

Modernising WA Worker's Compensation Laws

**Submission by OSTEOPATHY AUSTRALIA to:
WorkCover WA**

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Contact

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Summary and recommendations

In general, Osteopathy Australia congratulates WorkCover WA for very clear legislative instruments, legislative consultation and information sheets that made the feedback process for the *Worker's Compensation and Injury Management Bill 2021 (Consultation Draft)* more streamlined than many other legislative reviews. We also appreciate the extensive timeline given for comment; the timeline was generous and atypical for such reviews in our experience.

The clarity of the consultation process enabled us, in a spirit of partnership, to efficiently identify a limited number of areas needing greater clarity or refinement. Our recommendations centre on three broad themes. Some of them relate to clarifying provisions within the consultation draft bill itself, others seek clarity about how the bill will be operationalised or compliance upheld, and other recommendations request more insight into considerations or standards to be applied in meeting provisions or clauses within the draft bill. Our recommendations are as follows:

Recommendation 1: WorkCover WA should clarify state or other legal injury protections in place or scheduled for contractors and subcontractors. In particular, WorkCover WA should clarify how the draft bill is expected to interface where contractors have an injury on a third-party WA worksite subject to the bill as an in-scope workplace.

Recommendation 2: the draft bill or regulations should clarify the manner in which a workplace is expected to inform an injured worker of possible right to compensation (i.e. verbally, in writing or both) and records of the event for retention. WorkCover WA should provide standard informing templates for workplace use to aid compliance.

Recommendation 3: WorkCover WA should explore the relationship between insurer claim approval timeframes early and later in an injury, overall injury outcomes and claimant costs. The maximum number of days allowable for an insurer to approve, defer or refuse liability should be varied in the draft bill by injury stage or

progression (as indicated through a WA WorkCover commissioned review of the clinical evidence base).

Recommendation 4: the draft bill should clearly specify that services and providers a worker pays during the provisional payment period will not be subject to cost recovery efforts, just as the individual worker will be exempt from these efforts.

Recommendation 5: the draft bill or regulations should require WorkCover WA to consider private market rates charged by allied health professional groups in WA in addition to Medicare Average Charge data when recommending an appropriate indexation level to the Minister.

Recommendation 6: WorkCover WA should urgently clarify consultative processes to be used wherever the WA Government wishes to modify the descriptors or criteria applicable to existing health services and professions. How the WA Government anticipates on engaging health professional associations is of particular interest.

Recommendation 7: a revised WA regulatory framework for workplace rehabilitation providers and health professional group approval should be urgently progressed to minimise uncertainty among approved providers and health professional associations.

Recommendation 8: the draft bill should be changed to prevent insurers from limiting worker choice between allied health professionals with overlapping neuromusculoskeletal scopes (i.e. physiotherapists or osteopaths), just as it now prohibits insurers from denying workers Medical Practitioner choice.

Recommendation 9: the draft bill and any revised regulations should allow for allied health professionals with competence in specific injury types to complete Certificates of Capacity in lieu of a Medical Practitioner (for example, osteopaths for neuromusculoskeletal injuries). This model has been used in Victoria for years with good outcomes for system administration.

The osteopathic profession and its role in work injury management

Osteopaths in Australia are government regulated allied health professionals having inbound and outbound referral relationships with other health professionals.

Osteopaths complete a dual Bachelor or Bachelor/ Masters qualification covering functional anatomy, biomechanics, human movement, the musculoskeletal and neurological systems as well as clinical intervention approaches. There are significant commonalities between the health science units undertaken by osteopaths and those undertaken by peers of other allied health professions, including physiotherapy and exercise physiology.

As a defining characteristic, the osteopathic profession emphasises the neuromusculoskeletal system as integral to function and uses biopsychosocial and client-centred approaches in managing functional limitations from workplace injuries. The *Capabilities for Osteopathic Practice*ⁱ outline the required capabilities for professional skill, knowledge and attributes; osteopaths are required to possess many professional skills common across allied health and health professions.

Clients, including injured workers, present to osteopaths with a range of musculoskeletal functional impairments and recovery needs. Osteopaths are approved providers of injury management services in each state or territory jurisdiction, and in Victoria and NSW, are approved providers of workplace assessment and functional assessment services in both worker's compensation and transport accident scheme funded workplace rehabilitation services.

Osteopaths conduct comprehensive functional examinations and capacity assessments. Evidence informed reasoning is fundamental to case management and clinical intervention. Osteopaths prescribe skilled clinical exercise, including general and specific exercise programming aimed at enhancing functional capabilities including fine and gross motor skill application and physical capabilities for recovery at work. ⁱⁱ Many clients consult an osteopath for advice on physical activity, positioning, posture and movement. Self-management and early return to activity are the primary objectives of clinical services provided by osteopaths, consistent with the nationally endorsed *Clinical Framework for the Delivery of Health Services* and *Health Benefits of Good Work Position Statement (RACP)*, to which Osteopathy Australia is a key signatory.

