

**Report of the Structural Review of  
Institutional and Working Arrangements in  
Queensland's Workers' Compensation  
Scheme**

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## Table of Contents

Abbreviations and acronyms.....	6
Terms of Reference.....	7
Preface .....	8
Introduction to the report .....	9
The Queensland workers' compensation system.....	9
Comparison with other Australian schemes.....	9
Performance of the System .....	9
Economic and demographic factors influencing workers' compensation outcomes .....	10
Moving from reactive to proactive change .....	10
Chapter One – Term of Reference 1 .....	11
Introduction to Chapter One .....	11
Main issues relating to TOR 1 .....	11
Understanding the relationship between Q-COMP, WCQ and WHSQ.....	11
Discussion of issues relating to TOR 1.....	13
A regulatory continuum .....	13
A wider strategic approach .....	13
Elements in the proposed strategy .....	13
Assisting better understanding of the system.....	14
More transparent funding for WHSQ .....	14
Recommendations for TOR 1 .....	15
Recommendation 1.1 .....	15
Recommendation 1.2 .....	15
Recommendation 1.3 .....	15
Recommendation 1.4 .....	15
Recommendation 1.5 .....	15
Recommendation 1.6 .....	15
Recommendation 1.7 .....	16
Recommendation 1.8 .....	16
Recommendation 1.9 .....	16
Recommendation 1.10 .....	16
Chapter Two – Term of Reference 2 .....	17
Introduction to Chapter Two.....	17
Main issues relating to TOR 2 .....	17

Existing regulatory and supervisory powers and accountability.....	17
Ministerial regulatory role and powers .....	18
Obligations to report to the Minister.....	18
Other accountability requirements on Q-COMP, WCQ and WHSQ.....	19
Ministerial powers to direct Q-COMP and WCQ.....	19
Other Ministerial supervisory and regulatory powers.....	20
Q-COMP’s regulatory role and powers .....	20
WCQ’s regulatory role and powers .....	21
WHSQ’s regulatory role and powers relating to workers’ compensation .....	21
Roles and powers of other bodies .....	22
Discussion of issues relating to TOR 2.....	22
Accountability and transparency.....	22
Advice from Q-COMP to the Minister .....	24
Information about the fund and the scheme.....	25
Information for employers and workers.....	25
Information notices .....	26
Actuarial qualifications .....	26
Periodic reviews.....	26
Best practice by public sector departments and agencies .....	26
Ensuring that progress is measured and reported.....	27
Recommendations for TOR 2 .....	27
Recommendation 2.1 .....	27
Recommendation 2.2 .....	28
Recommendation 2.3 .....	28
Recommendation 2.4 .....	28
Recommendation 2.5 .....	28
Recommendation 2.6 .....	28
Recommendation 2.7 .....	28
Recommendation 2.8 .....	29
Recommendation 2.9 .....	29
Recommendation 2.10 .....	29
Recommendation 2.11 .....	29
Recommendation 2.12 .....	29
Recommendation 2.13 .....	29
Recommendation 2.14 .....	30
Recommendation 2.15 .....	30
Chapter Three – Term of Reference 3 .....	31
Introduction to Chapter Three.....	31
Background.....	31
The WCRA and claims management.....	31

Claims management performance.....	32
Review of claims management decisions .....	32
Medical Assessment Tribunals .....	33
The WCRA and common law settlement processes .....	33
Performance in common law settlement.....	33
Main issues relating to TOR 3 .....	33
Discussion of issues relating to TOR 3.....	33
Delays in notifications .....	33
WCQ’s engagement with employers, workers and others .....	34
Availability of medical expertise for claims managers.....	35
Regional issues.....	35
Investigation of claims .....	36
Rescinding decisions to reject claims .....	36
Use of external legal practitioners .....	36
Dealing with poorly performing employers.....	36
Better understanding of why common law actions are brought.....	37
Recommendations for TOR 3 .....	37
Recommendation 3.1 .....	37
Recommendation 3.2 .....	37
Recommendation 3.3 .....	37
Recommendation 3.4 .....	38
Recommendation 3.5 .....	38
Recommendation 3.6 .....	38
Recommendation 3.7 .....	38
Recommendation 3.8 .....	38
Recommendation 3.9 .....	38
Recommendation 3.10 .....	38
Chapter Four – Term of Reference 4 .....	39
Introduction to Chapter Four.....	39
Main issues relating to TOR 4 .....	39
Background and context .....	39
Discussion of issues relating to TOR 4.....	41
The effect of legal costs on the scheme .....	41
Matters relating to the legal profession.....	41
The significance of legal costs for individual workers and employers .....	42
A better understanding of what is happening in respect of legal costs .....	42
Advertising of legal services.....	42
Information for claimants about legal costs.....	43
WCQ’s legal resources.....	43
Recommendations for TOR 4 .....	44

Recommendation 4.1 .....	44
Recommendation 4.2 .....	44
Recommendation 4.3 .....	44
Recommendation 4.4 .....	44
Recommendation 4.5 .....	44
Recommendation 4.6 .....	45
Recommendation 4.7 .....	45
Chapter Five – Term of Reference 5.....	46
Introduction to Chapter Five.....	46
Background.....	46
Importance of injury management .....	46
National comparisons.....	46
Legislative requirements.....	46
Roles of insurers and Q-COMP .....	47
Main Issues relating to TOR 5.....	48
Discussion of issues relating to TOR 5.....	48
Recommendations for TOR 5 .....	49
Recommendation 5.1 .....	49
Recommendation 5.2 .....	49
Recommendation 5.3 .....	49
Recommendation 5.4 .....	49
Recommendation 5.5 .....	50
Recommendation 5.6 .....	50
Recommendation 5.7 .....	50
Recommendation 5.8 .....	50
Recommendation 5.9 .....	50
Appendix: List of persons and bodies consulted.....	51

## Abbreviations and acronyms

DJAG	Department of Justice and Attorney General
ESO	Electrical Safety Office
IRC	Industrial Relations Commission
MAIC	Motor Accident Insurance Commission
MAT	Medical Assessment Tribunal
Minister	The Minister for Industrial Relations and Attorney General
Q-COMP	The Workers Compensation Regulatory Authority
TOR	Term of Reference
WCRA	<i>The Workers Compensation and Rehabilitation Act 2003</i>
WCR Regulation	<i>The Workers Compensation and Rehabilitation Regulation 2003</i>
WCQ	WorkCover Queensland
WHSA	<i>The Workplace Health and Safety Act 1995</i>
WHSQ	Workplace Health and Safety Queensland

### Notes:

- i. unless otherwise indicated , a reference to a section means a section of the WCRA;
- ii. for the purposes of this report, it refers to WHSQ rather than to DJAG (to make clear that it is the responsible part of DJAG).

## Terms of Reference

The Review will advise the Minister on:

1. Appropriate strategies and institutional arrangements to ensure the roles and functions of Q-COMP, WorkCover and the Department of Justice and Attorney General in Queensland workers' compensation are clear and well understood by stakeholders and the broader community.
2. Arrangements that can be put in place to enhance transparency and ensure that information is readily available to stakeholders and the broader community on the workers' compensation scheme performance.
3. Strategies to improve the efficiency and effectiveness of the workers' compensation claims management and common law settlements processes.
4. The appropriateness of the current level of legal costs and management of the legal profession in workers' compensation matters.
5. What actions can be taken by scheme stakeholders to improve rehabilitation and return to work.

## Preface

I commenced this review on 1 June 2010 under the terms of reference (see earlier) approved by the Minister. The review involved a high level of consultation.

A reference group of stakeholders was established, chaired by an associate secretary of DJAG. It included representatives of unions, employer bodies, self-insurers, the Law Society, the Australian Lawyers Alliance and senior officials from Q-COMP, WCQ and WHSQ. The reference group met fortnightly and was consulted about the review's progress and the report's possible content and recommendations.

I consulted many interested groups and persons (see Appendix). They included unions, employers and their representative associations, legal professional bodies and legal practitioners, the Q-COMP board, the WCQ chair, the MAT chair, the Workplace Health and Safety board, the Australian Orthopaedic Association president, allied health professional representatives, key staff of Q-COMP, WCQ and WHSQ, MAIC and Q-Super, other Queensland safety regulators, WorkSafe Victoria and actuaries used by WCQ and Q-COMP.

The assistance of those who were consulted is gratefully acknowledged. They were not required to make formal written submissions, but many provided useful documents and drew attention to materials that assisted the review. To promote candid discussion, all discussions were confidential. Accordingly, the persons who were consulted are not quoted in the report.

The report was prepared with the benefit of those consultations and discussions. I also considered relevant materials, including legislation, Parliamentary debates, jurisprudence, previous reviews of workers' compensation law and practice, monographs, articles, and statistical reports. The report contains fifty-one recommendations, with associated findings. The findings and conclusions draw from what was put to me, but represent my views.

Most of the recommendations are for administrative action. Some would, if accepted, need legislative implementation. All are meant to contribute to ongoing improvement in the prevention of work-related harm and to fair, effective and efficient responses to it. A high performing workers' compensation scheme is important to achieving that goal.

In formulating my recommendations, I considered that, in line with modern regulatory practice, taking non-statutory action should be considered before legislative change. Some recommendations build on or complement action that has been taken or is foreshadowed. I recommended legislation where it was the only or best way to achieve a proposed objective. I also identified some areas where, although strong opinions were firmly held, there was not enough evidence for making sound policy judgements. In those cases, I have proposed that information and data be gathered to allow evidence-based decisions.

I consider that, overall, the recommendations will facilitate the work of the foreshadowed 2012 whole of scheme review.

Finally, I express my appreciation for the considerable assistance given to me by many people, but particularly the reference group and Ms Trinh Le from WHSQ who worked tirelessly with me throughout the consultation and the information gathering stages.

Robin Stewart-Crompton

16 August 2010

# Introduction to the report

## The Queensland workers' compensation system

1. The *Workers Compensation and Rehabilitation Act 2003* (WRCA) and *Workers Compensation and Rehabilitation Regulation* (WRC Regulation) establish the Queensland system of workers' compensation. Under the WRCA, an employer must insure or self-insure against injury sustained by a worker of the employer.<sup>1</sup> There are over 150,000 insured employers and 23 self-insurers.
2. WCQ and the Q-COMP<sup>2</sup> are the key bodies responsible for the system's administration. Each is established by the WCRA.<sup>3</sup> WorkCover Queensland (WCQ) issues policies in relation to accident insurance and the Workers' Compensation Regulatory Authority (Q-COMP) licences self-insurers.<sup>4</sup> Their respective roles, powers and functions are discussed in greater detail elsewhere.

