SECOND SESSION OF THE THIRTY SIXTH PARLIAMENT

FIRST REPORT OF THE
SELECT COMMITTEE ON
WORKERS' COMPENSATION
IN RELATION TO THE
WORKERS' COMPENSATION REFORM BILL 2004

Presented by Hon Sue Ellery MLC (Chair)

Report 1
September 2004

SELECT COMMITTEE ON WORKERS' COMPENSATION

Date first appointed:

July 2 2004

Terms of Reference:

On July 2 2004 the Legislative Council resolved that -

(1) A Select Committee is appointed;

(2) Chapter XXII of the Standing Orders applies to the proceedings of the Select Committee;

(3) The Select Committee is to inquire into and report on -

(a) the extent to which existing and proposed laws provided an equitable, sustainable and transparent system of compensation for persons injured in the course of, or who contract an illness or disease by reason of, their employment and whether time limitations on eligibility to claim compensation operate to the detriment of workers whose work-related illness is diagnosed after the limitation has effect;

(b) the sources and methods of funding the current scheme, its administration, and the efficiencies or defects with respect to any of those matters and options that would improve or supersede current practices or arrangements;

(c) the persons or classes of person included in the scheme and the adequacy or otherwise of the grounds for exclusion or ineligibility of those not included;

(d) whether the criteria on which the quantum of compensation is assessed are appropriate or unduly restrictive or act as a disincentive to participation in the scheme;

(e) the circumstances that determine, or should determine, payment of compensation in a lump sum or periodic instalments;

(f) whether it is desirable or necessary to retain an action in tort for negligence in a case where a plaintiff is, or is not, eligible to obtain compensation under the scheme and the conditions precedent (if any) governing the right to commence judicial proceedings;

(g) the feasibility of abolishing an action in tort and substituting a statutory cause of action arising from the imposition of strict liability; and

(h) any matters with respect to those described in the preceding paragraphs.

(4) For the purposes of its inquiry the Select Committee may consider part or all of the *Workers' Compensation Reform Bill* 2004 and report any findings or recommendations on that Bill during its passage. The Committee shall provide an interim report on matters relevant to the *Workers' Compensation Reform Bill* 2004 on, or before, September 15 2004.

Members as at the time of this inquiry:

Hon Sue Ellery MLC- Chair

Hon Jim Scott MLC

Hon Ray Halligan MLC

Staff as at the time of this inquiry:

Laurie Marquet, Clerk of the Legislative Council

Sheena Hutchison, Committee Clerk

Nigel Pratt, Clerk Assistant

Jan Panaperis, Senior Committee Clerk

Address:
Parliament House, Perth WA 6000, Telephone (08) 9222 7222
Website: http://www.parliament.wa.gov.au
ISBN 1 9208 8616 8

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CHAPTER 1

INTRODUCTION

REFERENCE AND PROCEDURE

1.1 The Select Committee was appointed on July 2 2004. Although not formally referred to it, the House required the Committee as part of its terms of reference to provide an interim report on the Workers Compensation Reform Bill 2004 ('Bill') by September 15 2004.

1.2 Due to the limited time available, the Committee identified and wrote to 19 persons or organizations having a direct and substantial interest in workers' compensation seeking written submissions on the Bill by August 2 2004. A list of to whom the Committee wrote is attached at Appendix 1. The Committee also advertised in *The West Australian* newspaper seeking written submissions. The Committee received 21 written submissions. The Committee also heard from four witnesses. A list of the submissions received and witnesses who gave evidence to the Committee are listed in Appendices 2 and 3 respectively. Details of the inquiry were also placed on the parliamentary website (www.parliament.wa.gov.au).

1.3 The Committee met on 10 occasions so that it could present its interim report to the House on September 21 2004, the first sitting day in September.

SUMMARY OF CHANGES TO THE WORKERS' COMPENSATION SCHEME SINCE 1993[1]

1.4 An appreciation of the current proposal for change contained in the Bill requires an understanding of the major changes made to the *Workers' Compensation and Rehabilitation Act 1981* ('Act') since 1993. There have been two significant changes, those in 1993 and 1999.

The 1993 Amendments

1.5 These amendments were enacted primarily to reduce the potential for workers to claim common law damages against their employers arising from work related disability. The Government of the time claimed that the cost of these common law claims were on the rise and needed to be controlled. The changes were claimed to be necessary to ensure the continued economic viability of a system underwritten by private insurers.

1.6 The Act was amended to set in place two thresholds which workers needed to meet or exceed in order to make a common law claim[2]. These thresholds, which later became

[1] Information for this summary was in part taken from a paper by Dr Robert Guthrie "An Overview of the 2004 Workers' Compensation Reforms: A Paper for the Industrial Relations Society, 23 June 2004".

known as 'gateways', required in the first instance, a worker to establish a 30% disability of the body as a whole.[3] If a worker could not establish this threshold, he or she could still proceed with a common law claim by establishing an entitlement through a second gateway. This required the worker to prove that as a result of the disability their pecuniary loss[4] was greater than the prescribed amount[5]. Damages under these provisions were not capped.

1.7 To compensate workers for this restriction on their previous right to claim common law damages against their employer in the event that they could establish negligence, further amendments increased their entitlements under the statutory scheme. Workers were entitled to be paid their average weekly earnings under the compensation scheme for the first four weeks of their incapacity. In addition Schedule 2[6] of the Act was amended to provide lump sum payments for permanent disabilities to the neck back and pelvis. These forms of injury had not previously attracted lump sum payments.

1.8 The dispute resolution system was also radically overhauled. A Compensation Directorate replaced the Workers Compensation Board. The purpose of moving away from the Board to the Directorate was to put in place a less formal dispute resolution process with some inquisitorial powers rather than the previous adversarial system. In an effort to contain legal costs legal representation at the Directorate was severely restricted.[7]

1.9 However the introduction of common law thresholds and the new dispute resolution mechanism had unintended consequences. Contrary to the expectations of both Government and private insurers the cost of claims and the frequency of the claims did not decline. Instead, because workers now needed to establish a high level of disability or pecuniary loss to access common law, the system had in-built incentives for workers to remain off work so one of the thresholds could be met. This resulted in

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2 Amendments were made to section 93 of the Act to put in place the thresholds.

3 This was calculated by a medical panel having regard to a variety of medical guides, including the Australian Medical Association Guides to impairment and Schedule 2 of the Act.

