical safeguards as they navigate the complex process of injury management and the return to work.</p> <p>While the majority of the proposed changes to the Workers' Compensation and Injury Management (1981) Act (the Act) are welcome and improve the position of the worker in receiving financial and medical support, ARPA WA has identified several areas of concern.</p> <p>Our comments on the consultation draft are designed to be constructive and improve the overall effectiveness of the Bill, ensuring that unintended consequences are addressed and the rights, welfare, and choices of the worker remain paramount.</p> <p>Reclassification and relegation of workplace rehabilitation</p> <p>ARPA WA contends that it is critical for the successful functioning of any workers' compensation scheme that rehabilitation is recognised as a central plank in the process of helping workers return to full health and, where possible, return to work. It is also essential the WA scheme maintains the independence of WRPs as a central tenant of the legislation.</p> |

Unfortunately, these ambitions are not reflected in the Draft Bill.

The Draft Bill effectively reclassifies rehabilitation from being an entitlement, like wages and medical costs, to being an expense, and relegates it from the head legislation to subsidiary regulations not yet drafted.

No compelling reason has been provided to justify removing rehabilitation from the head legislation in the Draft Bill, and there are several adverse consequences which arise from this action.

ARPA WA believes the proposed reclassification of rehabilitation will significantly reduce the choices available to workers in regard to rehabilitation and potentially impede their return to work.

Under existing legislation, it is clear to injured workers that they enjoy a right to access workplace rehabilitation services. This right is neither limited nor encumbered by third parties. It is enshrined in legislation and stands immutable.

Language is powerful and while ARPA WA understands it is not the Government's intention to diminish or reduce worker's entitlements, there is the clear danger that describing rehabilitation as an 'expense' will result in workers perceiving this to be the case.

The best interests of both injured workers and employers are served when workplace rehabilitation is seen as an integral and positive service, equipping workers with the support they need to manage the recovery process and return to work in the timeliest way.

Recently, the McGowan Government introduced historic legislation providing compensation for police officers who are medically retired due to work-related injury or illness. Announcing the legislation, the Government specifically referred to the officers' entitlements, inclusive of entitlement to vocational rehabilitation expenses.

"The scheme has been specifically tailored for police and ensures there is no reduction to existing in-service and post-service entitlements for work-related illness or injury."

Premier's Media Statement - Landmark police compensation legislation introduced to Parliament, 21 October 2021.

Currently, the language used by WorkCover WA offers explicit assurance to workers that they have an entitlement to access workplace rehabilitation services.

Understanding your rights, obligations & entitlements

Understanding all of your workers' compensation and injury management rights, obligations and entitlements will help you navigate your way to a suitable resolution following an injury or illness in the workplace.

Workplace rehabilitation providers

Find out about your entitlement to engage a workplace rehabilitation provider and how they could assist with your return to work following an injury or illness in the course of your employment.

Workcover.wa.gov.au

ARPA WA believes it is critical for the successful functioning of any workers' compensation scheme that rehabilitation remain an entitlement and not be reclassified as an expense.

Further, we fear relegating rehabilitation to be dealt with in subsidiary regulations may allow for future manipulation and interpretation from stakeholders who may determine what is and what is not a reasonable expense.

While the proposed change to the treatment of worker rehabilitation may be informed by a desire to align with other schemes across the country and a perception that workplace rehabilitation is not paid direct to the worker, we do not believe this justifies treating it differently to access to medical practitioners. By removing workplace rehabilitation from the Act and treating it as an expense rather than an entitlement, a clear unintended consequence is that it will reduce access to essential rehabilitation services and related choices available to the injured worker.

Any suggestion that the reclassification is warranted due to the majority referrals to WRPs being initiated by insurers is also incorrect.

ARPA WA members can provide examples of many cases in which a referral has been initiated by another party (not the insurer), yet the data submitted to WorkCover indicates that it is an insurer referral. Referrals for service come from a diverse range of stakeholders including employers, medical practitioners and workers' representatives in addition to insurers.

In Western Australia, a number of WRPs operate as non-panel providers with referrals solely requested by employers, medical practitioners and worker representatives due to past experiences and return to work outcomes achieved.

We believe the reclassification would materially reduce workers' rights and potentially deprive them of the ability to access rehabilitation services should an insurer or employer deem the service unnecessary.

The proposed reclassification of rehabilitation was not included in the initial draft or discussions on the Draft Bill. There is no substantial justification for the proposed change and no material benefits outlined.