## Comparison with other Australian schemes

3. Although useful broad comparisons may be made between the performance of the Queensland workers' compensation scheme and that of the schemes in the other Australian jurisdictions,<sup>5</sup> differences between the schemes sometimes make more detailed comparisons problematic.<sup>6</sup> Nonetheless, comparisons are made in this report where they are valid and relevant.

## Performance of the System

4. The scheme's overall design and how it operates have been relatively stable since 2003, when Q-COMP was established. Accordingly, notwithstanding amendments each year since then to the WRCA or WRC Regulation, as well as various adjustments to the administrative practices of WCQ and Q-COMP, it is possible to draw on performance trends for key aspects of the scheme. For the purposes of the report, where they are available and relevant, data over the past five financial years have been examined.
5. Those data reveal continuing pressure on the system. Measures are required to ensure that it remains adaptive, efficient and effective. Claims management and injury management both depend heavily on highly constructive engagement with employers and injured workers and professionals who are involved in those areas. The report looks at those issues and recommends action to improve that engagement and to ensure that obligations are met.
6. Trends in relation to common law actions and associated damages have resulted in considerable attention being given to those developments, the perceived underlying

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<sup>1</sup> WRCA, s.48.

<sup>2</sup> Under s.328 of the WRCA, the Authority may have a prescribed trading name. Under s.4 of the WRC Regulation, the trading name is Q-COMP.

<sup>3</sup> WRCA, Chapters 7 and 8.

<sup>4</sup> WRCA, ss.48 and 69-72.

<sup>5</sup> Such comparisons are made in the comparison of occupational health and safety and workers' compensation schemes in Australia and New Zealand issued annually by the Workplace Relations Ministers' Council

<sup>6</sup> Such differences include scheme design and scope, premium setting, excesses, and benefits.

causes and possible responses. The report finds that there is a lack of good evidence about what the drivers are in this area and recommends action to clarify the position. This extends to learning more about what leads to common law action being brought and what the costs for claimants are in such actions.

## Economic and demographic factors influencing workers' compensation outcomes

7. Queensland's economy and society are dynamic. There are substantial ongoing changes in the nature, size and types of industries and businesses, as well as in working arrangements and the size, composition, mobility, demographics and skills of the workforce.<sup>7</sup> As a result of such changes and with the introduction of new industries and technologies, work-related hazards and risks are constantly evolving.
8. These developments present further challenges to the successful prevention of work-related harm and potentially impose further demands on the workers' compensation system if prevention fails. Accordingly, government resources should be more effectively aligned and deployed to analyse the causes of those pressures and to develop and implement effective counter-measures. The report therefore proposes ways for safety regulators, Q-COMP and WCQ to work more effectively together.

## Moving from reactive to proactive change

9. It is notable that the various major changes to workers' compensation laws in Queensland since 1996 have occurred in response to external developments. Pressures on the scheme's funding and stability led to important legislative changes in 1996 and this year. The redesign of the scheme's regulation in 2003 arose from National Competition Policy considerations. The next review in 2012 represents a break from that pattern, as it will occur on the government's terms at a time of the government's choosing. The report proposes that such an approach should be the norm.

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<sup>7</sup> See Qld Budget Paper 2 - Budget Strategy and Outlook, 2010-11, at <http://www.budget.qld.gov.au/budget-papers/bp2.shtml>

## Chapter One – Term of Reference 1

*Appropriate strategies and institutional arrangements to ensure the roles and functions of Q-COMP, WorkCover and the Department of Justice and Attorney General in Queensland workers' compensation are clear and well understood by stakeholders and the broader community.*

### Introduction to Chapter One

10. Under TOR 1, the issues to be examined concern the relationship of Q-COMP, WCQ and WHSQ (the relevant part of DJAG). Their complementary roles appear to be imperfectly understood, creating some confusion among stakeholders about the responsibilities and interaction of those bodies. Possible remedial action is considered, including establishing a strategic setting for Q-COMP, WCQ and WHSQ (and possible other safety regulators) to work together to achieve mutually beneficial results. Recommendations are made for that purpose.

### Main issues relating to TOR 1

11. Issues often raised in relation to TOR 1 during the review's consultation stage concerned:
- a) the relationship between Q-COMP, WCQ and WHSQ and a perceived lack of easily understood information that explained it;
  - b) what resources they had and how they were used; and
  - c) whether Q-COMP, WCQ and WHSQ performed their functions in a way that optimised the overall performance of the workers' compensation scheme.

### Understanding the relationship between Q-COMP, WCQ and WHSQ

12. As mentioned earlier, each of Q-COMP, WCQ and WHSQ has particular roles, powers, functions and accountabilities. They are discussed in greater detail in the consideration of TOR 2. In practice, there are functional connections between them. That reflects not only the scheme's underpinning structure, but also the fact that each body requires information and advice from the others to perform its functions or to satisfy statutory accountability obligations. There are some existing legislative connections.

13. The WCRA's primary object is set out in s.4(1):

*(1) This Act establishes a workers' compensation scheme for Queensland:*

- (a) providing benefits for workers who sustain injury in their employment, for dependants if a worker's injury results in the worker's death, for persons other than workers, and for other benefits; and*

(b) encouraging improved health and safety performance by employers (emphasis added).

14. The WHSA's objective under s.7(1) is expressed as follows:

*(1) The objective of this Act is to prevent a person's death, injury or illness being caused by a workplace, by a relevant workplace area, by work activities, or by plant or substances for use at a relevant place.*

15. That objective is explained in s.7(4). Paragraph 7(4)(c) states:

*(4) The achievement of this Act's objective will help:*

*(c) reduce the burden on the workers' compensation scheme caused by these deaths, injuries and illnesses, which in turn reduces costs imposed on industry* (emphasis added).

16. In other words, the primary legislation itself reflects the inter-connection between preventing work-related harm and, where such harm occurs, dealing fairly and effectively with its consequences. The WHSA gives the principal regulatory role for workplace health and safety to WHSQ. Nonetheless, the legislation is co-regulatory in that obligation holders (persons conducting businesses or undertakings, workers and others involved in or contributing to the performance of work) also have particular duties to ensure that workplace health and safety is not jeopardised. Under the WCRA, employers must insure against work-related harm and their claims experience influences the premiums that WCQ sets for them.<sup>8</sup> Likewise, an employer's OHS record is expressly a factor for Q-COMP to consider in making its decisions about licensing an employer to self-insure.<sup>9</sup> WHSQ gives reports to Q-COMP on that matter.<sup>10</sup> Workers also have responsibilities under the workers' compensation legislation (for example, to participate satisfactorily in rehabilitation<sup>11</sup>).

17. The interaction between the agencies arises from:

- a) statutory requirements (for example, Q-COMP reviews certain decisions by insurers, including WCQ, and has other roles in relation to their activities; as noted above, WHSQ supplies certain OHS reports to Q-COMP);
- b) administrative or policy arrangements (for example, where WHSQ's policy unit interacts with Q-COMP or WCQ, or both, over matters on which it is advising the government);
- c) ad hoc activities of common interest (for example, joint information activity by Q-COMP and WCQ and co-operation between them over rehabilitation matters, or the joint promotion in the public sector by senior WHSQ and WCQ officials of good workplace health and safety and related workers' compensation issues<sup>12</sup>).

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<sup>8</sup> WCRA, Chapter 2, Part 3.

<sup>9</sup> Sections 71 and 72.

<sup>10</sup> Sections 71(2) and 72(2); WHSA, s.182A.

<sup>11</sup> Section 232.

<sup>12</sup> These examples are discussed elsewhere.

18. Q-COMP, WCQ and WHSQ have adopted various approaches to providing information about their roles, powers, functions, policies, programs and practices. Each has a well-constructed web site, with accessible information. Each holds interactive events such as stakeholder forums and other presentations. Officials often participate in conferences that are run by interested industry or professional bodies or groups and consult them over particular issues. WCQ surveys its customers and Q-COMP surveys its stakeholders to ascertain their views on various matters, including information needs. Q-COMP, WCQ and WHSQ summarise such initiatives in their annual reports. That information focuses on their particular responsibilities, with limited guidance about the system as whole.

## Discussion of issues relating to TOR 1

### A regulatory continuum

19. The laws concerning workplace health and safety and workers' compensation are part of a regulatory continuum. The prevention of work-related harm is the primary objective. Self-evidently, more effective prevention is in the interests of workers, businesses and the community. In this regulatory context, it has the additional benefit of reducing the incidence and seriousness of events that give rise to workers' compensation claims and affects the related processes of rehabilitating injured workers and assisting them to return to work. At the same time, appropriate premium setting positively influences the behaviour of policy holders in meeting their workplace health and safety obligations.

### A wider strategic approach

20. Within that framework, it appears possible to build on the existing linkages to strengthen the operational relationship between Q-COMP, WCQ and WHSQ. The objective would be to achieve better workplace health and safety and to improve the fair, efficient and effective operation of the workers' compensation scheme.
21. To secure that result, an overarching cross-agency strategy is proposed. The strategy's overall aim would be more effective prevention of workplace harm, as well as fair and more effective responses to such harm if it occurs. This would not replace existing strategies or programs. It would instead provide a context in which they might be better coordinated and refined to take account of the wider goals. It would provide a framework for improving outcomes and overcome any tendency for the agencies to operate as 'silos'.
22. The strategy would also facilitate the foreshadowed 2012 review through better and more transparent use of resources, including improved data relating to the workers' compensation scheme. Better data would also assist safety regulators and policy makers. WHSQ should be responsible for managing the development of the strategy.

### Elements in the proposed strategy

23. Subject to the Minister's endorsement, the strategy should be outcome-focused and require the agencies to work together proactively. The ESO should be included in the strategy, as its role in relation to workplace health and safety strongly complements that of WHSQ. Such a strategy should be developed by senior management in the agencies (the Q-COMP, WCQ and WHS boards would have important roles in this regard).

24. The strategy would provide a framework for cooperation, innovation, better use of resources and, where appropriate, more integrated service. This would include:
- a) in its strategic or business planning, each participating agency would have to take account of the overarching strategic goal;
  - b) where appropriate, the participating agencies should:
    - i. develop and implement common or complementary goals, policies and programs;
    - ii. identify and undertake relevant joint activities;
    - iii. improve the nature, validity and relevance of data that each collects and uses, so that, among other things, the data are more useful for identifying trends in workplace health and safety and the workers' compensation scheme, and for guiding interventions;
    - iv. take action to make the overall workplace health and safety and workers' compensation systems, rights and obligations easier to understand and use.
25. The Minister should seek the government's support for the strategy. Ministers with other safety regulators in their portfolios (Natural Resources, Mines and Energy; Transport) could be invited to commit to the strategy and to authorise the relevant safety regulators to participate. An MOU already exists between the safety regulators and that would provide a foundation for the proposed wider cooperation.
26. The strategy should commence no later than 1 July 2011 and operate at least until the 2012 review of the workers' compensation scheme has taken place and the government has decided its response to that review's report. Activities and results under the strategy would be reported against its key result areas in existing periodic reporting by the participating agencies to their portfolio Ministers.