4 This terminology proved to be very elastic. District and Supreme Court decisions in the mid 1990s held that this could include loss of wages, medical expenses, superannuation and other employment related remuneration and/or benefits.

5 The prescribed amount is the maximum amount of weekly payments available under the Act. As at 1993 it was set at $100,000, but it is indexed to increase each year. It is also the benchmark for the level of medical expenses and rehabilitation allowances to be paid. In respect of the former this is set at an additional 30% of the prescribed amount and in respect of the latter it is set at 7% of the prescribed amount.

6 Often referred to as a table of maims – it is a schedule which lists body parts and senses. If a worker suffers a permanent disability a lump sum payment can be calculated according to the Schedule when a medical assessment has been made.

7 The changes to dispute resolution were modelled on the changes made by the Victorian Government to the *Accident Compensation Act 1985* (Vic) in 1992 following the election of the Kennett liberal Government.

an increase in the duration of many claims and a corresponding increase in costs to insurers.

The 1999 Amendments

1.10 The Government sought to remedy the difficulties caused by the 1993 changes by altering the common law thresholds and capping common law damages for the majority of common law claims. Amendments put in place a threshold which required that workers who could not establish a 30% disability would be entitled to proceed to a common law claim if they could establish a disability of between 16 –29% disability of the body as a whole. Those workers who came within this threshold would be entitled to proceed with a damages claim but that claim would be capped at twice the prescribed amount; that is a maximum of about $250,000 as at 1999.

1.11 A significant incentive for the worker to remain in the statutory system was the need for a worker to elect to proceed with a common law claim within six months of receiving statutory benefits. Once the election was made, all statutory benefits ceased. The effect of the amendments made to the Act in 1999 were significant and immediate. The number of common law claims dropped sharply after 1999 and since that time have continued to drop.

THE PROPOSED AMENDMENTS IN THE WORKERS' COMPENSATION REFORM BILL 2004

1.12 The main changes to the current system proposed by the Bill are:

- a reduction in the common law threshold from 30 to 25% Whole Person Impairment;
- a second common law threshold of 15% but less than 25% impairment to allow workers to proceed with a common law claim;
- medical assessments for the purpose of Schedule 2 lump sum entitlement or access to common law be based on the concept of impairment rather than the current disability assessment and the concept of rehabilitation being replaced with injury management;
- an assessment of impairment by 'approved medical specialist' and a restriction on the capacity of a worker to challenge these assessments;
- the election period for common law claims to be extended from six months to 12 months with provision for a further extension of up to 12 months for workers who have injuries, which have not stabilised;

- workers who elect to proceed with a common law claim to have their compensation reduced and cease over a period of six months rather than an immediate cessation with an election;

- the restriction on common law claims be compensated through increased statutory entitlements to include:

  a) weekly payments capped at two times Australian Bureau of Statistics Average Weekly Earnings ('AWE');

  b) the period before a step down in payments at AWE occurs to be extended from four weeks to 13 weeks and the stepped down payments to include regular allowances as a usual part of the workers' wages;

  c) workers with serious disabilities who cannot proceed with a common law claim and meet specified criteria to be entitled to specialised retraining programs; and

  d) workers with a total and permanent incapacity to be entitled to an increase in the maximum statutory allowances;

- legal representation to be re-introduced into the dispute resolution process with strict timeframes and cost thresholds for legal practitioners; and

- the Dispute Resolution Directorate to replace the existing Conciliation and Review Directorate.

CHAPTER 2

KEY ISSUES AND COMMITTEE'S APPROACH

THE RATIONALE FOR THE WORKERS' COMPENSATION INSURANCE SCHEME

2.1 The Productivity Commission estimates some 75% of employees in Australia are covered by workers' compensation.[8] The Commonwealth and each State, the ACT and Northern Territory operate their own discrete schemes that have common aims but differing means of achieving them.

2.2 Current workers' compensation regimes are based on compulsory, employer-funded, insurance contracts or policies that provide a degree of income maintenance and cover part or all of the costs associated with rehabilitation of a person who suffers an injury or contracts a disease that is related to the person's employment or workplace. Similarly, provision is made for benefits to be paid to dependants where a person's death occurs in the workplace in the course of the person's employment.

2.3 A distinguishing feature of workers' compensation schemes is the worker's eligibility to the payment of benefits regardless of whose act or failure to act was the sole cause of, or a contributing factor to the circumstances in which the injury occurred. A second feature is the employer's obligation to fund the scheme rather than a contributory scheme funded by employers and workers alike. While at first sight it may be seen as imposing an unfair burden on employers, it is fully justifiable when assessed in context of an employer's continuing obligation to provide and maintain a safe and healthy workplace. Moreover, the costs to the employer are offset against lower rates of pay than what would obtain otherwise. In a real sense, the wider community provides the premiums albeit that it is the employer who is responsible for the upfront contribution.

2.4 Without no-fault insurance, a work-related injury that made the worker unable or unfit to work would cause hardship resulting from an immediate loss of income. An injured worker might be eligible, weeks later, for an unemployment or disability payment provided by the Commonwealth. Benefits are paid at a flat rate regardless of a recipient's income as it was immediately before the injury was sustained.

2.5 Securing compensation of a significant amount necessitated commencing civil proceedings seeking an award of damages for alleged negligence by the employer. Proving the elements of negligence, eg, establishing the employer's duty of care, proving that the employer knew or ought to have known of the existence of the risk or

[8] Productivity Commission, *Report on National Workers' Compensation and OHS Frameworks*, March 2004, p.158.

hazard, that its existence created a situation where it was reasonably foreseeable that injury would occur, and that the employer nonetheless failed to remedy the situation, presents evidential hurdles that may be impossible to leap, particularly where years may have elapsed between the date of injury and the start of the trial. Statutory limitations that prevent bringing legal proceedings years after the occurrence that forms the basis of the proceedings, apart from other policy considerations supporting the limitations, recognizes the failings of human memories and their loss of accurate recall the greater the time lapse becomes.[9]

2.6 As well as proving an employer's breach of the duty of care owed to the plaintiff employee, the plaintiff runs the attendant risk that any award of damages may be diminished, sometimes extinguished, where the court attributes a degree of culpability to the worker for the injury sustained. As well, if the worker's case fails there is the burden of paying the employer's legal costs as well as one's own.

