THE LAW SOCIETY
OF NEW SOUTH WALES

21 April 2011

Service Providers
C/- Business Analysis and Strategy Group
Workers Compensation Division
WorkCover NSW
Locked Bag 2906
LISAROW NSW 2252

Dear Sir/Madam,

WorkCover NSW Discussion Paper, 'Regulation of Service Providers in the NSW Workers Compensation System', February 2011

The Law Society's Injury Compensation Committee (the Committee) thanks WorkCover NSW (WorkCover) for the opportunity to provide a submission in response to the discussion paper.

The discussion paper was not formally provided to the Committee. It was provided by email to representatives of Worker's Compensation Regulation and Process Working Group who met with WorkCover on 22 March 2011. The discussion paper has now been the subject of careful consideration by the Committee.

The Committee strenuously opposes WorkCover's proposals. The reasons proffered for the need for the reforms are grossly insufficient and are poorly detailed. The proposal lacks an evidentiary basis ordinarily required to justify reform of the magnitude suggested.

Further, despite the stated reasons for the need for the reform, the discussion paper is largely silent on material issues including:

1. The legislative and regulatory amendments required to give proper and lawful effect to the proposal;
2. Governance issues and protocols; and
3. Detail of the process by which disputes over administrative decisions conducted internally will be resolved and determined.

Whilst the Committee appreciates that WorkCover holds a belief that all service providers need to be better regulated, what is lacking in the proposal and discussion paper are proper reasons and evidence to support WorkCover's views that:

1. The legal profession are not already appropriately regulated;
2. Insofar as the legal profession is concerned, WorkCover's failure to obtain any redress for what WorkCover perceives as improper or illegal conduct despite the protections of a carefully constructed and independent investigative and determination process. Evidence or direct examples of conduct by the legal profession that WorkCover claims exists (supporting findings of improper or illegal conduct) are simply not tabled and have not been provided. To the extent that there is evidence to support WorkCover's claims, there is no evidence to support that those examples of conduct are not capable of investigation and determination by existing authorities under well structured and existing law and processes;

3. There has been no failure by WorkCover and its agents to properly regulate and control the activities of the medical profession justifying a 'one size fits all' approach;
4. The issues WorkCover face are not driven by a lack of competence of WorkCover's personnel to investigate, enforce and prosecute existing regulation that already protects the scheme;
5. There is a need for WorkCover to grant itself power to determine the question of 'reasonable and necessary' medical treatment and to alter this long established stable legal test to include an essentially nonsensical proposal of 'in the best interests of the worker'. In pursuit of this unjustified extension of unchecked authority, WorkCover seeks power to be able to determine who can and cannot provide those services and what rates are payable. In doing so, WorkCover seeks to remove the established jurisdiction of the Workers Compensation Commission to hear and determine these issues; and
6. Workers, employers and services providers directly impacted will be better off.

WorkCover's proposals pay no obvious regard to significant problems associated with a regime by which WorkCover as regulator will enjoy powers of determining:

1. What services can and cannot be provided to the scheme;
2. What rates can and cannot be charged for services determined by WorkCover as appropriate for provision;
3. Who can and cannot provide those services; and
4. In the event of a dispute on points 1-3 above, the process of review and determination is conducted by WorkCover on unknown criteria, by unknown persons in a closed process. The proposal to allow peer review or appeal to the Administrative Decisions Tribunal on administrative law grounds is wholly unacceptable. Both of these create legal difficulties for appellants and grossly limit the rights of review by comparison to those extended on appeal to a component Court of Record that judicially determines matters on the merits and exercising independent and transparent processes.

In the Committee's view, WorkCover's proposals are anti-competitive and contrary to the interests of all stakeholders and service providers. It will only serve to increase WorkCover's powers well beyond that considered appropriate by successive governments and scheme architects. It provides no real protection for those impacted by the improper use or abuse of power, and poor decision-making practices, both of which are not safeguarded against. Indeed, if it is the case that many of the issues of WorkCover's concern are driven by a lack of effective decision-making on enforcement of existing laws and regulations, or alternatively, a substantial misinterpretation of the law and regulations under which WorkCover are currently required to abide, then the potential for abuse of power is real. The scheme should not attempt to regulate and entrench such behaviour.

The Committee's opinion is that the starting point for any review is to have an independent review examine WorkCover's current operating performance and the existing legislative and regulatory framework. That review should independently and robustly test the various assumptions WorkCover hold as factual and as applicable to all service providers irrespective of the unique circumstances in which WorkCover may have encountered difficulties fulfilling its already well-defined role. The review should be conducted by someone legally qualified and experienced within the scheme. The Committee is happy to liaise with the Government as to appropriate nominees.