We believe changes to the existing legislation should be made on the basis of improvement, or net benefit, with particular regard to whether the proposed change improves the welfare and rights of the worker. This change fails this criterion and is not in the spirit of the legislative review.

The ultimate impact will be a compromise of the worker's injury management and return to work experience and outcome. It will also negatively impact the success and effective operation of the overall scheme, which is known and often acknowledged in professional circles, as the best scheme in the country.

Independence of Workplace Rehabilitation Providers

The legislative structure of workers' compensation in WA is designed to ensure injured workers are appropriately compensated and provided with access to independent workplace rehabilitation services. This ambition is not currently reflected in the draft Bill.

The provision of independent Workplace Rehabilitation Providers (WRPs) is a vital element of Western Australia's existing workers' compensation scheme.

It is the independent nature of WRPs that allows for all parties in the return to work process to be fairly and fully heard.

Part of our role is to provide impartial education and expert consultation, communication and negotiation skills to ensure all parties meet their obligations.

We contend that independent WRPs are critical to achieving positive return to work outcomes.

Choice of Workplace Rehabilitation Providers

Paramount to the success of the workplace rehabilitation role is the ability for the injured worker to have a choice in provider.

The Draft Bill addresses choice of medical practitioner for the injured worker but fails to address choice when it comes to the workplace rehabilitation provider. ARPA WA contends the different treatment of medical practitioner and workplace rehabilitation provider in the Draft Bill is unjustified and ultimately would impact on the level of care available to the injured worker.

There is no compelling reason to treat the two service providers differently. ARPA WA has previously been advised by WorkCover WA that the level of complaints regarding WRPs in WA is low. We contend this is because accredited workplace rehabilitation providers are highly skilled, independent parties equipped to manage the complexities of return-to-work matters when faced with differing and often opposing agendas from a variety of stakeholders.

The importance of ensuring there is collaboration and balanced input from service providers was highlighted in a report published in 2019 by the Victorian Ombudsman. The report provided detailed insights into the shortcomings which may be associated with insurer only management of complex injured workers.

Following the investigation of 102 complex claims, the Ombudsman stated

“The evidence suggested that in the case of complex claims, financial reward and penalty measures in agents’ contracts with WorkSafe were driving a focus on terminating and rejecting claims to maximise profit, at the expense of sound decision making.”

Further, the Ombudsman found

“This evidence, when combined with the extent of unreasonable decision making on complex claims identified by the investigation, raises questions about the suitability of commercial organisations to manage complex claims.”

ARPA WA believes the best results for workers are achieved when independent workplace rehabilitation providers work collaboratively with insurers. Complex cases require the dedicated and joint efforts of all providers to achieve positive return to work outcomes.

[Full Report - <https://www.ombudsman.vic.gov.au/our-impact/investigation-reports/worksafe2-follow-up-investigation-into-the-management-of-complex-workers-compensation-claims/#full-report>]

ARPA WA also contends the Draft Bill should specifically provide for worker choice when it comes to workplace rehabilitation providers. This right is currently articulated in WorkCover WA’s Worker consent Form for Workplace Rehabilitation Providers. The form states:

The worker’s right to choose a workplace rehabilitation provider

Every worker has the right to choose a workplace rehabilitation provider. Should the worker wish to change their workplace rehabilitation provider, they will need to discuss the change [with] their employer and insurer

Case Conferences

ARPA WA believes that early referral to a workplace rehabilitation provider (WRP) for specialist early return to work intervention services is one of the most critical factors in supporting an injured worker in achieving a successful return to work outcome.

In a paper on the Health Benefits of Good Work, the Royal Australasian College of Physicians (RACP) concluded that if a person is off work after an injury:

- after just 20 days, the probability that they will ever return to work reduces to just 70 per cent
- at 45 days off work, that chance is reduced to 50 per cent
- at 70 days it's just 35 per cent.

The inclusion of case conferences in the Draft Bill is welcome, however the proposed draft states that an employer, insurer or agent cannot be present at a medical examination when there is a need for a progress medical certificate to be issued (as per regulations).

At a return to work case conference, a required outcome is that a progress certificate of capacity is issued. ARPA WA has concerns that the reference to an employer, insurer or agent not being present when there is a need for a progress certificate of capacity to be issued (though noted this is in reference to medical examinations), may result in misinterpretation.

There appears to be some confusion about different references to medical examinations, appointments and return to work case conferences. We believe the Draft Bill would benefit from greater clarity in this regard.

The RACP outlined the importance of case conferences as “an essential part of a proper process to ensure that employees receive appropriate support.