Osteopathy Australia

Osteopathy Australia is the peak body representing the interests of osteopaths, osteopathy as a profession, and consumer's rights to access osteopathic services. We promote standards of professional behaviour over and above the requirements of AHPRA registration. Over 80% of all registered osteopaths are members of Osteopathy Australia.

Our core work is liaising with state and federal government, all other statutory and professional bodies regarding professional, educational, legislative and regulatory issues as well as private enterprise. As such, we have close working relationships with the Osteopathy Board of Australia (the national registration board), the Australian Health Practitioner Regulation Agency (AHPRA), the Australian Osteopathic Accreditation Council (the university accreditor and assessor of overseas osteopaths), all state and territory injury management schemes, as well as with large cross jurisdictional workplace rehabilitation service providers. We also work closely with other health professional bodies through our collaborative work with Allied Health Professions Australia (AHPA). In our representative capacity, we welcome the opportunity to WA's *Worker's Compensation and Injury Management Bill 2021 (Consultation Draft)*.

Key submission points

Contractor coverage needs clarity

Many industries, including those within the allied health care sector, have a high proportion of independent contractors and sub-contractors working within them. We understand the consultation draft and its provisions generally do not apply to contractor classes of worker, and instead in general, only to Pay As You Go (PAYG) employees. As a result, we are unsure of what protections would be afforded to contractors or subcontractors injured in the course of work at third-party worksites that are subject to the bill as in-scope workplaces.

Recommendation 1: WorkCover WA should clarify state or other legal injury protections in place or scheduled for contractors and subcontractors. In particular, WorkCover WA should clarify how the draft bill is expected to interface where contractors have an injury on a third-party WA worksite subject to the bill as an in-scope workplace.

Manner by which workplaces will inform injured workers of possible right to compensation needs clarity. WorkCover WA could standardise resources for workplaces to use in informing to optimise lawful compliance

The draft bill requires employers who become aware that a worker has had a workplace injury to inform of right to possible compensation within 14 days.

While the timeframe is very clear, the bill features a notable omission regarding the manner or form in which notice is to be given and recorded. For example, is it to be verbal, written, or a combination thereof? Further, what records if any, must be kept showing the process has occurred?

For optimal compliance with the revised bill, WorkCover WA should proffer fact sheets informing of right to compensation that a workplace can simply print and hand over or speak to. Such fact sheets would help workplaces of varying sizes and with varying levels of resources to adhere to the provisions.

Recommendation 2: the draft bill or regulation should clarify the manner in which a workplace is expected to inform an injured worker of possible right to compensation (i.e. verbally, in writing or both) and records of the event for retention. WorkCover WA should provide standard informing templates for workplace use to aid compliance.

Possible need to vary maximum insurer timeframes for claim approval, deferral or refusal for workers requesting compensation from between six to 12 months of injury

The draft bill provides that a worker who suffers an injury from employment may claim compensation from their employer, generally within 12 months of injury.

Some neurological or musculoskeletal issues may only become highly problematic at a point after an initial injury occurs in a workplace. At such a point, an injury sustained in the workplace is persistent and potentially more difficult to manage. We note that the insurer maximum timeframes for claim approvals, deferrals or refusals are the same irrespective of when an injury occurred and at what point following injury a claim is made. Referring to the evidence base, WorkCover WA may benefit from considering the impact of insurer approval timeframes early and later in an injury for overall injury costs and claimant outcomes.

Recommendation 3: WorkCover WA should explore the relationship between insurer claim approval timeframes early and later in an injury, overall injury outcomes and claimant costs. The maximum number of days allowable for an insurer to approve, defer or refuse liability should be varied in the draft bill by injury stage or progression (as indicated through a prospective WA WorkCover commissioned review of the clinical evidence base).

More clarity needed on provisional payment recovery limitations where injury liability is ultimately not accepted

We understand that whether a claim is accepted or not accepted, during the claim appraisal period, provisional insurer payments may be made to the worker. The draft bill now stipulates these payments are unrecoverable from workers. What the bill does not state is whether this preclusion would apply only to recovery efforts directed toward workers as 'individuals' strictly, or whether it extends to protect third party health services and other service providers that have assisted the individual worker and received insurer monies, but are not the individual worker.

Osteopaths, alongside other allied health professionals, are central to early management of injury, including at points where liability may not yet be established. Were provisional payments able to be recovered from third- party service providers, health professionals would face risks that may result in diminished incentive with inevitable consequences for worker health service utilisation, injury complexity and outcomes.

Recommendation 4: the draft bill should clearly specify that services and providers a worker pays during the provisional payment period will not be subject to cost recovery efforts, just as the individual worker will be exempt from these efforts.

Need for WorkCover WA to consider private fee levels within WA allied health professional groups in recommending fee indexation amounts to the Minister

The draft bill provides for allied health fees indexation amounts to be determined by Ministerial Order on an annual basis outside of regulation. This approach can allow greater flexibility for the Ministerial Order to suit prevailing market circumstances. However, it is not without risk for osteopaths and other allied health professionals.