The Committee now responds specifically to the five proposals outlined in the discussion paper.

Proposal One

The first proposal which suggests giving WorkCover the power to prevent certain service providers from operating within the Workers Compensation System quite clearly involves WorkCover becoming a regulator of service providers in circumstances where this is not the role of WorkCover. The Committee is strongly against the proposition that service providers (whether medical or legal) who are already properly qualified and authorised to provide service to clients should otherwise be excluded from the Workers Compensation System by WorkCover.

Such a proposal has the potential to result in injured workers being subjected to a limited choice of service providers in circumstances which may adversely impact on the health and well being of injured workers. This is especially the case in regional areas.

The proposal is also inconsistent with the provisions of the Workers Compensation legislation. The question of whether or not medical treatment expenses payable to service providers are recoverable is determined by reference to whether the medical and treatment expenses are reasonably necessary as a result of injury. It would clearly be entirely unacceptable to implement a proposal which would result in an injured worker not being able to recover the costs of medical and treatment expenses simply because the service provider was not authorised to operate within the scheme.

In regional areas of New South Wales there are many instances where an injured worker has no choice at all in the medical service provider who is required to provide treatment. If such a service provider was excluded from operation within the scheme this would either impose an unnecessary burden on an injured worker to underwrite medical expenses, or alternatively cause an injured worker to relocate or travel long distances simply to get appropriate treatment.

It is also the view of the Committee that an injured worker should not be constrained in any way in the choice of health service providers. It would, for example, be entirely unacceptable for an injured worker to be forced away from obtaining treatment from a long term treating general practitioner solely because that doctor was excluded by WorkCover from operation within the Workers Compensation System.

Proposal Two

The second proposal which suggests that WorkCover should have the power to decline specific types of services is again inconsistent with the provisions of the legislation. If the provision of medical treatment is reasonably necessary as a result of injury then it is (and clearly should be) treatment which an injured worker should be entitled to have paid. The current legislative test which requires such treatment be 'reasonably necessary' as a result of injury is clearly sufficient to exclude the payment of costs for treatment which is either unreasonable or unnecessary.

Proposal Three

The third proposal to "ensure payments for services provided to injured workers represent value for money" again represents a clear departure from those matters which ought properly be the concern of WorkCover. The question of whether services represent value for money will clearly be a matter for the health service providers and injured workers. The Committee's

view is that it is entirely inappropriate for WorkCover to dictate to the injured what constitutes 'value for money'.

Proposal Four

The fourth proposal for the establishment of consultative and peer review mechanisms to provide what is described as 'an objective assessment of the appropriateness of services,' appears to be predicated on the assumption that such mechanisms do not exist at present. The medical profession is clearly able to ensure that health service providers are adequately educated and informed as to the most appropriate and up-to-date treatment modalities. Further, this is not an area in which WorkCover needs to be involved.

Proposal Five

The final proposal relating to the establishment of Panels of Service Providers to deliver particular types of services for WorkCover and other stakeholders is not supported by the Committee. The suggestion that Panels of Service Providers be established for the provision of services to the injured, to employers or insurers is entirely inappropriate. The choice of health service providers has always been a matter for an injured worker and this choice remains a very important part of the provision of workers compensation benefits to the injured.

Employers and insurers have always, quite rightly, had the right to choose service providers based on their own criteria, and there is simply no justification for attempting to alter that position. It is the true stakeholders, and in particular injured workers and employers, who are in the best position to determine that service providers are appropriately qualified and best able to deliver the outcomes expected by those stakeholders.

In addition, the suggestion that the provision of Panels of Service Providers would enable WorkCover to negotiate competitive cost for services fails to acknowledge that cost for medical and legal services are already heavily regulated and constrained so that there is no scope for the negotiation of what are said to be 'competitive costs'.

Stakeholders within the Workers Compensation Scheme have had no difficulty in the past in ensuring that service providers meet the necessary standards required for the provision of such services. This is certainly not an area in which any further involvement by WorkCover is required.

It is the view of the Committee that injured workers, employers and insurers should remain free to select service providers without interference or constraint by WorkCover (as they have done without difficulty up to the present time).

Should you have any queries please feel free to contact the Committee. The policy lawyer with responsibility for this matter is Patrick McCarthy, who can be contacted on (02) 9926 0323 or by email at patrick.mccarthy@lawsociety.com.au.

Yours sincerely,

Stuart Westgarth
President