#### Assisting better understanding of the system

27. To facilitate stakeholder understanding and use of the workers' compensation and workplace health and safety systems (but not contingent on the strategy), WCQ, Q-COMP, WHSQ and the ESO should jointly prepare easy to understand guidance about their respective roles, powers and functions and how they interact. The guidance should be available on their websites, complementing the detailed information already provided. WHSQ should co-ordinate this activity.

#### More transparent funding for WHSQ

28. At present, WCQ provides funds to Q-COMP and funds for WHSQ activities. The funds are combined in a single payment to Q-COMP. The WHSQ portion is paid by Q-COMP to WHSQ, together with an additional amount for WHSQ collected by Q-COMP through a levy on self-insurers. The payments would be made more transparent by WCQ paying its WHSQ contribution directly to WHSQ.

## Recommendations for TOR 1

### Recommendation 1.1

There should be an overarching cross-agency strategy for more effectively preventing work-related harm and responding to its consequences, which should be developed for ministerial endorsement by 31 March 2011. WHSQ should be responsible for managing the development of the strategy.

### Recommendation 1.2

The overall goal of the strategy would be to strengthen the interaction between WHSQ, the ESO, Q-COMP and WCQ so that the benefits of better co-ordinating their activities relating to preventing work-related harm, and responding to its consequences are realised.

### Recommendation 1.3

The interaction should include:

- a) sharing data and other information that is relevant to the various responsibilities of the WHSQ, the ESO, Q-COMP and WCQ; and,
- b) where appropriate, co-ordinating their activities, including the development and distribution of guidance material, with priority given to any activities of mutual benefit to some or all of the participants.

### Recommendation 1.4

Under the strategy, WHSQ, the ESO, Q-COMP and WCQ, should be required:

- a) when each engages in strategic or business planning, to take account of the goal of the overarching strategy and of any common or complementary goals, policies and programs of the participants; and
- b) to identify and, where appropriate, undertake joint activities that would assist in achieving the goal of the overarching strategy.

### Recommendation 1.5

The strategy should be outcome based. Activities and results would be reported against the strategy's key result areas in existing periodic reporting to the Minister.

### Recommendation 1.6

After the draft strategy has been prepared and approved by the chief executives of the entities to which it applies, taking account of stakeholder views, it should be submitted to the Minister for Industrial Relations for endorsement.

### Recommendation 1.7

Subject to the Minister's endorsing the strategy:

- a) the Minister should consider seeking the Government's support for the strategy; and
- b) the strategy should commence no later than 1 July 2011 and operate at least until the 2012 review of the workers' compensation scheme has taken place and the government has decided its response to the review's report.

### Recommendation 1.8

Subject to the Government's support, Ministers in other portfolios in which there are safety regulators (Natural Resources, Mines and Energy; Transport) should be invited to commit to the strategy and to authorise the safety regulators concerned to participate.

### Recommendation 1.9

Easy to understand guidance about the respective roles, powers and functions of Q-COMP, WCQ, WHSQ, the ESO and DJAG and how they interact should be prepared jointly and made available on their websites. Such guidance should include links to more detailed material which may be found on those web sites.

### Recommendation 1.10

Instead of WCQ providing funding to Q-COMP which includes funding for WHSQ, WCQ should provide funding separately to Q-COMP and to WHSQ. Q-COMP should continue to provide, under s.479 of the WCRA, amounts collected from self-insurers to WHSQ.

## Chapter Two – Term of Reference 2

*Arrangements that can be put in place to enhance transparency and ensure that information is readily available to stakeholders and the broader community on the workers' compensation scheme performance.*

### Introduction to Chapter Two

29. For this term of reference, three aspects were considered:

- a) the transparency of policies, programs, practices and outcomes relating to workers' compensation;
- b) the related question of the accountability of the various bodies that have powers and functions under the WCRA; and
- c) the scope, accessibility and usefulness of information about:
  - i. relevant policies, programs, practices and performance of the workers' compensation scheme and the bodies that are responsible for its operation;
  - ii. how individual employers and workers can use the workers' compensation system.

### Main issues relating to TOR 2

30. Issues frequently raised in the consultation during the review concerned:

- a) a perceived shortage of useful information about the performance of the fund and the scheme generally;
- b) differing views about the non-statutory operational standards that underpinned, or should underpin, the scheme;
- c) whether Q-COMP was sufficiently equipped under the WCRA to act as a regulator;
- d) whether individual employers and workers had ready access to simple, reliable and current information about using the workers' compensation system;
- e) whether all persons affected by WCQ decisions were aware of their rights to have the decisions reviewed;
- f) a view that some government departments and agencies were falling short of the standards expected of employers under the WCRA.

### Existing regulatory and supervisory powers and accountability

31. To understand the issues of transparency and accountability, the underpinning regulatory requirements for the control, supervision and accountability of the key public entities in

the workers' compensation system must be considered. They are the source of existing obligations and will affect the nature and operation of any proposed changes

32. The WCRA establishes a complex, inter-connected framework of regulatory roles and responsibilities for the Minister, Q-COMP, WCQ, self-insurers, authorised persons, tribunals and courts. Statutory checks and balances are provided, including accountability requirements. WHSQ has some supporting responsibilities under the WCRA (see later), but it does not have a central role in the scheme. The overall regulatory structure has applied since 2003, when Q-COMP became a statutory body.<sup>13</sup> The framework appears not to be well understood outside government.

### Ministerial regulatory role and powers

33. The Minister has overall administrative responsibility for the WCRA (as well as for the WHSA)<sup>14</sup> and is at the apex of an accountability pyramid under that Act. As outlined below, the Minister has the primary role in directing certain Q-COMP and WCQ actions.

### Obligations to report to the Minister

34. Under the WCRA, Q-COMP and WCQ must report quarterly to the Minister<sup>15</sup> and submit their annual reports to the Minister (who presents the annual reports to the Parliament).<sup>16</sup> The quarterly reports are not public. The annual reports are publicly available once presented to the Parliament.
35. Q-COMP's board<sup>17</sup> must keep the Minister reasonably informed of Q-COMP's operations, financial performance and financial position.<sup>18</sup>
36. WCQ's board<sup>19</sup> is similarly required to keep the Minister informed about WCQ's operations, financial position and financial performance and to inform the Minister immediately about matters that, in the board's opinion, may prevent, or significantly affect, WCQ's achievement of the objectives of its statement of corporate intent or the targets under its corporate plan (see discussion later).<sup>20</sup>
37. WCQ must further report annually to the Minister about the extent to which it is fully funded<sup>21</sup> and notify the Minister (and Q-COMP) of a proposed specification of a method or rate that will provide for a premium payable by an employer in the event that the employer's premium rate repeatedly exceeds the relevant industry rate.<sup>22</sup>

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<sup>13</sup> See the *Workers Compensation and Rehabilitation Bill 2003*. The explanatory notes stated that the creation of an autonomous statutory authority would ensure independent and impartial decision making in relation to matters affecting all insurers, both self-insurers and WCQ. The initiative was taken in response to the findings of a public benefit test under National Competition policy.

<sup>14</sup> Administrative Arrangements Order (No. 1) 2010

<sup>15</sup> Sections 332 and 411.

<sup>16</sup> Sections 333, 412 and the *Financial Accountability Act 2009*.

<sup>17</sup> Q-COMP's 7 member board is appointed by the Governor in Council under s335. The current board holds office until 30 June 2012.

<sup>18</sup> Sections 334 and 338(e).

<sup>19</sup> WCQ's 7 member board is appointed by the Governor in Council under s.424. The current board holds office until 30 June 2012.

<sup>20</sup> Section 414.

<sup>21</sup> Section 461.

<sup>22</sup> Section 54(4).

## Other accountability requirements on Q-COMP, WCQ and WHSQ

38. The WCRA's accountability requirements for Q-COMP and WCQ complement more general public sector governance standards under other legislation. Other Queensland legislation relating to the governance of public sector bodies<sup>23</sup> applies to Q-COMP, WCQ and WHSQ. This is an important consideration when assessing the adequacy of existing transparency and accountability requirements. It does not, however, necessarily provide the easy access to information that interested non-government bodies and persons are seeking or the type of information that they want.

## Ministerial powers to direct Q-COMP and WCQ

39. Under the WCRA, the Minister has various powers to direct Q-COMP and WCQ.

40. In relation to Q-COMP, the Minister may, after consulting its board:

- a) give the board a direction in relation to Q-COMP, if the Minister considers that to be necessary in the public interest<sup>24</sup>;
- b) give a direction to Q-COMP for the WCRA's administration.<sup>25</sup>

41. Q-COMP must also make payments to organisations and bodies identified by the Minister for specified purposes involving workers' injuries, awareness of rights and procedures under the Act, and rehabilitation and return to work programs.<sup>26</sup>

42. As to WCQ, the Minister may:

- a) consult and direct the board in relation to WCQ, if the Minister considers that to be necessary in the public interest<sup>27</sup>;
- b) other than in respect of its commercial activities, direct WCQ 'for the administration of the Act';<sup>28</sup>
- c) direct the board in writing not to dispose of a specified WCQ asset<sup>29</sup>;
- d) issue binding guidelines about WCQ's corporate plan and direct changes to it<sup>30</sup>;
- e) direct changes to the board's draft statement of corporate intent.<sup>31</sup>

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<sup>23</sup> These include the *Statutory Bodies Financial Arrangements Act 1982*; the *Financial Accountability Act 2009*; the *Auditor-General Act 2009*; the *Ombudsman Act 2001*; and the *Right to Information Act 2009*.

<sup>24</sup> Section 476.

<sup>25</sup> Section 477. Such a direction may relate to WCQ's recovery of certain workers' compensation costs through Q-COMP – ss.101 and 105H.

<sup>26</sup> Section 479.

<sup>27</sup> Section 481.

<sup>28</sup> Section 482.

<sup>29</sup> Section 393.

<sup>30</sup> Sections 395 and 400.

<sup>31</sup> Sections 406 and 408.