2.7 The court action in these cases has been described as a lottery – risky and unpredictable[10] and, it may be added, very often beyond the financial resources of an ordinary worker to undertake the litigation in the first place. The no-fault scheme is tacit recognition that the public interest is served by assisting injured workers to maintain their living standards during periods of recuperation and, at the same time, provide the means and inducements for them to return to the workforce at the earliest opportunity. That is also a benefit to employers.

2.8 A worker who has compensation cover has restricted access to the common law action for negligence. Essentially, the restrictions prevent "double-dipping" by an injured person and assure employers that the possibility of having to pay damages for workplace injury in addition to the premiums paid to the insurer of the compensation scheme is remote.[11] In one sense, the common law action is available only in those cases where the level of disability or loss is greater than the benefits derived from the statutory scheme whether in quantum or duration.

THE COMMITTEE'S INQUIRY IN RELATION TO THE *WORKERS' COMPENSATION REFORM BILL 2004*

2.9 The House has provided the Committee with this opportunity to report its findings and recommendations on the Bill, but did not refer the Bill to the Committee in a formal sense. In light of the short period for consideration of the Bill, the Committee, as well as inviting submissions through newspaper advertisements, separately approached

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9 Conversely, the limitation period has been extended in cases where work-related disease is diagnosed much later, eg, asbestosis.

10 So described by Justice Woodhouse in his 1972 report on *Accident Compensation in New Zealand.*

11 An employer's premium includes an amount payable through an insurer to the Insurance Commission under the *Employers' Indemnity Supplementation Fund Act 1980*. Common law damages awards are payable from this fund.

persons and organizations having a direct and substantial interest in workers' compensation or who had previously advised such persons and organizations.

2.10 The Committee is grateful to those who made submissions at short notice. They demonstrated a detailed knowledge of the existing and proposed regimes and the likely effect , from their perspective, the Bill's provisions will have on the scheme.

2.11 The submissions, although wide ranging, could be grouped within the following subject areas —

- adoption of "impairment" to replace "disability" as the basis of assessing injury and, relatedly, the effect on access to common law tort action;
- medical assessments and the role and functions of medical practitioners as the scheme is currently structured and how it is proposed; and
- workers' compensation administration, the basis for the restructure of the Commission as "WorkCover WA", changes to dispute resolution procedures and provisions for conciliation and arbitration.

2.12 There was no suggestion in any submission that the scheme itself be scrapped. The desirable social policy outcomes provided by no-fault insurance for work-related injury is accepted. The differences of opinion translate into issues with respect to —

- eligibility for cover, ie, what is a "worker", who pays the premiums;
- who assesses the money value of the premiums;
- what events are covered under the scheme, and what type of cover is provided;
- the existence, or not, of some internal flexibility to meet a beneficiary's changing circumstances during the recuperation period;
- "return to work" issues involving "injury management";
- whether injuries assessed on impairment criteria give a substantively different result from assessments using disability concepts;
- apparent over-complexity of the scheme, particularly when calculating eligibility periods;
- trigger mechanisms, eg, for worker's elections, forming the basis for cessation of benefits;

- the use of delegated legislation to provide ascertainable content of the scheme and the necessity of delegated legislation to the scheme's operability; and

- the roles of medical and legal practitioners and the acceptable level of involvement/interference by WorkCover in matters that go to professional conduct.

2.13 The order of reference to the Committee on workers' compensation, apart from the Bill, has meant that it would be premature for the Committee to express a concluded view on these matters. The Committee's primary aim is to provide the House with information and opinion from those most affected by the current law as to whether or not the Bill represents an improvement to what is already in place.

2.14 The Committee's report is therefore a discussion of the issues raised and how others would see them resolved.

CHAPTER 3

IMPAIRMENT VERSUS DISABILITY AND REHABILITATION VERSUS INJURY MANAGEMENT

"IMPAIRMENT" NOT "DISABILITY"

3.1 Viewed in isolation a case could be made that the sole motive for changing the method of assessing the gravity of workplace injury is to reduce costs and avoid rises in premium rates. If that were the motive and justification the Bill's relevant enabling provisions may not survive the House's consideration, or amendments may render those provisions inoperable.

3.2 The correlation that the 1981 Act achieves between "compensation" and "rehabilitation" is dependent on the supposed purpose of each. It follows that their discrete purposes may not require that their operation be synchronized in their application to an injured worker. The Bill seeks to reframe notions of "rehabilitation" as an end in itself by introducing the concept of "injury management" and its emphasis on ensuring, wherever possible, that the worker goes back into the workforce, preferably without loss of previous employment or entitlements, at the earliest opportunity. Put another way, remedial treatment for work-related injury is to facilitate regaining employment capacity at a point that may not reflect the fullest recovery possible but is at a stage where the injury does not prevent or impede resumption of employment and the corresponding cessation of compensation payments.

3.3 The marriage of compensation and injury management is a more comfortable description of the overall purpose of the scheme which is to be income supportive but with strong inducements to resume employment. It is not an unemployment benefit fund paying better rates than Commonwealth entitlements, or a de facto superannuation scheme for those facing retirement.

3.4 Injury management provides part of the context that explains adoption of impairment as the basis of assessment of the degree or severity of injury.

3.5 Proving that another's negligence was the actual or probable cause of injury as the condition precedent to any award of damages by way of compensation creates litigation and the pivotal role of lawyers in the conduct of those proceedings. A medical practitioner's involvement in litigation will be ancillary and evidential.

3.6 A no-fault insurance scheme provides compensation to a "worker", as defined, on an equitable predetermined basis and without either party incurring the not inconsiderable costs associated with civil actions. What remains is a need to assess the

degree or severity of an injury, its effect on functional abilities, and an estimate of the period for recuperation where that is a viable proposition. The pivotal role is assumed by medical practitioners while that of lawyers is diminished or extinguished.

3.7 The credibility of the workers' compensation scheme largely depends on its structural integrity and consistency in administration. An absence of ascertainable standards of injury assessment opens the gateway to caprice and actual or apprehended bias for or against individual claimants or certain groups or classes of scheme participants. It is a fundamental aspect of equality before the law that a person's entitlements (or obligations) flow from decisionmaking procedures that treat like with like. Although the need for assessments to be made in accordance with published criteria is not doubted, it does no harm to recall or spell out what underlying principle is satisfied by the imposition of external standards of assessment.