The following key parameters were identified by the RACP for effective case conferences:

- Participation of employee, employer, treating medical practitioner and other relevant parties
- Clear separation from medical consultations
- Employee’s informed consent to the conference and to the participation of each attendee
- Respect for the employee’s right to confidentiality and procedural fairness
- Written information available for doctors, employees and employers to explain the case conference, what it may cover, and how it differs from a medical consultation
- Emphasis should always be on providing constructive support for the employee and their rehabilitation needs.

WRPs regularly act as the facilitator of case conferences, liaising between the worker, employer and medical practitioner to achieve a positive return to work outcome.

In its assessment, the RACP found that at a case conference, workplace rehabilitation providers may assist by:

- identifying strengths and barriers to return to work and detailing plans to include and address these
- developing an initial injury management and return to work plan
- educating all key stakeholders to ensure the clear understanding of individual roles
- liaising with allied health providers to fast track medical access, including specialist reviews.

The Draft Bill fails to stipulate that a WRP can facilitate case conferences and we believe it is critical for this to be rectified.

ARPA WA is also concerned that the Draft Bill introduces a limit on the “number of times” a case conference can occur. This again, seems to be a further diminution of the rights of the injured worker, where ongoing case conferences may be essential to achieve the worker’s successful rehabilitation and return to work.

Executive Summary

Western Australians who are injured in the workplace are currently supported by independent, professional workplace rehabilitation providers to achieve timely and positive return to work outcomes.

ARPA WA is committed to continuing to work collaboratively with WorkCover WA to deliver a seamless service to injured workers and reduce the negative impacts associated with any long term work absence, work disability or unemployment.

Our members trust these detailed comments provide useful insights which will help tailor the draft legislation.

We would welcome the opportunity to elaborate further on these issues which we believe have the potential to improve the Draft Bill and ensure the welfare of injured workers in Western Australia remains paramount.

Specific Comments on the Draft Bill

| Part | Division | Section | Comments |
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| 1 | 3 | 8 | ARPA WA supports the clear guidelines regarding injury arising from participating return to work programs or to undertake workplace rehabilitation. |
| 2 | 2 | 41 (2) | <p>This is a new provision which fails to identify workplace rehabilitation expenses in addition to medical and health expenses.</p> <p>This is outlined as priority 2.4 of the Insurer and Self-insurer Principles and Standards and the section for payments on a without prejudice basis for pending claims.</p> <p>ARPA WA contends that if provisional payments are to be legislated, this provision should include explicit reference to workplace rehabilitation expenses.</p> |
| 2 | 3 | 56 | <p>Research clearly demonstrates that workers who are supported to return to work in a timely way achieve better results in terms of health and wellbeing outcomes for individuals.</p> <p>Exploring the effect of early intervention on return to work, researchers have found that:</p> <ul style="list-style-type: none"> • those who underwent early intervention were more likely to back at work within six months • those who underwent early intervention were 50 per cent more likely to return to work at 12 months <p>While we acknowledge the need to ensure injured workers are appropriately compensated following an injury, a possible unintended consequence of introducing a step down from 13 weeks to 26 weeks may result in delays in the worker's return to work. ARPA WA recommends that this be considered in line with the research on the health benefits of good work.</p> <p>Should the Government proceed with the election commitment change, ARPA WA recommends that to ensure a worker's capacity in line with medical recommendations are appropriately assessed and that all potential recovery at work strategies are explored, that a referral to an accredited workplace rehabilitation provider is mandated if a worker has been off work for four weeks.</p> <p>ARPA WA believes that early referral to a workplace rehabilitation provider for specialist early return to work intervention services is one of the most critical factors in supporting an injured worker in achieving a successful return to work outcome.</p> <p>WRPs are expertly equipped to provide recommendations to ensure workers are provided with suitable duties programs, on the job training for new skills and special assistance to deal with severe injuries.</p> |