43. As a safeguard, the WCRA requires WCQ's board to notify the Minister and the auditor-general immediately if it suspects that complying with a direction will imperil WCQ's achieving full funding.<sup>32</sup>

#### Other Ministerial supervisory and regulatory powers

44. Under the WCRA, the Minister has other important supervisory and regulatory roles. They include approving the self-insurer levy specified by Q-COMP for each financial year<sup>33</sup> and a power (exercisable on Q-COMP's recommendation) to make a binding code of practice for insurers about claims management.<sup>34</sup>

45. The Minister can initiate investigations by the department's chief executive into any matter affecting Q-COMP or WCQ.<sup>35</sup> Safeguards are provided.

46. Another provision empowers the Minister to remove a MAT member.<sup>36</sup>

47. Under Chapter 10 of the WCRA, the Minister may establish a workers' compensation advisory committee. Such a committee may consider any matter that the Minister refers to it and make appropriate recommendations.

#### Q-COMP's regulatory role and powers

48. Although Q-COMP's primary function under s.330 is to regulate the workers' compensation scheme, its regulatory powers are limited.<sup>37</sup> Not all of its twelve enumerated functions<sup>38</sup> are regulatory and its direct powers to secure compliance with the WCRA are limited. As mentioned above, although Q-COMP can recommend a code of practice that applies to insurers' claims management<sup>39</sup>, the Minister decides whether to make such a code. No such code exists and no recommendation has yet been made.

49. Q-COMP has particular regulatory powers and functions in respect of self-insurers.<sup>40</sup> It considers applications for self-insurance, grants self-insurance licences, sets licence conditions, audits compliance and considers applications for licence renewal.<sup>41</sup> Q-COMP may cancel licences on specified grounds.<sup>42</sup> It directs a self-insurer how to meet its obligations by stipulating such matters in the licence conditions. The WCRA creates various offences relating to matters that come within Q-COMP's responsibilities.

50. Under s.331, Q-COMP is responsible for various matters relating to the return to work and rehabilitation of injured workers (see the later discussion of TOR 5). Q-COMP has a statutory role in accrediting employer rehabilitation systems.<sup>43</sup>

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<sup>32</sup> Section 483.

<sup>33</sup> Section 81.

<sup>34</sup> Section 486A.

<sup>35</sup> Sections 478 and 486.

<sup>36</sup> Section 495(3)(c)

<sup>37</sup> Q-COMP's approach to monitoring compliance by and the performance of insurers is set out in its Insurer Performance Management Program, which is available at <http://www.qcomp.com.au>.

<sup>38</sup> Section 331.

<sup>39</sup> Section 486A.

<sup>40</sup> Section 68(4).

<sup>41</sup> WCRA, Chapter 2, *Employer's obligations*, Part 4, *Employer's self-insurance*.

<sup>42</sup> Section 95 and following provisions.

<sup>43</sup> Section 43 and 227.

51. Consistently with its overall responsibilities for monitoring the scheme, Q-COMP may advise WCQ about the effect of a proposed exemption by WCQ of an employer from an obligation to insure under the WCRA.<sup>44</sup>
52. Under the WCRA, Q-COMP may appoint authorised persons<sup>45</sup> to conduct investigations and inspections to monitor compliance with its requirements in performing its functions under the WCRA.<sup>46</sup> The WCRA prohibits various types of conduct that undermine the work of authorised persons.

### WCQ's regulatory role and powers

53. WCQ's fundamental responsibility is to undertake the business of accident insurance (and any other insurance authorised by the WCRA), delivered, as far as practicable, as a commercial enterprise.<sup>47</sup>
54. WCQ may exercise certain statutory powers as an insurer, including setting and varying premiums,<sup>48</sup> Penalties and additional premiums may be recovered for various types of non-compliance. WCQ may suspend a person's entitlement to compensation for particular types of non-compliance with the WCRA (for example, failing to undergo a required personal examination by a 'registered person', namely, a medical practitioner or other specified appropriately qualified professional)<sup>49</sup> or vary, suspend or terminate a person's entitlement to compensation after a review.<sup>50</sup> A non-complying employer may also lose the benefit of insurance. There are various offences under the WCRA relating to matters that come within WCQ's responsibilities.
55. Under the WCRA, WCQ may appoint authorised persons<sup>51</sup> to conduct investigations and inspections<sup>52</sup> to monitor compliance with WCQ's requirements in performing its functions under the WCRA.<sup>53</sup> This activity may lead to enforcement proceedings.<sup>54</sup> The WCRA prohibits various types of conduct that undermine the work of authorised persons.

### WHSQ's regulatory role and powers relating to workers' compensation

56. The WHSA is the main source of WHSQ's powers and functions, which are focused on workplace health and safety. Nonetheless, there are statutory connections between the WHSA and the WCRA, and WHSQ has certain specific responsibilities under the WCRA for which it may need to use powers under the WHSA.
57. The WHSA's objective relates to preventing a person's work-related death, injury or illness.<sup>55</sup> As mentioned, the WHSA states that achieving the objective will, among other

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<sup>44</sup> Section 49.

<sup>45</sup> WCRA, Chapter 7, Part 8.

<sup>46</sup> The powers of authorised persons are set out in Chapter 12 of the WCRA.

<sup>47</sup> Sections 383 and 384.

<sup>48</sup> Persistently poor performers may be required to pay a premium over the capped rate – s.54(3A).

<sup>49</sup> Section 135.

<sup>50</sup> Section 168.

<sup>51</sup> Section 466.

<sup>52</sup> The powers of authorised persons are set out in Chapter 12 of the WCRA.

<sup>53</sup> Section 462.

<sup>54</sup> WCQ's 2008-09 annual report records 24 prosecutions. WCQ has administrative controls to detect fraud and other corrupt activity.

<sup>55</sup> WHSA, s.7(1).

things, ‘... reduce the burden on the workers’ compensation scheme caused by these deaths, injuries and illnesses, which in turn reduces costs imposed on industry.’<sup>56</sup>

58. A complementary provision exists in the WCRA. Its primary object is establishing a Queensland workers’ compensation scheme that provides benefits for injured workers and others and encourages ‘... improved health and safety performance by employers’.<sup>57</sup>
59. There are direct regulatory links to WHSQ under the WCRA. Q-COMP must request an OHS report from WHSQ when Q-COMP is considering an application for a self-insurance licence.<sup>58</sup> The WHSA contains a complementary provision authorising the preparation of such a report.<sup>59</sup>

### Roles and powers of other bodies

60. To round out the description of the WCRA’s regulatory framework, the roles and powers of other persons and entities should be mentioned. Self-insurers are given the powers conferred on insurers generally under the Act.<sup>60</sup> Medical Assessment Tribunals make final determinations about certain medical aspects of claims.<sup>61</sup> The Industrial Relations Commission has jurisdiction to deal with dismissals of injured workers<sup>62</sup> and to hear appeals from reviews by Q-COMP of WCQ decisions (Industrial Magistrates also have jurisdiction).<sup>63</sup> Appeals lie to the Industrial Court from IRC and magistrates’ decisions.<sup>64</sup> Other courts of competent jurisdiction can hear appeals relating to various decisions affecting self-insurers.<sup>65</sup>

### Discussion of issues relating to TOR 2

61. The issues considered here overlap with those considered in relations to TOR 1.

### Accountability and transparency

62. The differences between WCQ as a government entity and private sector or local government employers who are self-insurers result in different forms of regulation and accountability. Thus, as outlined above, WCQ is subject to various statutory accountability measures and to Ministerial direction. Individual self-insurers are subject to WCRA obligations and to Q-COMP’s licence conditions and audits. Although Q-COMP must monitor the compliance of all insurers with the WCRA and their performance under it, Q-COMP cannot establish minimum norms about compliance and performance, apart from by setting individual self-insurer licence conditions.

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<sup>56</sup> WHSA, s.7(4)(c).

<sup>57</sup> Section 5(1)(b)

<sup>58</sup> Sections 71 and 72. The sections relate to applications by single and group employers. In each case, the employer’s occupational health and safety performance is a matter to be considered by Q-COMP.

<sup>59</sup> WHSA, s.182A.

<sup>60</sup> Sections 92, 92A.

<sup>61</sup> WCRA, Chapter 11.

<sup>62</sup> Sections 232E and 232F.

<sup>63</sup> WCRA, Chapter 13, Part 3.

<sup>64</sup> Sections 560A to 564.

<sup>65</sup> Sections 567 to 571.

63. As to accountability, some persons consulted during the review suggested that Q-COMP should be able to monitor WCQ's performance more directly and stipulate prudential standards for WCQ. Proponents of this view are not satisfied that the existing accountability arrangements are either appropriate or effective. The Minister's role should, according to this view, be complemented or replaced by stronger Q-COMP powers and WCQ should be required to disclose more information to Q-COMP. This was seen by those stakeholders as a logical extension of Q-COMP's regulatory role.
64. On the other hand, it is important to identify whether there is a regulatory shortcoming that needs to be addressed. As described above, WCQ already has extensive reporting obligations to the Minister and is subject to wide Ministerial powers of direction. The Minister may also initiate investigations by the department into WCQ's operations.
65. Two questions arise. First, are such accountability and supervisory arrangements wrong in principle or deficient in practice? Secondly, if there are shortcomings, could they be addressed administratively or would the WCRA have to be amended?
66. Although other models may be posited, requiring the public worker's compensation accident insurer to be accountable to a responsible minister is neither uncommon nor unworkable. WCQ's board has clear responsibilities under the WCRA<sup>66</sup> and, as previously outlined, WCQ is subject to many statutes that require public accountability.
67. Accordingly, in the context of the overall model now used for the Queensland workers' compensation scheme, it is not considered that the role of the Minister needs to be changed. As discussed below, the Minister should, however, be empowered to secure formal Q-COMP advice about the scheme's operation and for Q-COMP to establish standards relating to it.
68. WCQ's activities as an insurer may have serious effects on the scheme. Notwithstanding its primary regulatory function, Q-COMP has limited powers to examine such matters, even if the Minister so wishes (under the WCRA, investigations are to be conducted by the department). Similarly, Q-COMP has limited capacity to establish benchmark standards for activities by insurers under the scheme. It may set particular standards as licence conditions for self-insurers, but has no statutory capacity to influence or even inquire into WCQ's activities as an insurer.
69. Nonetheless, radical change does not appear necessary. Instead, consideration should be given to additional powers and functions for Q-COMP that would sit within and reinforce the existing accountability framework.
70. First, Q-COMP should, in line with its regulatory role, be able to provide formal guidance on the standards that all insurers should meet. Providing in the WCRA for Q-COMP to make minimum advisory standards, with the Minister's approval, would be an appropriate way of achieving that result. The standards could be developed in respect of prescribed matters, be subject to the regulatory assessment statement process and be gazetted. They would not, however, need to be prescriptive. It would not be desirable to restrict how the standards could be met, as that could unnecessarily limit innovation and continuous improvement.