3.8 Under the existing law, injury assessment is based on "disability". Although there is little opportunity for dispute about the nature or extent of an injury, medical opinion will differ about a worker's current or potential ability to regain quality of life at the level predating the injury. The paradox is that the nature and extent of a disability is determined, not solely by reference to the type of injury that has occurred, but by judging the effect that the injury has, or is likely to have, on the worker's ability to regain his/her pre-injury quality of life. The illustration is given of the ability of an administrator to resume similar work after loss of a finger of one hand contrasted with a concert pianist's ability to pursue a career after suffering the same type of injury.

3.9 The degree of a worker's disability is the product of a deductive process that involves comparing pre- and post-injury abilities and assigning value to any resulting diminution; the value increases the greater the loss of ability affects career or employment prospects and the quality of life. The percentage of the assessed disability, by comparison with what is defined as total disability, determines rates of compensation. How far the desired outcome influences the subjective judgments made in the assessment process is moot.

3.10 Impairment is an assessment of the body's functional ability as a consequence of the physical loss of, or damage to, various parts of the body. The degree of impairment is assigned a percentage calculated by reference to total loss of functionality as 100%.

3.11 Unions WA readily concede the possibility that impairment assessment may be disadvantageous compared with assessment of disability. Unions WA approach is one of "principled pragmatism" which sees the scheme as an ongoing work in progress making adjustments to assure the scheme's viability. From its perspective, any putative disadvantage resulting from impairment assessment will be offset by concessions elsewhere. Some of those counterweights are already included in the Bill.

3.12 A bare comparison of the two forms of assessment returns a result that is misleading. The purpose of impairment assessment cannot be divorced from the complementary concept of injury management. The substitution of disability assessment and rehabilitation by impairment and injury management is substantive both in intent and result. It is not a cosmetic "rebadging". It follows that what the Bill proposes should be judged on its merits and not by comparison with the current provisions.

3.13 The Bill intends that impairment act as the gateway to the common law action for negligence. Although impairment will raise the bar to qualify, where the degree of impairment is met, the weekly payments under the 1981 Act continued for six months after the election date at 75% for the first three months and 50% for the remainder. Currently, weekly payments cease on election. The election period for injury – there is no limitation so far as work-related disease is concerned - is extended from six months to one year with provision for a further one year's extension.[12]

3.14 The question remains as to the need to limit access to the action for negligence. As it is, anything paid from the scheme is recoverable in the event that an injured worker is awarded damages. The limitation on litigation would seem to arise from the cost of the premiums which includes a percentage paid to the Insurance Commission under the 1980 supplementation fund legislation from which damages awards are payable.

3.15 There is general agreement across the submissions received that injury assessed against impairment lends itself to the use of tables describing the injury and its percentage rating against whole body impairment. Unlike an assessment of disability, impairment assessment does not extend to other factors that currently allow different assessments in cases where the degree of impairment is virtually the same.

3.16 The equity and consistency of the assessment of injury will be dependent upon the manner in which the assessment guides are formulated and their application by medical practitioners in individual cases. Issues relating to disputes about the degree of impairment are discussed later in this report.

INJURY MANAGEMENT

3.17 Injury management, as the definition in clause 8 states, seeks to return an injured worker to employment, whether at the same level of participation at the time of the injury's occurrence or at a reduced level consistent with the effect of the impairment on the worker's functional capacity.

3.18 The Committee makes the point that it made with respect to impairment and disability assessments – comparing rehabilitation with injury management is not constructive.

[12] The Bill needs to state in clear terms whether or not a writ can be issued before formal election. The plaintiff takes a risk where it is subsequently found that the impairment assessment is less than that required before legal proceedings can be issued.

Injury management has a different focus - the speedy return by the injured worker to the workplace. Rehabilitation is arguably a broader concept with the desired concept a return to work.

3.19 Adverse comment in the submissions is more concerned with the obligations the Bill would impose on employers and insurers to implement injury management programs. The argument is that the Bill's provisions are unduly prescriptive and rigid while, at the same time, too much of the form and content of injury management is left to be determined by WorkCover WA through a code (*cf* cl 155A) and a virtually unfettered power of discretion.

3.20 The need for proposed Part IXA providing for specialist retraining programs has been questioned and the reliance placed on subsidiary legislation to give form and substance to the statutory intent has been criticized. It is noted that participation in a retraining program extinguishes access to the common law action for negligence (*cf* cl 93K(3)).

3.21 Specialist retraining programs are intended to enable a worker whose impairment is assessed as being at least 10% but less than 15 % and whose prospect of returning to work is virtually non-existent without participation in a formal course of study or training to undertake an appropriate course at little or no cost to them. Part or all of the costs that equate to 75% of the prescribed amount, are to be borne by the employer (or insurer) under direction of WorkCover WA. The prescribed amount is that which is current at the date that the worker signed a retraining agreement with WorkCover WA.

CHAPTER 4

MEDICAL ASSESSMENTS AND RELATED MATTERS

MEDICAL ASSESSMENTS

4.1 Weekly payments, medical and related expenses, lump sums and other benefits are entitlements contingent on an assessment of an eligible worker's disability or, as now proposed, the degree of impairment. All assessments are made by medical practitioners.

4.2 An assessment is a decision that affects a person's rights or entitlements following injury in the workplace equally as much as other decisions that relate to a person's livelihood, eg, registration to carry on a trade or business. Decisions that deny or affect a person's rights, title or interests will often be made subject to an appeal by the enactment establishing the decisionmaking framework. Appeals may permit re-argument of the original matter or may be restricted to revisiting the record of the proceedings held by the decisonmaker. Sometimes an appeal lies solely on a question of law. An appeal must be conferred by an enactment; it is not recognized by the common law.

4.3 The Bill does not give an injured worker a right to appeal an assessment or related determination. An indirect appeal, in the form of a referral to a medical panel, is at the discretion of an arbitrator who may make the decision as to the degree of impairment personally and without such a reference.

4.4 Proposed section 146J(1) cuts off the remaining avenue to challenge an assessment. In most cases, both the substance of a decision such as an assessment of the degree of a worker's impairment and the process by which it was made, may be questioned in legal proceedings on a number of grounds. The [Supreme] Court has a common law jurisdiction to supervise – review – the lawfulness of decisions made by public officers. A review application may allege that the decisionmaker had no authority to make the decision ("jurisdictional error") or that it was arbitrary, capricious or unfair because no reasonable opportunity was given to a person affected to present a case, or the decision is perverse and is not supported by the material put before the decisionmaker. It may be that the decisionmaker has proceeded to deal with the matter in the mistaken belief that the law confers the necessary jurisdiction. The decisionmaker may have been biased or that it was reasonable to conclude that a relationship between the decisionmaker and one of the parties raised an implication of bias. Apart from jurisdictional error, the other grounds relate to procedural fairness.