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| | | | <p>We believe the scheme should encourage earlier return to work.</p> <p>This solution is backed by recent research funded by WorkSafe Victoria and undertaken by the Institute for Safety, Compensation and Recovery Research (ISCRR).</p> <p>In its 2018 Occupational Rehabilitation Review Recommendations Report 9, its evidence review found moderate to strong evidence that:</p> <ul style="list-style-type: none"> • workplace / occupational rehabilitation interventions are effective at improving RTW outcomes, particularly for musculoskeletal injuries • workplace / occupational rehabilitation achieves the best outcomes when delivered early (2–4 weeks of injury). <p>Not only do workers benefit from the health outcomes of returning to work, if early referral was initiated, this also increases the possibility of the worker being back to pre-injury capacity (if medically appropriate) before they may be affected by the step down approach therefore reducing any financial impact on the worker.</p> <p>Further delays would leave workers without direction, support or assistance and may potentially escalate tensions between a worker and their employer, ultimately resulting in the employer paying higher insurance premiums.</p> |
| 2 | 4 | 70 | <p>It is noted and agreed that medical and health care expenses are to be referred to as “Compensation for medical and healthcare expenses”.</p> <p>It is proposed workplace rehabilitation be added as a compensable expense.</p> <p>In the current Workers’ Compensation and Injury Management Act (1981), workplace rehabilitation is listed in schedule 1 cl17 along with medical expenses. In addition to medical and healthcare expenses being clearly identified in the Draft Bill, workplace rehabilitation expenses should also be explicitly identified and included in the same manner.</p> <p>While this may be further and better addressed in Part 3, Division 4, section 172 to 181, we believe it is essential for the description relating to access to workplace rehabilitation to be in line with medical and other health expenses, that is “Compensation for workplace rehabilitation expenses”.</p> <p>More information below.</p> |
| 3 | 2 | 164 (1) | <p>ARPA WA supports the new obligation for workers to attend a return to work case conference.</p> |

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| | | | <p>We propose the Draft Bill should include Workplace Rehabilitation Providers as another party authorised to organise and request attendance at a case conference.</p> <p>This would reflect current practice in which WRPs are often instrumental in co-ordinating return to work case conferences.</p> <p>An outcome of any return to work case conference is the need for a progress certificate of capacity to be issued as this medical information is required to formulate the return to work program with other stakeholders. It is important to ensure that Part 3, Division 4, Section 171 does not impede the ability for parties to be present when a progress certificate of capacity is issued.</p> <p>ARPA WA supports the regulation related to the maximum frequency of case conferences, however, recommends that regulations relating to the maximum number of times a worker may be required to participate in a return to work case conference be removed.</p> <p>The number of times a worker would engaged in a return to work case conference is dependent on many factors, including the nature of the injury, the nature of the work duties, the employer's and doctor's understanding of work duties, unknown biopsychosocial issues that present later in the process and the length of their program.</p> <p>For complex injuries, this program may unfold over some years and stipulating the maximum number of times a return to work case conference would be detrimental to the return to work outcome for the individual.</p> |
| 3 | 4 | 170 (2) | <p>Medical Practitioners have a significant influence on return to work outcomes and ARPA WA supports worker choice in relation to medical practitioner.</p> <p>However, there have been times when the worker's GP is unfamiliar with the workers' compensation process and the worker requests assistance in finding an appropriate doctor to manage their return to work program. Often this is done with other stakeholders, employers, insurers or a workplace rehabilitation provider.</p> <p>GPs who have limited understanding of workers compensation may seek to delay a worker's return to work until they are fully medically rehabilitated. This may result in detrimental outcomes for workers. As such, it is not uncommon for a worker to ask a WPR provider to recommend a GP who is experienced in dealing with workplace injury.</p> <p>The current phrasing of Part 3, Division 4, Section 171 (2) does not allow for this to practice to continue. APRA WA proposes rephrasing this clause to allow an employer, insurer or insurer agent to act with the worker's consent, in line with current practice. This does not negate the fact that workers retain their rights in the choice of their treating Medical Practitioner.</p> |

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| | | | <p>Consider rephrasing to “Workers can, only if they agree, attend a medical practitioner chosen or nominated by the worker’s employer or employer’s insurer to perform any of the functions set out in subsection (3)”.</p> |
| 3 | 4 | 170 (3) | <p>ARPA WA supports General Practitioners functions being clearly defined, inclusive of attendance to return to work case conferences.</p> |
| 3 | 4 | 171 | <p>ARPA WA is aware of cases in which the employer is a first responder and/or in a remote area where the worker has little access to support. In these cases the employer or employer’s representative will be present for medical examinations and procedures at the worker’s request.</p> <p>On this basis, it would be prudent to consider rephrasing this new provision to allow attendance at medical examinations if workers provide their consent.</p> <p>Further, there needs to be clarity on the issue of an employer, insurer or insurer agent being present in a medical examination where a progress certificate of capacity is issued.</p> <p>ARPA WA agrees that in most circumstances there is no need for an employer, insurer or agent of the insurer to be present when a worker is being physically examined. However, this item emphasises that employer, insurer and agents of insurer cannot be present when a progress certificate of capacity is issued. This contradicts the required outcome of return to work case conferences.</p> <p>We propose removal of the item “to issue a certificate of capacity for the worker”.</p> <p>Alternatively, there needs to be clarity in the section of return to work case conferences (Part 3, Division 2, Section 164(1) that allows a progress certificate of capacity to be issued in addition to very clear guidelines on the difference between a medical examination and a return to work case conference.</p> |
| 3 | 4 | 172 | <p>ARPA WA proposes this section be titled <i>Compensation for workplace rehabilitation expenses</i> and moved to Part 2, Division 4 in line with other entitlements of the worker.</p> <p>This would ensure that workplace rehabilitation expenses are in line with medical and healthcare expenses which was previously in schedule 1 of the Workers’ Compensation and Injury Management Act (1981).</p> <p>Further, the injured worker should have the right following a workplace injury to access the services of an appropriately qualified Workplace Rehabilitation Consultant to co-ordinate their return to work needs.</p> |