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<sup>66</sup> In consultation, it was suggested that the review consider the WCRA's requirements about the composition of the boards. This was not within the terms of reference and not pursued.

71. Insurers should be required to inform Q-COMP of actual or expected non-compliance with a minimum advisory standard and to explain the occurrence or expected occurrence of the non-compliance. Q-COMP should report non-compliance in its periodic reports to the Minister and its Annual Report. Q-COMP would only make such standards for prescribed matters.
72. The minimum advisory standards should not displace statutory requirements nor any requirements that WCQ is authorised to impose. Q-COMP could use the standards in auditing self-insurer performance and review compliance with them when considering licence renewals.
73. Such standards would also give employers who may be considering applying for self-insurance useful guidance about what would generally be expected of them.
74. Where a standard applies to WCQ, any non-compliance should be reported by WCQ to the Minister (who has existing powers under the WCRA to direct WCQ) and to Q-COMP. This would not preclude Q-COMP from reporting the non-compliance to the Minister or from commenting on it.
75. These proposed arrangements would complement the existing structure, add to transparency, provide further guidance about the expected performance of insurers and be consistent with a graduated approach to securing compliance under the WCRA. Experience with minimum advisory standards would also facilitate consideration in 2012 of the need for any further adjustments to the regulatory structure.
76. As previously described, Q-COMP can recommend that the Minister make a code of practice relating to an insurer's claims management.<sup>67</sup> Subject to the WCRA's authorising minimum advisory standards, where Q-COMP is considering making a recommendation for a code, the WCRA should require Q-COMP to consider first whether a minimum advisory standard should be made instead and to advise the Minister of its views. Consideration should be given to broadening the types of matters in respect of which a code may be made to complement those for which the standards could be made.

#### Advice from Q-COMP to the Minister

77. Recognising Q-COMP's regulatory role, the Minister should be able to request formal advice from Q-COMP on any matter relating to the overall operation of the scheme. There is no such power now. Q-COMP should be empowered to request information and to have access to individuals and documents for the purposes of providing such advice. There should be safeguards about protecting confidentiality, where necessary. The Minister should be able to provide Q-COMP with copies of documents that the Minister considers relevant, including reports given to the Minister by the department or WCQ.
78. This would complement the Minister's power to require the department's chief executive to investigate and report on any matter relating to WCQ or Q-COMP. It would fill a gap in the regulatory scheme, as the current investigatory powers do not relate to the overall scheme. There may be circumstances in which the same matter may be capable of

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<sup>67</sup> Section 486A.

investigation by the department or by Q-COMP under the proposed amendment. In such cases, it would be for the Minister to decide which investigatory option should be used.

#### Information about the fund and the scheme

79. Some concerns were expressed about the perceived lack of transparency about the financial status of the fund and the performance of the scheme. It was felt that there should be more information provided to stakeholders and opportunities to engage with WCQ's actuary to understand better material developments and trends. In this regard, MAIC, which regularly convenes such events, was seen as a good example. WCQ has already provided actuarial briefings in 2010 as part of the recent WCRA review. WCQ proposes to continue stakeholder engagement in this area, with further actuarial briefings and stakeholder forums. These may be more effective as joint presentations with Q-COMP. Subject to proper safeguards for commercially sensitive information, the presentation and discussions should be designed to meet fully the valid information needs of the stakeholders.<sup>68</sup>

#### Information for employers and workers

80. In the consultations, the adequacy of information for employers and workers was often raised as an issue. The concerns broadly related to obligations to provide information, its accessibility and how it is communicated information.
81. It was stated during the consultations that some injured workers are misinformed or not informed at all about their rights to claim compensation under the WCRA. To overcome this, it was suggested that there could be a standard document (possibly prepared by Q-COMP) that should be given to injured workers explaining their rights and obligations. The nature or scope of such problems was, however, not clear. More serious and extensive action may be necessary. WHSQ should examine the issue further.
82. Although the information on the Q-COMP and WCQ websites was seen as useful and accurate, some concerns were expressed about whether all employers and workers could readily have access to it or understand it. This reinforces the need for effective and easy communication by other means, such as telephone help lines, or easy to understand information in community languages provided through intermediaries, such as unions, employer or industry associations, interpreters and other community services. Such steps are already taken but the needs for information are considerable and ongoing monitoring of how well they are met is essential. No specific recommendation is made on this point, but the issue should be examined as part of the joint activities of Q-COMP, WCQ and WHSQ recommended under TOR 1.
83. While it is important to ensure that information, including in relation to decisions on claims or other developments, is provided quickly and in the form sought by recipients, some concerns were expressed about information being provided by WCQ electronically (including by text messages). It is undoubtedly difficult to strike the right balance and WCQ has sought to ascertain the preferences of those with whom it communicates. There may be similar issues about the communication by self-insurers with injured workers. Again, this is an area that requires monitoring. The concerns are acknowledged and drawn to the attention of WCQ and Q-COMP.

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<sup>68</sup> Some stakeholders considered that WCQ should provide information about the premium break even rate.

## Information notices

84. Persons affected by decisions under the WCRA may sometimes be unaware of their rights to seek a review or to appeal under Chapter 13. Although twenty-one provisions of the WCRA provide for a decision to be open to such a review or appeal, only four require persons affected by the decision to be advised of that right.<sup>69</sup> This might explain why there were reports of such persons not being aware of those rights. Accordingly, the WCRA should provide that the maker of a decision that is reviewable or open to appeal under Chapter 13 must give the person who is affected by the decision a written information notice about that person's right to apply for review.<sup>70</sup>

## Actuarial qualifications

85. Qualified actuaries have a critical role in the workers' compensation scheme. Their functions are specified in the WCRA and regulation. Although this is not a major point, there is a difference between the WCRA and the regulation. The latter defines an actuary for the purpose of the regulation as an actuary approved by Q-COMP. The WCRA does not define the term and refers, depending on the actuarial function, to an actuary who is approved by Q-COMP or appointed by WCQ. In the case of WCQ's report on the extent to which WCQ is fully funded<sup>71</sup>, the WCRA refers to 'an appropriately qualified actuary'. To provide greater clarity, Q-COMP should be required under the WCRA to stipulate the required qualifications of an actuary for any of those statutory purposes. The requirements could be gazetted.

## Periodic reviews

86. As described earlier, there have been relatively frequent reviews of the workers' compensation scheme since the 1990s. They have occurred in response to external events, such as financial pressures or the requirements of national competition policy. There would be value in a more systematic review process that was more under the control of government as to timing and scope. Accordingly, recognising that the next scheduled review is to be in 2012, it is proposed that the WCRA be amended to require that the workers' compensation system be reviewed at least once in each period of five years after 2012.

## Best practice by public sector departments and agencies

87. Government departments and agencies undertake a wide range of work with varying exposures to hazards and risks. Accordingly, it is logical to expect that the nature and incidence of work-related harm are broadly similar to those for private sector employers, particularly where they are in similar industries. The departments and agencies have the same obligations relating to workplace health and safety as private sector entities, and the same obligations in respect of workers' compensation and the associated obligations to workers. It is at least as unacceptable for there to be non-compliance by any department or agency with the requirements of the WCRA as it is for a non-government employer. In

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<sup>69</sup> Sections 49, 54,56-58, 64,66, 77, 80, 81, 96, 103, 105J, 107E, 109, 134, 229, 232, 245, 258 and 262. Only sections 77, 80, 96 and 134 provide for notice of a right of review or appeal.

<sup>70</sup> An example of the contemporary approach is provided by the *Transport (Rail Safety) Act 2010*.

<sup>71</sup> Section 461.

addition, such non-compliance may undermine the government's authority in promoting the highest standards of workplace health and safety and in dealing with work-related harm through the workers' compensation scheme.<sup>72</sup>

88. The review was provided with some information on a confidential basis indicating that there are shortcomings in some departments and agencies in meeting basic obligations, such as reporting an injury within the required time<sup>73</sup> and meeting return to work obligations.<sup>74</sup> This appears inconsistent with the aims of the *Safer and Healthier Workplaces 2007-2012* strategy, including government leading by example.
89. Senior DJAG and WCQ officials have recently commenced a program of meetings with chief executives of public sector bodies to underscore the importance of protecting workplace health and safety and meeting workers' compensation obligations. This initiative should be strongly supported. Given the importance of the public sector for Queensland's community and economic performance, and the high standards that are expected of the public sector,<sup>75</sup> the government should consider making it clearer that the Queensland public sector is expected to achieve best practice compliance in workplace health and safety and in workers' compensation matters. A good start might be for all departments and agencies to participate in the *Zero Harm at Work Leadership Program* launched by the Premier and the Minister in 2009.<sup>76</sup>

### Ensuring that progress is measured and reported

90. This review is one element in an ongoing process of reform and improvement in workers' compensation law and practice. It precedes the 2012 whole of scheme review. Achieving improvements to the scheme before then will not only help all who use the scheme but will also facilitate and guide the 2012 review. Thus, progress must be made in implementing the recent legislative changes, in giving effect to the decisions of the government following this review and, as part of a culture of continuous improvement, in identifying and giving effect to other improvements to the scheme's operation. Such progress should be regularly reported to the Minister. In relation to matters arising from this report, that information should be included in each of the implementing bodies' quarterly reports and included in their Annual Reports.

## Recommendations for TOR 2

### Recommendation 2.1

At least until the government's response to the 2012 review is known, WCQ and Q-COMP should agree, for example, through a MOU, on a program of twice-yearly joint presentations to all interested stakeholders reporting on:

- a) the financial status of the fund, including an actuarial report; and

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<sup>72</sup> Available at: <http://www.deir.qld.gov.au/workplace/resources/pdfs/saferworkplacesstrat.pdf>.

<sup>73</sup> Section 133.

<sup>74</sup> WCRA, Chapter 4, Part 4.

<sup>75</sup> For example, see the management and employment principles in s.25 of the *Public Service Act 2008*.

<sup>76</sup> <http://www.deir.qld.gov.au/workplace/zeroharm/index.htm>

- b) performance in all areas that are critical for the scheme's ongoing viability and the achievement of its objectives.

#### Recommendation 2.2

The data so presented and related material information should be available as soon as reasonably possible for interested persons.

#### Recommendation 2.3

Q-COMP should be empowered under the WCRA to develop, subject to the regulatory assessment statement process, minimum advisory standards in respect of prescribed matters for the workers' compensation scheme, and recommend such standards to the Minister. If the Minister agreed to a proposed standard, it would be published in the *Gazette*. Such standards could not be inconsistent with the WCRA or WCR Regulation or any other applicable law and should not be inconsistent with any standards set by WorkCover in relation to matters for which WorkCover is responsible. Where Q-COMP considered it appropriate, it should be able to set licence conditions for a self-insurer which were inconsistent with a minimum advisory standard.