4.5 Proposed section 146J is a "privative clause" whereby common law judicial review is overridden or restricted by Parliament. A medical practitioner's assessment of a

worker's degree of impairment is given immunity from legal challenge or automatic peer review by a medical panel. As already noted, peer review occurs, if at all, by way of a referral from an arbitrator hearing a dispute.

4.6 A medical practitioner must be designated by WorkCover WA as an "approved medical specialist" in order to make assessments. Given the common understanding of what identifies a "specialist" medical practitioner, the Committee would prefer the designation of "approved medical practitioner" rather than "approved medical specialist".

4.7 Proposed section 146F gives WorkCover WA a virtually unfettered discretion in making these appointments. In reality that discretion is limited to the number of medical practitioners available. The Australian Medical Association (WA branch) ('AMA') told the Committee that the State has insufficient medical practitioners in general practice, particularly outside metropolitan Perth leading to a corresponding increase in patient numbers per doctor. It suggests that the workload that results acts as a strong disincentive for a general practitioner to take on the additional burden of providing assessments under the current scheme or as the Bill proposes to make it. The committee accepts the AMA's statements and their potential effect on the size of the pool of available medical practitioners. However, the number of medical practitioners eligible to participate and actual participation rates are matters that affect the operation of the scheme and any associated difficulties must be resolved in that context at the operational level. For that reason, there is no practicable legislative solution that goes beyond providing a supportive environment.

4.8 An agreement carries the connotation that it is the product of discussion and negotiation. The reference in proposed section 146F(3) to a "written agreement" dealing with such matters as the rate of fees and procedures to be followed in making an assessment is not used in the sense of a negotiated arrangement. It masks its real effect which is to enable WorkCover WA to offer on a "take it or leave it" basis the terms and conditions that are to govern the performance of an approved medical specialist's activities.

4.9 The unilateral imposition of terms and conditions under which a service is to be provided is not inherently objectionable. Unilaterally-imposed terms and conditions of a contract are common in consumer transactions whether it is a mortgage or use of a credit card. Standard form agreements are not objectionable in themselves. Consumer protection legislation redresses the imbalance of the relevant bargaining strengths between provider and consumer by requiring the disclosure of the true cost of the agreement and a statement of the parties' rights and obligations. Here, the objection relates to the apparent capacity WorkCover WA is given to regulate professional matters and the use it makes of " . . . and other matters relating to . . . " the performance of an approved medical specialist's functions. Arguably, WorkCover WA is not precluded by anything in the Bill from treating medical specialist A less

favourably than it treats medical specialist B. The fear of intrusion into professional matters may be unfounded. Read in its context, the words "procedures to be followed" in proposed section 146F(3) applies, arguably, to the administrative procedures under which the various examinations and assessments are to occur in contrast to what is encompassed by a "medical procedure". It would be useful if the Minister clarified the intended scope of this provision.

4.10 The Committee agrees with the AMA and others who argue that a bare notice of cancellation in the *Gazette* of a person's designation as an approved medical specialist may be professionally damaging, especially where the cancellation is at the behest of the medical practitioner or it is for a reason unrelated to questionable or substandard performance. It seems to the Committee that the requirement to publish the names of those approved or removed in the *Gazette* is unnecessary in light of the requirement in proposed section 146F that the Director keep a register and make it available for public inspection. Deletion of the gazettal requirements avoids any adverse inference that might otherwise be drawn from a cancellation notification.

4.11 An assessment made by a panel of two approved medical specialists has the same immunity from judicial review as that of a single approved medical specialist.

4.12 Assessment of the degree of impairment is a professional judgment made by a medical practitioner. It may be thought inappropriate for a court to second-guess the original assessment albeit the court would have medical opinion to assist it. Any force in the argument that a review of an assessment should be by the medical specialist's peers is maintained with difficulty when several provisions, eg, proposed section 158C(2)(a), give power to arbitrators, who must be legal practitioners, to make that decision themselves or, at their discretion, refer it for assessment by an approved medical specialist or a panel.

4.13 Justification for the enactment of a privative clause ousting the Supreme Court's common law supervisory jurisdiction must be that the public interest outweighs an individual's right to obtain judicial review. The Court is not concerned to inquire into the merits of the case – the issues on review relate to the decisionmaker's jurisdiction and the fairness of the decisionmaking process. Because most decisions involve receipt, consideration, and weighing of evidential material, very few are excluded from judicial review. Those that are excluded are usually because human judgment or opinion cannot influence the result.

4.14 A decision is made solely on tests or the application of assessment criteria with no ability for the interposition of human opinion or judgment is not subject to judicial review. The administration of predetermined content by way of test or assessment is a procedure that cannot be unfair because there is no room for the "test decisionmaker" to show bias or deprive an affected person of a reasonable opportunity to present a case, the human factor is absent. Conversely, judicial review rests on common

recognition that human error or antipathy may influence a judgment, opinion, assessment or decision.

4.15 Leaving aside the issue of whether impairment is properly assessed by use of tables, it is ironic to find that the criticism that the assessments are rigid and formulaic nonetheless supports the argument that the decision, despite the Bill's references to "decisions" made during and as a consequence of an assessment being those of medical specialists and others, is determined on the result of a calculation made in accordance with tables. As previously noted, this is a crucial difference between assessment of impairment and that of disability which allows different weight to attach to socio-economic factors that are not part of consideration in assessing the degree of impairment.

4.16 Importantly, it should be noted that the argument for non-reviewability is not affected by an initial mis-diagnosis of the injury. The assessment is to ascertain the degree of impairment not the reliability of the diagnosis of the injury that is brought under assessment.

4.17 Although the exclusion of judicial review may, at first sight, be seen as an unnecessary erosion of a person's right to procedural fairness, it is an exclusion that is already recognized where, as is the case with assessment of impairment leaving no room for human influence, the decision results from the use of predetermined criteria.