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| | | | <p>This right ensures that all workers have access to an independent professional with the skill and expertise to assist them return to productive employment. It safeguards against other parties being given discretion in the application of assistance and enshrines workers' fundamental rights in the legislative framework.</p> <p>This provision was instrumental in the previous Act and we contend it should be retained in the new legislation.</p> |
| 3 | 4 | 180 | <p>As outlined in general comments, ARPA WA strongly contends that access to workplace rehabilitation remain an entitlement for injured workers.</p> <p>As previously highlighted, workplace rehabilitation is instrumental in the overall workers' compensation scheme as indicated in the title of the Act. It is paramount to the injured worker that their ability to access independent workplace rehabilitation is underpinned by robust legislation and not a matter for regulations.</p> <p>ARPA WA believes there is inherent danger in attempting to articulate in regulation the circumstances in which workers may be provided with access to <i>an approved workplace rehabilitation provider to provide a workplace rehabilitation service</i>.</p> <p>By its very nature, a right is enshrined in legislation, not proscribed in regulation.</p> <p>The existing system has clearly demonstrated its efficacy in achieving strong return to work outcomes as detailed in WorkCover WA's annual report, with low levels of complaints.</p> <p>Further, workplace rehabilitation accounts for just 21 per cent of all service payments. This level has remained constant in the past four years and demonstrates the extremely cost effective nature of the service, particularly in light of the complex nature of so many of the cases.</p> <p>Should the Government reject this recommendation, ARPA WA seeks further consultation and detailed input into this process.</p> |
| 3 | 4 | 181 | <p>Recent research conducted by ARPA NSW into the current rates paid to WPRs in comparison to allied health services and NDIS services, demonstrated the damaging impacts of failing to gazette commercially viable fixed rates for workplace rehabilitation services.</p> <p>In its formal submission to the State Insurance Regulatory Authority in November 2020, ARPA NSW recommended that workplace rehabilitation service rates be gazetted at commercially viable rates to bring the services into line with comparable allied health services, and comparable markets.</p> |

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| | <p>The submission outlined how workers compensation has fallen behind other sectors for service rates with other sectors deemed to be easier and more rewarding. Gazetting commercial rates provides consistency across services and ensures that rates are indexed annually and adjusted to respond to market conditions.</p> <p>ARPA WA contends it is essential for workplace rehabilitation providers to compete on an even playing field with other service providers which also employ allied health professionals. This includes NDIS providers, aged care and home care providers – all services experiencing increasing demand.</p> <p>We are also aware of the significant failings when it comes to outcomes based funding models across a diverse range of service delivery programs. In particular, we note that in other sectors it has been the management of complex, long term cases which have been most adversely impacted.</p> <p>In evidence presented to the Senate Standing Committee on Education and Training during its evaluation of the Jobactive program, it was demonstrated that the outcome-based payment model focused incentives of on short-term rather than long-term, sustainable outcomes.</p> <p>The Australian Council of Social Service (ACOSS), submitted that an over-emphasis on funding outcomes has had a number of adverse effects on the system including 'creaming' and 'parking'.</p> <p>Put simply, ACOSS contended the funding model incentivised providers to focus on participants who were easy to place – creaming these incentives – while parking those clients with more complex needs.</p> <p>Should such a model be applied there is a real risk this may translate to less effective services for WA’s most seriously injury workers and those in need of the most complex care.</p> <p>The current system with the gazetted rate rewards best practice which places the worker’s needs at the centre of all care. This should remain paramount.</p> |
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