#### Recommendation 2.4

Where an insurer did not comply, or did not intend to comply, with an applicable standard, the insurer should be required to provide written notice as soon as reasonably possible to Q-COMP and, in the case of WorkCover, to Q-COMP and the Minister, explaining the reason for non-compliance.

#### Recommendation 2.5

Q-COMP should be required to include information about such non-compliance by insurers in its periodic reports to the Minister and in its Annual Report.

#### Recommendation 2.6

Without limiting any other matters that it might wish to consider, Q-COMP should be empowered under the WCRA to take into account any instances of non-compliance by a self-insurer with an applicable minimum advisory standard (and any failure to report non-compliance) when considering an application for the renewal of a self-insurance licence.

#### Recommendation 2.7

Before making a recommendation to the Minister for a code of practice relating an insurer's claims management under s.486A of the WCRA, Q-COMP would be required:

- a) to consider whether a minimum advisory standard should be gazetted instead, or if a standard had been gazetted, why a code of practice should be made in relation to the same matter; and
- b) to advise the Minister of Q-COMP's views on the matter.

## Recommendation 2.8

In deciding on the prescribed matters that could be the subject of minimum advisory standards, consideration should also be given to providing for a wider range of matters that may be the subject of a code of practice under s.486A.

## Recommendation 2.9

The Minister should be empowered to request in writing formal advice from Q-COMP about any matter relating to the overall operation of the workers' compensation scheme and, where the Minister did so, an insurer would, under the WCRA, have to comply with any reasonable written request from Q-COMP:

- a) for information or data in relation to the matter to which the Minister's request relates; and
- b) for access to any persons or documents who may assist Q-COMP in responding to the Minister's request.

*Note: Any powers of Q-COMP in this respect would not:*

- *limit the powers exercisable by an authorised person under Chapter 12, Enforcement, of the WCRA, which could be extended for this purpose;*
- *displace the Minister's powers under s.486 to ask the department chief executive to investigate and report on any matter relating to WorkCover or the powers of the department chief executive under that section.*

## Recommendation 2.10

Q-COMP should be required to respect the confidentiality of any information so obtained but would not be precluded from disclosing it to the Minister for the purposes of its advice.

## Recommendation 2.11

The WCRA should be amended to require the maker of a decision that is reviewable or open to appeal under Chapter 13 of the WCRA to provide the person who is affected by the decision with a written information notice about that person's right to apply for review.

## Recommendation 2.12

The WCRA should empower Q-COMP to determine the minimum qualifications for an actuary for the purposes of the Act.

## Recommendation 2.13

The WCRA should be amended to provide for a review of the operation of the workers' compensation scheme at least once each five years after 2012.

#### Recommendation 2.14

The Minister should seek the government's support for all government departments, agencies and other bodies to seek to meet best practice standards of prevention in relation to work-related harm and in the use and application of the workers' compensation scheme.

#### Recommendation 2.15

Progress in giving effect to all matters agreed upon by the government after considering this report should be reported to the Minister in the quarterly reports by each of the implementing bodies and included in their Annual Reports.

## Chapter Three – Term of Reference 3

*Strategies to improve the efficiency and effectiveness of the workers' compensation claims management and common law settlements processes.*

### Introduction to Chapter Three

91. The successful operation of the workers' compensation scheme strongly depends on the fairness, efficiency and effectiveness of the management and settlement of claims, including those involving common law actions. Poor performance in these areas may undermine the achievement of the scheme's objectives. Understandably, during the review, claims management and settlement issues attracted much attention.

### Background

#### The WCRA and claims management

92. As earlier described, an eligible injured worker may, under the WCRA, make a claim to WCQ or the relevant self-insurer for compensation. The legislation stipulates the process and the time limits.<sup>77</sup> Under the legislation, an application, to be valid, must be lodged within 6 months of an entitlement to compensation arising.<sup>78</sup> The legislation specifies what documentation and proof is required.<sup>79</sup> An employer (other than a self-insurer) must, within 8 days of a worker sustaining a compensable injury, report the injury to WCQ.<sup>80</sup> The report must be sent immediately if an employer knows of the injury, or the worker reports the injury to the employer or the employer receives a request from WCQ for the report.

93. According to data provided by Q-COMP for the purposes of the review, the average time in the scheme as a whole from an injury date to a claim intimation (that is, one lodged with an insurer) fell from 36.8 days in 2005-06 to 31.5 days in 2009-10. The periods have been consistently shorter for claims lodged with WCQ (just over 31 days in 2009-10) than for claims lodged with self-insurers (just over 47 days in 2009-10).

94. Under the WCRA, WCQ or a self-insurer must make a decision within 20 business days after an application is made and notify the applicant. If no decision is made in the prescribed time, the applicant must be notified of the reasons within a further 5 days.

95. There are various statutory obligations on workers and employers that affect how claims are dealt with. These include a worker's obligation to submit to a medical examination, if required,<sup>81</sup> to provide information about changes in the worker's condition and capacity to work<sup>82</sup> and to participate in rehabilitation.<sup>83</sup> Likewise an employer has obligations in relation to rehabilitation and a worker's return to work.<sup>84</sup>

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<sup>77</sup> WCRA, Chapter 3, Part 5 and WRC Regulation, Part 5.

<sup>78</sup> Section 131. Lodgement within 20 days of an entitlement arising is encouraged by a limit on the retrospective payment of compensation for claims made after that time.

<sup>79</sup> Section 132 and WRC Regulation, s.85.

<sup>80</sup> Sections 133 and 586.

<sup>81</sup> Section 135.

<sup>82</sup> Section 136.

96. There are rights of review under Chapter 13 of the WCRA in relation to decisions about claims and compensation benefits.
97. As mentioned earlier, insurers can, in specified circumstances<sup>85</sup>, refer injured workers to a medical assessment tribunal<sup>86</sup> for a final decision on medical aspects of a claim, including a worker's capacity for work, degree of impairment, level of dependency or disfigurement as a result of an injury.

### Claims management performance

98. About 98,000 claims were lodged in 2009-10 (about 86,000 with WCQ and nearly 12,000 with self-insurers). In 2005-06, there were about 86,000 claims. For each year since then, the number per year has fluctuated from around 98,000 (2006-07 and 2009-10) to around 103,000 (2007-08 and 2008-09).<sup>87</sup> This is a substantial workload for insurers.
99. Of the statutory claims, a relatively small percentage proceeds to common law action.<sup>88</sup> This was fairly stable between 2005-06 and 2007-08 (around 3 per cent), but increased over the past two years (3.5 per cent in 2008-09 and 4.3 per cent in 2009-10). Total expenditure has substantially increased. This trend is expected to abate through the effect of the recent amendments to the WCRA.
100. The scheme has a good record in relation to meeting the statutory decision-making time frame. In the period from 2005-06, the percentage of claims decided within 20 days has improved from 89 to 96 per cent.<sup>89</sup> There has been a similar improvement in the percentage of cases decided within 5 days, from 64 per cent in 2005-06 to 74 per cent in 2009-10. The improvement was stronger for WCQ than self-insurers.

### Review of claims management decisions

101. A relatively small percentage of decisions in relation to claims are reviewed, but the number has grown steadily since 2007-08. In 2005-06, about 2.7% of claims (around 2,300) were reviewed. By 2009-10, about 3.0% of claims (about 3,000) were reviewed. A higher percentage of self-insurer decisions are reviewed. The outcomes do not appear to be affected by whether the person seeking a review is legally represented. The percentage of decisions that are returned for reconsideration has almost doubled in the past five years (from 7 per cent, or 140 claims, in 2005-06 to 13 per cent, or 358 claims, in 2009-10), although closer examination of the reasons would be required to understand that trend.
102. The rate of appeals under the WCRA in relation to reviewed claims has decreased over the last five years. Although the number is relatively steady (347 in 2009-10), the

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<sup>83</sup> Section 232.

<sup>84</sup> WCRA, Chapter 4, Parts 4 and 6.

<sup>85</sup> Section 500.

<sup>86</sup> Established under WCRA, Chapter 11.

<sup>87</sup> The number of claims increased for WCQ and self-insurers over that period. Although the number of claims made to WCQ decreased by over 5 per cent in 09-10 from 08-09, the number made to self-insurers increased by about 2 per cent in the same period.

<sup>88</sup> There are some claims for common law damages only.

<sup>89</sup> In 2007, the statutory decision making period was reduced from 40 to 20 days.

percentage of reviewed claims appealed has fallen from 18 per cent in 2005-06 to 13 per cent in 2009-10.

## Medical Assessment Tribunals

103. The trend from 2005-06 to 2008-09 was a steady decline in the number of referrals to MATs (from about 3,000 referrals to under 2,500). There was an increase in 2009-10 (2,656 referrals).<sup>90</sup>

## The WCRA and common law settlement processes

104. As previously mentioned, the WCRA contains extensive provisions relating to common law actions for damages.<sup>91</sup> The entitlement to seek damages is restricted to workers who meet certain statutory pre-conditions. There are provisions covering all aspects of bringing a claim, from initiation to trial, and about awards of damages. The WCRA seeks to have common law claims resolved quickly and without undue expense or technicality. An important pre-requisite to starting a proceeding for damages is a compulsory conference at which a genuine attempt to settle must be made.<sup>92</sup> Under the legislation, settlement is encouraged even if a claim is not settled at the compulsory conference.

## Performance in common law settlement

105. WCQ has adopted a strategic approach that seeks the early settlement of common law claims. The percentage of matters that settle before a compulsory conference increased in 2009-10 to almost 35 per cent from under 25 per cent the previous year. Similarly, the percentage of claims settled at compulsory conference increased from 50 per cent in 2008-09 to over 52 per cent in 2009-10. There was a corresponding reduction in matters that were settled in post-conference stages. Very few matters go to trial.<sup>93</sup>

## Main issues relating to TOR 3

106. The main issues were identified by examining recent performance, discussions with Q-COMP, WCQ and some self-insurer representatives, and consulting stakeholders. Issues that were frequently raised related to WCQ's level of engagement with employers, a perceived lack of useful information about the claims process, the effects on regions of centralised claims management, how WCQ investigated claims, WCQ's use of external lawyers and medical experts. A proposal for voluntary undertakings was raised and a technical issue relating to the rescission by WCQ of incorrect decisions was identified.

## Discussion of issues relating to TOR 3

### Delays in notifications

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<sup>90</sup> Not all referrals require a hearing before a tribunal.