CHAPTER 5

WORKERS' COMPENSATION ADMINISTRATION - STRUCTURE AND OPERATIONAL ISSUES

WHAT THE INQUIRY SHOWS

5.1 The Committee has said in relation to the appointment of medical practitioners that there are limits to what legislation can accomplish by itself. The same observation can be made about the framework the Bill intends should apply to the statutory benefits scheme.

5.2 There is no doubt that the introduction of impairment as the basis of injury assessment has not met universal, unqualified support from the organizations representing the participants involved in the system as it is now or as it is intended to be.

5.3 Because of the discrete nature of each of the forms of assessment, it became apparent to the Committee during its inquiry that the House must either accept or reject impairment assessment. The relevant provisions establish the principle, how that is to translate into a working system and by whom it is to be applied and when access to common law damages may be sought. These are provisions that do not respond to the "fine-tuning" of parliamentary amendment particularly when much of the operational and procedural detail is committed to the Government and its agencies through the use of subsidiary legislation or administrative instructions.

5.4 Similar constraints on amendments apply to the replacement of the Commission with WorkCover WA; a matter more fully discussed below.

5.5 The Committee has sensed dissatisfaction bordering on frustration with the non-availability of the regulations that are vital to the functioning of the new arrangements. This situation might be defused were the Government to make available, before passage of the Bill, a table of contents for each of the regulations that must be made. That would give a reasonable indication of the intended scope and purpose of the regulations and their context within the Bill.

WORKCOVER WA

5.6 The Bill proposes replacing the existing Commission with a governing body called WorkCover WA. Not all submissions were supportive of the change or the extension of the functions to be conferred on WorkCover WA. So far as the name itself is concerned, section 94(3) of the 1981 Act authorizes the existing Commission to operate under that name.

5.7 The establishment, dissolution, rearrangement, and functions of an agent or instrumentality of the State Government are matters for it alone to decide. The Crown's prerogative [subsisting common law powers] supplies the requisite legal authority. Parliament is involved where the entity is created, or is to be created, by a written law or where it is intended to confer powers of compulsion on the entity or establish offences and allow for penalties to be imposed for non-compliance with a requirement of the enactment. More often than not, Parliament will also be requested to appropriate money from the Consolidated Fund to defray the operational and capital costs of the entity.

5.8 The Government has the responsibility in due course of demonstrating that the restructure made by the Bill has improved the efficiency, effectiveness, and economic operation of the statutory scheme.

5.9 For these reasons, the Committee has no comment to make on the proposed structure included in the Bill.

DISPUTE RESOLUTION

5.10 Part IIIA of the 1981 Act was added in 1993 and provides a comprehensive scheme for the resolution of disputes defined in section 84A as —

> **"dispute"** means —
>
> (a) a dispute in connection with a claim for compensation under this Act and includes —
>
> (i) a dispute as to liability to make or continue to make weekly payments of compensation;
>
> (ii) a dispute between employers as to liability;
>
> (iii) a dispute between insurers as to liability to indemnify an employer;
>
> (iv) a dispute between an employer and an insurer as to the insurer's liability to indemnify the employer;
>
> or
>
> (b) a matter to be determined by a dispute resolution body under section 67(2a)(b);

5.11 Clause 67 repeals Part IIIA. Clause 130 repeals Part XI and substitutes Parts XI – XVIII. Some of the more contentious issues considered by the Committee arise from these provisions.

ARBITRATORS

5.12 Clause 286 reserves appointment as an arbitrator to the Minister. A person must be both an officer of WorkCover WA and a legal practitioner to be eligible for

appointment. Arbitrators are part of the Dispute Resolution Directorate established by clause 278 within WorkCover WA with operational autonomy.

5.13 The objections contained in the submissions are directed at the absence of an effective, external, review mechanism for arbitrators' decisions that are intended to have far-reaching effect. Reference has already been made to the power given to an arbitrator to determine the degree of impairment.

5.14 Clause 187 makes an arbitrator's decision final and binding with no right of appeal apart from the limited form allowed by clause 247 which depends not only on leave to appeal being granted by the Commissioner but prevents appeals about compensation where the amount is less than $5000 (or other prescribed amount) and the amount is at least 20% of the actual award.

5.15 Clauses 204, 205 are of particular concern to the Law Society of Western Australia and other legal practitioners who made a submission. Clause 204 removes the right not to incriminate oneself. The provision is becoming commonplace in bills that propose establishing bodies with inquisitorial functions, eg, the Corruption and Crime Commission and the Australian Crime Commission in its federal and State jurisdictions. A limited immunity is provided in these cases and reference should be made to the report of the Uniform Legislation Committee on the *National Crime Authority (State Provisions) Amendment Bill 2002*, pp 15-17 for a full discussion of the implications of removing the right and the operation of the various immunities that are substituted. The Uniform Legislation Committee was somewhat unconvinced by the arguments put in support of removal of the right.

5.16 Clause 205 modifies the application of legal professional privilege to a legal practitioner in relation to the production of a medical report or answering questions put in relation to a medical report. The provision overrides the confidential nature of a communication between client and lawyer and the privilege against disclosure of such a communication that cannot be waived by any person other than the client.

5.17 Although the inroad is highly specific and allows for excision of privileged communications in a medical report it is nevertheless seen as a dangerous and unnecessary erosion of a fundamental right. While there is no specific provision in the Bill, it should be the case that the client be given an opportunity to waive the privilege to the extent permitted under clause 205 rather than invoke the provision at the outset.

5.18 It is obvious that the denial of judicial review and the highly circumscribed ability to appeal an arbitrator's decision are intended to assist the efficient despatch of disputes and procedural difficulties. That may be the result. Conversely, it may spawn protracted litigation challenging the validity of some of the restrictions and the scope and purpose of others. Where to strike the balance is a hypothetical question until the scheme has been in operation for a number of years. It was precisely for this reason

that the Chamber of Commerce argued against the Bill on the ground that the effects of 1999 amendments had yet to be fully appreciated. The CCC claimed the Bill's proposals were thus premature.

RULES AND REGULATIONS

5.19 The Committee has already commented on the absence of draft regulations that are an integral part of the Bill's intended operation. A comparison of the 1981 Act and the Bill suggests that some of the five sets of regulations now in force may survive albeit amended to reflect the changes the Bill makes. Others will be entirely new because of the Bill's changes of policy.