In jurisdictions where Medicare Average Charge data is used for fee setting (a methodology we understand WA is considering), there have sometimes been freezes on annual fees indexations. Some allied health professionals work predominately with private patients, and some do not charge gaps for clients where they could for Medicare services---simply due to client financial or social disadvantage. Referring solely to Medicare data may therefore give a skewed picture of fees appropriate and applicable to workplace compensable injury management. We do not wish to see scenarios emerge where approved workers face untimely delays to service provision by comparison to private clients.

Recommendation 5: the draft bill or regulations should require WorkCover WA to consider private market rates charged by allied health professional groups in WA in addition to Medicare Average Charge data when recommending an appropriate indexation level to the Minister.

Consultation with professional associations needed prior to modifying descriptors or criteria that apply to existing health services

The draft bill provides for regulations to ‘modify the descriptors or criteria that apply to existing health services if there is a sound basis for doing so’. It is of interest that regulation will be used to enshrine and ‘lock-in’ such changes to health professional criteria and descriptors, but that a differing model of Ministerial Orders will be applied to payment indexation. In theory, this means payments can be negotiated quickly, but scopes of practice and application may not be--- when scopes of practice and their growth or expansion in applied practice generally should determine pay levels. This is paradoxical.

We also seek urgent clarification of any consultative processes that would be used wherever a change to descriptors or criteria for existing health services is considered, whether related to regulatory mechanisms or via other means.

Recommendation 6: WorkCover WA should urgently clarify consultative processes to be used wherever the WA Government wishes to modify the descriptors or criteria applicable to existing approved health services and professions. How the WA Government anticipates on engaging health professional associations is of particular interest.

Workplace rehabilitation professional group approval requirements and provider regulations need timely clarification

Workplace rehabilitation is of particular interest to osteopaths and Osteopathy Australia; following extensive work demonstrating the appropriateness of osteopaths for functional assessment and workplace assessment consultancy roles in NSW and Victoria, the profession is now approved within rehabilitation providers funded by motor accidents schemes and workplace injury management schemes in Australia’s two most populous states.

We understand a future revised WA regulatory framework will set out requirements for the approval and regulation of workplace rehabilitation providers. It is necessary for both workplace rehabilitation provider and health professional group clarity, to update, consult on and release this framework as soon as practicable, ideally in 2021.

Recommendation 7: the revised WA regulatory framework for workplace rehabilitation providers and health professional group inclusion should be urgently progressed to minimise uncertainty among approved providers and health professional associations.

Worker ability to choose Medical Practitioner, but not allied health professionals with overlapping professional scopes, is peculiar

The draft bill provides that an injured worker is entitled to attend a Medical Practitioner of the worker's own choice and cannot be required to choose or attend one chosen by the worker's employer or insurer. This should set a precedent for all clients wishing to see health professionals with overlapping scopes of practice, for example, a physiotherapist or an osteopath.

Allied health professionals should not be treated differently given their extensive training and competence, and a two-tiered system allowing choice of Medical Practitioner but not choice between suitably qualified allied health professionals with overlapping scopes is logically inconsistent.

Recommendation 8: that the draft bill be changed to prevent employers or insurers from limiting worker choice between allied health professionals with overlapping scopes (i.e. physiotherapists or osteopaths), just as it now prohibits employers and insurers from denying workers their Medical Practitioner choice.

Health professionals other than Medical Practitioners and Certificates of Capacity in proscribed circumstances

The draft bill provides for regulations to be enacted authorising a health practitioner (other than the worker's treating Medical Practitioner) to issue a certificate of capacity in specific circumstances.

Osteopathy Australia's firm position is that Certificates of Capacity should, in lieu of a Medical Practitioner, be completed by allied health professionals with scopes of practice relevant to a specific injury type or presentation. For instance, osteopathy for musculoskeletal impairments, speech pathology for speech and language impairment due to injury, psychology for work related psychological injuries; allied health professionals receive extensive training within their specific scopes of practice, and this training where utilised, could be leveraged for a more timely, more streamlined, and less costly and more streamlined worker's compensation system.

Recommendation 9: the draft bill and any revised regulations should allow for allied health professionals with competence in specific injury types to complete Certificates of Capacity in lieu of a Medical Practitioner (for example, osteopaths for neuromusculoskeletal injuries). This model has been used in Victoria for years with good outcomes for system administration.

Endnotes

ⁱ Osteopathy Board of Australia (2019), Capabilities for osteopathic practice [online]; <https://www.osteopathyboard.gov.au/Codes-Guidelines/Capabilities-for-osteopathic-practice.aspx>

ⁱⁱ Adams et al (2018), A workforce survey of Australian osteopathy: analysis of a nationally-representative sample of osteopaths from the Osteopathy Research and Innovation Network (ORION) project, [BMC Health Services Research](#) December 2018, 18:352