<sup>91</sup> WCRA, Chapter 5. Part 7 of the WCR Regulation also addresses certain procedural aspects relating damages.

<sup>92</sup> Section 289.

<sup>93</sup> This is based on figures provided by WCQ at a Joint Stakeholder Workshop on common law claims management on 8 July 2010.

107. As mentioned above, the period between the date of injury and the lodging of a claim has fallen (particularly for claims made to WCQ), but it is still over 30 days. Decision making time on the claim must be added. Apart from delaying payments for accepted claims, such periods are likely, among other things, to impede the effectiveness of rehabilitation interventions, where they are required.
108. It should be noted that data reported in the 2008 Hanks Report on the Victorian workers' compensation system<sup>94</sup> identified a median delay of 49 days in that State between an injury and a decision on liability. This reflected some characteristics of the Victorian scheme. The Hanks report contrasted the Victorian performance with that in NSW, where the median delay between an injury occurring and agent notification of the injury fell from 19 days in December 2001 to 6 days in December 2007. Significant reductions coincided with the introduction in 2002 of provisional liability and injury notification, and the waiving in 2006 of employer excess for claims reported early.<sup>95</sup> The Hanks report also commented on the Tasmanian adoption of provisional liability for weekly benefits.<sup>96</sup> This influenced a finding and recommendation that Victoria should adopt a system of provisional liability. The Victorian government rejected that proposal as being likely to put the ongoing viability of the scheme at risk. The government considered that improving injury notification would achieve many of the same benefits.
109. In consultation, some stakeholders suggested that such a scheme might be appropriate for Queensland. Others disputed that view. Its supporters considered that such an arrangement would be fairer and speed up the notification of claims. Its opponents pointed out that decisions on claims were relatively speedy in the Queensland system, that there were financial implications (which had led to the Victorian government's rejection of the Hanks proposal) and that administrative measures were to be preferred.
110. In the event, no finding is made on this point for a number of reasons. Apart from the lack of agreement, the financial implications would have to be considered more closely. Further, before any legislative action was contemplated, non-statutory measures to achieve speedier notifications should first be tested.

#### WCQ's engagement with employers, workers and others

111. Some employers believe that WCQ does not sufficiently involve or inform them about claims. They considered that sometimes they were not given enough opportunities to comment on claims affecting them or on WCQ's proposals for dealing with them. This was seen as leading to inappropriate decisions. It was suggested that a claim could be accepted without the employer knowing of the claim or without due regard to the employer's views or proper investigation. This was seen as reflecting a disproportionate emphasis on settling claims speedily and an unbalanced view about 'no fault' statutory claims. On the other hand, other employers expressed satisfaction with the levels of customer service and the extent of interaction about claims and related matters.
112. Although WCQ has internal policies that should address concerns about lack of contact, WCQ has indicated that it accepts that there is room for improvement. Some of the problems seem to arise from a lack of information about and misunderstanding of

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<sup>94</sup> Hanks P, *Accident Compensation Act Review, Final Report*, Victorian Government, 2008.

<sup>95</sup> *Ibid*, p.98, paragraph 3.66

<sup>96</sup> *Workers Rehabilitation and Compensation Act 1988* (Tas), Part VII.

WCQ's obligations and policies. Others appear to reflect insufficient engagement. These could be addressed by administrative action. A starting point would be to revise WCQ's service charter to address more clearly better communication with employers over claims management. This would demonstrate that such interaction is one of WCQ's key service goals. There might be value in reporting publicly (for example, in the annual report) on how the commitments in the charter are being met.

113. WCQ held a Joint Stakeholder Workshop on Common Law Claims Management in July 2010, which was an effective in informing the stakeholders about developments and performance in relation to common law claims. Such a workshop should be periodically convened to strengthen WCQ's understanding of and responses to stakeholder concerns and to allow WCQ to explain how it undertakes its work in this area and the results of its policies and programs. The workshop also provides a model for other similar events, for example, a workshop in relation to statutory claims management. Consideration should also be given to holding such events in regional areas from time to time.

114. There is considerable interest in information (such as guidance notes or similar material) about the claims process. Although useful material of this type is available on the Q-COMP and WCQ web sites, it is somewhat fragmented and varies in the level of detail provided. Following consultation with stakeholders, it appears that it would be useful for Q-COMP and WCQ to produce new, easy to understand guidance for employers and injured workers about what to expect in the claims process, how they can facilitate a claim's fair and effective progress, their review and appeal rights and how to obtain more information, if necessary. Similar material should be available for other persons who may become involved at a workplace (such as managers, supervisors and RRTW coordinators).<sup>97</sup> WHSQ should contribute information on good workplace health and safety practice in relation to injured workers who are at work under a return to work arrangement. The needs of people from culturally and linguistically diverse backgrounds and people with disabilities should be accommodated.

#### Availability of medical expertise for claims managers

115. Until fairly recently, WCQ had in-house medical expertise. That is no longer the case. Advice is now only obtained from external medical experts. A number of interested persons suggested that WCQ's claims managers would be assisted in their work by returning to some arrangement under which such advice could be readily obtained in-house and in person. To ensure that suitably skilled medical experts were available, they might be engaged on a sessional footing. This would supplement other means of seeking such advice. WCQ should consider this further.

#### Regional issues

116. Although WCQ has a number of regional offices, its claims management is now centralised. There is some concern that regional circumstances and needs may not be as well addressed under those arrangements as under previous arrangements. WCQ believes that, in its service delivery, it recognises and responds appropriately to regional issues. Even so, given the importance of successfully managing statutory and common law claims, WCQ should review whether there are any shortcomings in claims managers'

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<sup>97</sup> In the discussion of TOR 5, a recommendation is made for HSRs to be given training so that they may facilitate good workers' compensation practices at workplaces. HSRs' needs for information would be met through support given to them for that role.

knowledge and understanding of regional circumstances. If there are, they might be addressed by training or better access to such knowledge and relevant information.

### Investigation of claims

117. A number of issues were raised in relation to the investigation of claims. At a minimum, WCQ is seen as not sufficiently transparent about its approach to investigating claims. There is a perception that some claims that ought to be investigated are overlooked (this is linked to concerns over WCQ's level of engagement with employers in problematic claims). Concerns were also raised about the objectivity of investigators.
118. WCQ should respond to these concerns by reviewing its policies and practice in relation to the investigation of claims. It should do so in consultation with stakeholders. It might inform Q-COMP about its findings so that Q-COMP can consider the implications for investigations undertaken by self-insurers.

### Rescinding decisions to reject claims

119. An amendment to the WCRA is required to put beyond doubt WCQ's capacity to rescind at its own initiative an incorrect decision to reject a claim.<sup>98</sup> A mistake might occur, for example, because a claimant was wrongly thought not to be covered by the WCRA. This amendment would avoid the need for the affected party to seek a formal review by Q-COMP. It would complement the existing provision for internal review of a proposed decision to reject an application. It would also reduce delay and expense for an aggrieved worker and provide a simple means to rectify incorrect decisions. It would not, however, displace the right to a review by Q-COMP. It should be for WCQ to decide whether to exercise the power to rescind.
120. It is not proposed that this apply to incorrect decisions about accepting claims. The circumstances differ. The hardship suffered by a worker whose claim was mistakenly rejected is different from the consequences for WCQ of accepting a claim. If a mistake has been made in accepting a claim, a review is the appropriate remedy.

### Use of external legal practitioners

121. Wider issues about WCQ's use of its own resources rather than its panel of external legal practitioners are discussed under TOR 4. The issue that is considered here relates to the question of whether WCQ should seek to use panel lawyers (or other experienced practitioners) to strengthen the skills and knowledge of the WCQ staff involved in claims management. If this were feasible, it might involve such matters as skills auditing, training, advising on law and practice, and other professional guidance. This would improve consistency of approach in WCQ's representation in claims and facilitate speedier development of less experienced staff.

### Dealing with poorly performing employers

122. A recent amendment to the WCRA<sup>99</sup> allows a higher than industry premium rate to be set for an employer with persistent poor injury performance. This provides an

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<sup>98</sup> Section 134.

<sup>99</sup> Section 54(3A).

opportunity for WCQ to be able to accept a voluntary undertaking about better performance instead of proceeding directly to the additional premium. Whether to accept such an undertaking would be a matter for WCQ, but an undertaking should include commitments to specific actions that would rectify the poor performance. WHSQ (or any other relevant safety regulator) should be consulted about the proposals. The consequence of failure to achieve the commitments would be the application of the premium. An amendment to the WCRA may be required if it were considered that an increased premium resulting from non-compliance with an undertaking should be retrospective to the date of the undertaking or to the start of the non-compliance. An undertaking would not displace any action that WHSQ or the other relevant safety regulator proposed to take in relation to that employer.

### Better understanding of why common law actions are brought

123. An issue that emerged in the review concerns the propensity of injured workers to take common law action in relation their injuries. Various reasons were suggested, including a breakdown in the employment relationship, inadequate return to work or rehabilitation, inappropriate external encouragement including by 'claims farmers' or simply a rational decision in the circumstances of the case. There appears to be no conclusive evidence about the motivating factors. Given the importance of such information for policy on common law claims, WHSQ should commission a survey to identify the reasons. The results would be helpful in understanding the motives and circumstances of injured workers who take such action and guide policy responses.

## Recommendations for TOR 3

### Recommendation 3.1

WCQ's service charter should be amended as soon as reasonably possible to commit WCQ to ongoing effective engagement with employers about claims management, including advising them at specified times of a claim's progress and what action is being taken.

### Recommendation 3.2

WCQ should continue to hold interactive seminars with interested stakeholders relating to common law claims management at least annually and should consider similar seminars in relation to statutory claims management (and return to work and rehabilitation).

### Recommendation 3.3

By 31 March 2011, WCQ should, in consultation with stakeholders, prepare easy to understand guides for employers and injured workers about what to expect in the claims process, how they can facilitate a claim's fair and effective progress, their review and appeal rights and how to obtain more information, if necessary. Similar material should be available for other persons who may be involved at a workplace (such as managers, supervisors, RRTW coordinators). WHSQ should contribute information on good WHS practice as to injured workers who are at work under an RTW arrangement. At the same time, Q-COMP should, in consultation with self-insurers and other interested stakeholders, prepare similar material.

#### Recommendation 3.4

By 31 March 2011, WCQ should review whether claims management would be improved by appointing medical experts to whom WCQ staff managing claims could have ready access for advice on medical aspects of claims. Such experts might also be available for professional discussions with medical practitioners dealing with workers under the scheme.