5.20 The Committee acknowledges the wide-ranging power the Bill confers to make regulations and the uncertainty that will be created until they are made. There may be some comfort in knowing that regardless of the breadth of the regulation-making power, a regulation is void if it purports to go outside the scope of the parent enactment or it creates further powers independently of those found in the enactment.

5.21 Under section 42 of the *Interpretation Act 1984*, either House may disallow a regulation or a part of a regulation. In the Legislative Council, the question for disallowance must be resolved, at the latest, on the 13th sitting day following that on which notice of motion was first given. Some Acts provide their own time frames both as to notice and when the question must be resolved. In those case, the statutory provisions are observed because of their overriding effect on the standing orders. Disallowance operates prospectively. Anything done before disallowance in reliance on the disallowed regulation is preserved and stands or falls on compliance with the provisions of the law as they were at the time. The transitional regulations discussed below are immune from disallowance by reason of their "one off" use. Once they have effect, retroactively in most cases, the matter is resolved and cannot be undone by subsequent disallowance which would simply disallow an already spent regulation.

5.22 Because much of the detail, some of it substantive, is left to regulations and other forms of subordinate legislation, the possibility exists for disallowance to operate unfairly as between a worker subject to the regulations and a worker similarly placed but whose case arises after disallowance. Moreover, the length of time that may elapse after notice to disallow has been given may be considerable given the sitting patterns of the House, and be a cause of uncertainty to those administering, and those subject to the impugned regulations. The Committee will consider possible solutions to this issue in its wider inquiry.

5.23 There are two other matters that call for comment. Clause 178 allows the Governor to make regulations if the Bill, as enacted, does not make adequate provision to deal with the changeover from the old scheme to the new. Additionally, if the Minister forms

the opinion that there is an anomaly arising from the implementation of the replacement enactment, that anomaly may be cured by regulation.

5.24 It is then provided that such a regulation may operate retroactively but without prejudice to the then existing rights or interests of any person apart from the State itself.

5.25 Similar provisions have been objected to by committees of the Legislative Council and were dealt with in great detail by the joint Committee on Delegated Legislation in its advice to the Public Administration Committee on clause 20 of the *Planning Appeals Amendment Bill 2001* and included as Appendix 4 to the report on that Bill.

5.26 The Committee draws the attention of the House to the inclusion of a power to make transitional regulations in the Bill.

5.27 Clause 179 enables the making of subsidiary legislation, effectively a statutory instrument having legislative effect and therefore not restricted to "regulations", amending subsidiary legislation made under the authority of **any** Act if the Minister considers such a course is a necessary or desirable consequence of the Bill becoming law. As the clause itself acknowledges, it does not prevent making subsidiary legislation under the empowering Act in which case the question is why clause 179 is thought necessary.

HIV/AIDS

5.28 Proposed section 31F allows a lump sum payment rated at 100% of the amount prescribed from time to time where AIDS is contracted in the course of employment. The entitlement is extinguished if the onset of AIDS results from unlawful use of an illicit drug or "voluntary sexual activity". Presumably, "voluntary" is intended to mean "consensual" in which case it seems preferable for the provision to refer to "consensual sexual activity". However, it is difficult to understand the reason for the exclusion based on a sex worker's sexual activity. A sex worker who goes on to develop AIDS contracted through sexual contact in the workplace may not have known or have been told that the other party was HIV positive or had contracted AIDS. Moreover, it cannot be assumed, regardless of the state of knowledge about the other party's HIV/AIDS status, that the worker(s) engaged in unprotected sexual activity.

5.29 The Committee suggests that the exclusion is potentially wide-ranging and unduly discriminatory. Arguably, the test for eligibility should relate to the sex worker knowing the existence of the risk associated with unprotected sexual activity where at least one of the persons involved is HIV positive or has full-blown AIDS and whether the worker, in the case on which the claim is made, was made aware of the other's HIV/AIDS status and in any event did not engage in unprotected sexual activity.

FIXING RATES OF PREMIUMS

5.30 The existing mechanism for determining the premiums payable to insurers is the Premium Rates Committee ('PR Committee') established under Part VIII of the 1981 Act. The PR Committee, chaired by the Auditor General, is representative of the several interests intimately involved in the operation of the statutory scheme.

5.31 The Bill amends Part VIII to the extent necessary to abolish the existing PR Committee and vest its functions in WorkCover WA. The proposal has been criticized in submissions for the abandonment of the representation principle evidenced by the composition of the current PR Committee. It was suggested that the composition of the PR Committee and its apparent independence from ministerial direction has assured the confidence it is said to enjoy.

5.32 Giving the power to fix premium rates to WorkCover WA was seen as retrograde, unnecessarily bureaucratic, exclusionary, and likely to lead to contention.

5.33 The Committee commends a provision that requires WorkCover WA to disclose its intended rates and their bases to the interests having representation on the existing committee and take their responses under consideration before publishing the final version.

5.34 The Committee notes that Clause 113 needs to be amended in committee of the whole by repealing section 151(a) and (c) – there is no amendment in the clause as it is printed although the "blue bill" shows them as repealed.

STATUTORY SCHEME AND ACTION IN TORT FOR NEGLIGENCE

5.35 The Bill will have a restricting effect on a worker's ability to commence legal action seeking an award of damages for work-related injury. The restriction is primarily the product of the threshold degree of impairment that will be required. The Plaintiff Lawyers' Association put the view very strongly that the new threshold will effectively strangle access to the common law action.

5.36 The Committee observed in its introductory comments that the restrictions on eligibility to claim damages at common law appeared to rest on preventing double dipping. The offset provisions in the current law and as the Bill intends reflect that principle.

5.37 The interrelationship of the statutory scheme and the common law action are part of the wider inquiry this Committee was established to pursue. It is premature for the Committee to express a concluded view on this issue but, and Queensland's statutory scheme is a case in point, there seems to be little reason why the statutory entitlements, in principle, should modify access to the common law action for

damages. As it is, damages cannot be awarded with respect to those aspects already compensated under the statutory scheme.

THE COMMISSIONER

5.38 The Bill creates the office of Commissioner to head WorkCover WA. The Commissioner must be a District Court Judge and specific provision is made for the Commissioner to continue to perform judicial functions during tenure.

5.39 The use of judicial officers as *persona designata* is not unusual. It, supposedly, lends dignity to the office to which the judicial officer is appointed. At the same time, it brings a judicial officer within the sphere of the executive government and, potentially, may result in a perception of partiality towards a particular government and consequent loss of a belief in the judicial officer's neutrality when acting judicially.

5.40 The Bill repeats a particular defect in this type of appointment. The *Act of Settlement 1701(GB)* re-enacted that part of the *Bill of Rights 1689* that abolished judicial tenure during the Sovereign's pleasure replacing it with tenure during good behavior. Supreme and District Court judges are removable for proven misbehavior or incapacity or inability to perform the functions of judicial office by an address of both Houses to the Governor praying for removal. The Commissioner is also removable by the same process but such removal does not affect the Commissioner's tenure as a judge, albeit that the grounds for removal would probably suffice in relation to each of the offices.

5.41 The Committee suggests that the approach found in the *Corruption and Crime Commission Act 2003* provides a more acceptable way of dealing with such appointments. Under that Act, any person appointed as the Commissioner ceases to hold judicial office which may then be revived without loss of seniority or entitlements when the person ceases to be the Commissioner.

CHAPTER 6

CONCLUSION

6.1 The Committee has been unable to consider many of the issues raised in the submissions so far as they relate to the content of the Bill. They will be given consideration as the wider inquiry progresses.

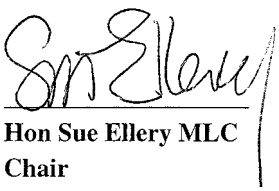
6.2 The Bill is a textbook example of the difficulties experienced when policy has to be translated into statutory language. Although the concepts are easy to comprehend, their expression in the Bill is a complicated exercize if ambiguity and imprecision are to be avoided. The complexity is amplified by the form of the Bill, which is to make substantial amendments to the text of the parent Act, and the absence of a draft of the regulations that are an essential element of the introduction and administration of the statutory scheme that is intended to supplant current arrangements.

6.3 Many of the submissions from persons and bodies deal with aspects of the Bill, and matters of interpretation, that may take some time to "bed down" before their application is delimited . Undoubtedly, further amendments will be required as and when the parliamentary intent parts company with the legislative effect of the enactment as interpreted by the judiciary.

6.4 There is a body of opinion, collated from the submissions received, to the effect that the policy changes will exacerbate the inequities said to exist in the 1981 Act

6.5 The Committee has avoided embroiling itself in argument on matters of policy that are properly determined by the House. This report is intended to assist members' understanding of the major implications of the proposals by reference to the content of submissions received without attaching findings or recommendations that, as a result of the Committee's further inquiry, may be unsustainable.

6.6 The Bill's passage will be completed well before the Committee is in a position to report on the desirable principles on which any no-fault statutory scheme for workers' compensation should be established. Once these changes are put in place, it becomes difficult to persuade any government to revisit the scheme so soon after making substantial alterations. Nonetheless, it is to be hoped that the results of this Committee's inquiries will be given proper consideration when the next review of the 1981 Act is commenced.



Hon Sue Ellery MLC
Chair

September 21 2004

APPENDIX 1

LIST OF INTERESTED PERSONS AND ORGANIZATIONS TO WHOM THE COMMITTEE WROTE

APPENDIX 1

LIST OF INTERESTED PERSONS AND ORGANIZATIONS

Mr Daryl Cameron, Group Manager WA & NT , Insurance Council of Australia

Associate Professor Dr Robert Guthrie, Head of School of Business Law, Curtin University

Mr Greg Burgess, President, Australian Plaintiff Lawyers Association

Mr Ian Weldon, President, Law Society of Western Australia

Mr Paul O'Halloran, Paul O'Halloran and Associates, Barristers and Solicitors

Mr Kevin Reynolds, State Secretary, CFMEU

Mr Harry Neesham, Executive Director, WorkCover Western Australia

Mr Don Ingram, President, Injured Persons Action and Support Association

Mr Reg Howard-Smith, Director, Chamber of Minerals and Energy of WA Inc

Ms Toni Walkington, Branch Secretary, Community & Public Sector Union

Dr Paul Skerritt, President, Australian Medical Association Inc (WA)

Ms Ricky Burgess, Chief Executive Officer, Western Australian Local Government Association

Mr David Kelly, State Secretary, Miscellaneous Workers' Union

Mr John Langoulant, Chief Executive Officer, Chamber of Commerce & Industry of WA

Mr Ian Viner AO QC, President, Western Australian Bar Association

Ms Linda Thompson, Chairman, Self Insurers Association of WA Inc

The Hon Chief Justice D K Malcolm AC, Chief Justice of Western Australia

Her Honour Judge Antoinette Kennedy, Chief Judge, District Court of Western Australia

Ms Stephanie Mayman, Secretary, Unions WA

APPENDIX 2

LIST OF SUBMISSIONS RECEIVED

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Dr John Quintner

Mr Geoff Taylor, Director, Work Safety and Health Associates

Mr Tony D'Agui

Mr Peter Anderson MB, B CHIR, FRACS, FFRM-RACP

Mr Reg Howard-Smith, Director, Programs and Member Services, Chamber of Minerals and Energy

Ms Anna Breed, AWAWA Group

Mr Don Ingram, President, Injured Persons Action & Support Association (Inc)

Mr Greg Burgess, Australian Plaintiff Lawyers Association

Insurance Council of Australia Limited

Ms Linda Thompson, Chairperson, Self Insurers Association of WA

Ms Sue Howard, Industrial Relations Manager, Australian Hotels Association

Ms Anne Bellamy Director, Health Safety and Workers' Compensation, Chamber of Commerce and Industry

Dr Robert Guthrie, Head of School, Business Law School, Curtin University

Mr Dave Robinson, Assistant Secretary, Unions WA

Ms Julie Mills, Chief Executive Officer, Recruitment and Consulting Services Association WA

Mr Paul Skerritt, President, Australian Medical Association

Mr Dave Kelly, Secretary, Liquor, Hospitality and Miscellaneous Union

Hon David K Malcolm AC, Chief Justice of Western Australia

Mr Ian Weldon, President, The Law Society of Western Australia

Mr B L Nugawela, Barrister

Mr David Massey

APPENDIX 3

LIST OF WITNESSES

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Dr Robert Guthrie, Head of School, Business Law School, Curtin University

Dr Richard Choong, Vice-President of the Australian Medical Association Inc (WA)

Mr Peter Jennings, Deputy Executive Director, Australian Medical Association Inc (WA)

Mr Brian Nugawela, Barrister