#### Recommendation 3.5

By 31 March 2011, WCQ should give further consideration to whether any action needs to be taken to strengthen the knowledge and understanding of centralised claims managers of regional circumstances that may be material to dealing with a claim or to provide them with better access to such knowledge and relevant information.

#### Recommendation 3.6

By 31 March 2011, WCQ should, in consultation with stakeholders, review its policies and practices about the investigation of applications for compensation to consider whether WCQ's capacity to investigate is used appropriately and to make any necessary adjustments.

#### Recommendation 3.7

To put the matter beyond doubt, the WCRA should be amended to permit WCQ to rescind at its own initiative a decision to reject an application for compensation where WCQ was satisfied that the decision was wrongly made or that material information had not been taken into account. Any such decision would only be able to be made where the parties were afforded due process and where WCQ gave notice within a prescribed period of the original decision to the parties of WCQ's intention to consider such rescission. If WCQ took such action, it would not preclude review of the confirmed or changed decision.

#### Recommendation 3.8

By 31 March 2011, WCQ should consider whether sufficient use is being made of legal panel members or other skilled practitioners to assist in the training of WCQ staff who are engaged in claims management to improve the skills and knowledge of less experienced staff.

#### Recommendation 3.9

Where WCQ is considering taking action to increase the premium of a poor performing employer, WCQ should be able to consider accepting a voluntary undertaking about improved performance by the employer and to agree not to impose the increase if the agreed improvements occur.

#### Recommendation 3.10

By 31 December 2010, WHSQ should commission a survey by an impartial third party to identify why injured workers take common law actions for damages, and seek to have the results publicly available by no later than 30 June 2011.

## Chapter Four – Term of Reference 4

*The appropriateness of the current level of legal costs and management of the legal profession in workers' compensation matters.*

### Introduction to Chapter Four

124. The fourth TOR concerns legal costs and the management of the legal profession. These are important matters. Legal costs are part of common law payments under the WCRA and are significant for the scheme and claimants. The legal profession has a key role under the scheme.

### Main issues relating to TOR 4

125. Concerns were often raised in consultation about the amounts of legal costs in claims. Some apprehension was expressed that:

- a) such costs had become excessive, particularly due to increased common law claims;
- b) at the individual level, they absorbed too much of settlements or awards of damages;
- c) workers may not fully appreciate the costs that can result from legal representation;
- d) directly or indirectly, the advertising of legal services was inappropriately generating claims;
- e) workers were sometimes being encouraged to pursue legal action beyond the point where a claim might otherwise be appropriately resolved.

126. As previously mentioned, some stakeholders also considered that WCQ over-emphasises speedy claims settlement. It was claimed that this added undue pressure on scheme costs by limiting the examination of claims, thereby allowing some unjustified claims to be successful.

127. These views appear to have been based on particular instances known to the persons concerned or reports made to them by others whom they believed to have observed such problems. Apart from statistical data, no objective general evidence or analysis relating to these matters was presented during the review.

128. Issues were also raised about the differences in the regimes that apply under Queensland laws to proceedings for personal injuries. As those matters are outside the terms of reference, they are not considered in the report.

### Background and context

129. Legal costs, although not a dominant element in scheme expenditure, are substantial. In 2008-09, nearly \$31million was paid in defendant legal costs and \$1.5 million in

plaintiff legal costs. These amounts are respectively 3 per cent and 0.1 per cent of WCQ's payments on common law claims.<sup>100</sup>

130. Drawing on data from WCQ and Q-COMP, the following broad trends may be discerned for the scheme as a whole in the period 2005-06 to 2009-10:
- a) accepted statutory claims increased from nearly 79,000 in 2005-06 to over 87,000 in 2009-10 (with a peak of nearly 96,000 in 2007-08);
  - b) statutory claims costs increased by about 12 per cent from 2005-06 to 2008-09, but fell by 2 per cent in 2009-10;
  - c) the percentage of statutory claims that go to common law increased from 3.2% in 2005-06 to 4.3% in 2009-10 (but fell in 2006-07 and 2007-08)<sup>101</sup>;
  - d) expenditure on common law claims as a percentage of total expenditure on claims increased over that period from 42 per cent to 49 per cent (but there was also a significant increase in the number of claims finalised in 2009-10);
  - e) the average duration of common law claims fell in the same period from 13.7 months to 11.4 months;
  - f) the average legal cost outlay compared to workers' compensation settlement reduced from 15 per cent in 2005-06 to 10 per cent in 2009-10.<sup>102</sup>
131. No data are available about solicitor-client costs.
132. Legal costs for workers' compensation matters are regulated in Queensland by statute.<sup>103</sup> Similarly, there are both statutory controls in relation to the conduct of legal practitioners<sup>104</sup> and professional standards established by the Queensland Law Society.
133. Guidelines on appropriate conduct, including in relation to advertising by legal practitioners<sup>105</sup> have been promulgated by the Legal Services Commissioner and as conduct rules under the *Legal Profession Act 2007*.<sup>106</sup> The *Personal Injuries Proceedings Act 2002* restricts advertising of personal injury services and prohibits touting.<sup>107</sup> There are penalties for breaches, which constitute misconduct under the *Legal Profession Act 2007*.

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<sup>100</sup> WCQ Annual Report, 2008-09, p.21.

<sup>101</sup> There was a marked increase in common law claims after the decision in *Bourk v Power Serve P/L & Anor* [2008] QCA, which was addressed in the recent amendments, but that may not have been the only factor influencing the increase.

<sup>102</sup> The percentage was 9 per cent for WCQ and 19 per cent for self-insurers.

<sup>103</sup> WCRA, Under s.6 of the *Personal Injuries Proceedings Act 2002*, that Act does not apply in various specified circumstances to injuries within the meaning of the WCRA.

<sup>104</sup> The *Legal Profession Act 2007*.

<sup>105</sup> Legal Services Commission, *A guide to advertising personal injury services*, 2009, and *A guide to advertising personal injury services on the internet*, 2009, available at: <http://www.lsc.qld.gov.au/>

<sup>106</sup> The *Legal Profession (Solicitors) Rule 2007*, made by the Queensland Law Society, prohibits certain types of advertising. Similarly, the 2007 *Barristers Rule* made by the Bar Association limits advertising by barristers.

<sup>107</sup> *Personal Injuries Proceedings Act 2002*, Chapter 3, Part 1.

## Discussion of issues relating to TOR 4

### The effect of legal costs on the scheme

134. Changes in the amount paid for legal costs under the scheme can serve as a broad measure of the scheme's performance, although careful analysis is required to appreciate properly the significance of such changes. Such costs have a substantial financial impact on the scheme as a whole. There is an opportunity cost, because increases in what is spent on any aspect of the scheme (including legal and other costs) may result in less funding being available for other important elements of the scheme or in increases in premiums and levies, or both. Moreover, to the extent that they are paid by claimants, legal costs affect the net amount of damages that claimants receive.
135. Growth in outlays on legal costs may not only have an impact in its own right on the scheme, but may also be an indicator of a corresponding increase in legal actions. Although it is too early to say whether recent statutory reforms (and WCQ's approach to claims management) will moderate such pressures in the medium term, it is appropriate to prepare now for the possibility of further initiatives relating to costs.
136. This is a dynamic area for all jurisdictions. Apart from the National Legal Reform, there are models in other jurisdictions for regulating workers' compensation legal costs. Victoria has fixed payments for defendant costs under a *legal costs order*<sup>108</sup> and is now considering an option of developing a fixed costs model for some plaintiff legal costs. This is being considered as a way to give greater certainty and sustainability in the Victorian scheme's financial position. The Victorian workers' compensation authority also sees it as providing plaintiffs with reduced transaction and administrative costs<sup>109</sup> and quicker payment. It provides an interesting comparative model.

### Matters relating to the legal profession

137. As discussed earlier, the legal profession has a key part in the workers' compensation scheme. Practitioners play a vital role in advising and representing claimants and insurers (and third parties). The scheme's success depends heavily on the profession contributing to its fair, effective and efficient operation. Some workers' compensation claims may involve complex issues of fact and law, requiring high levels of professional skill and judgement. Others are simpler and more easily resolved. The scheme should operate so that the appropriate level of legal service is always deployed for each claim.
138. In considering the management of the legal profession in this context, it is important to recognise that there are well established mechanisms relating to the conduct of the profession, provided by both the legal profession's self regulation and externally by statute. There may well be further relevant developments as COAG's National Legal Profession Reform project is implemented.<sup>110</sup>

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<sup>108</sup> The *WorkCover Legal Costs Order 2006* made by the Governor in Council under s.134AG of the *Accident Compensation Act 1985* (Vic).

<sup>109</sup> Including lower costs for assessment of costs by a cost assessor, as provided under the Victorian system.

<sup>110</sup> <http://www.ag.gov.au/legalprofession>

## The significance of legal costs for individual workers and employers

139. A particular aspect to consider is whether individual workers or employers are actually being affected by excessive litigation and costs. Such people are vulnerable as they will often have had little experience in legal matters or in dealing with lawyers.<sup>111</sup> The question arises of whether they need additional safeguards.
140. The profession's supervisory bodies (the Queensland Law Society and the Legal Services Commission), advised the review that they had no evidence of, and had received no complaints about, unprofessional conduct in relation to workers' compensation. As mentioned, the review was not otherwise presented with evidence of any systematic abuses or direct evidence of inappropriate behaviour by legal practitioners.
141. On the other hand, many stakeholders with regular, direct knowledge of the workers' compensation system considered that such conduct was occurring. At the very least, those perceptions are harmful to confidence about a key aspect of the system and should be addressed.

## A better understanding of what is happening in respect of legal costs

142. A closer examination of practices in this area appears warranted to support future evidence-based policy decisions. WHSQ should commission surveys by an impartial third party to ascertain what percentage of settlement amounts are paid to claimants, legal practitioners and medical professionals or for any other purposes.<sup>112</sup> If possible, the first should be completed by mid-2011. In designing such surveys, careful attention will need to be given to the issues surrounding the confidentiality of surveys. The de-identified results could be discussed at a conference of WHSQ, WCQ, Q-COMP, legal professional bodies and other interested parties, with options for managing legal costs considered (such as using the proposed Victorian model of fixed party and party plaintiff costs and adjusting the maximum payment for the conduct of a speculative personal injury claim).
143. Subject to the findings of such surveys, consideration should also be given in 2012 to a possible statutory requirement for legal practitioners to disclose such information to Q-COMP on a confidential basis, whether directly or through a professional supervisory body. To reduce any regulatory burden, this disclosure might be targeted, for example, by using representative samples of practitioners and cases.
144. This would provide a better appreciation of trends in solicitor and client and other costs. Without independent and informed assessment of such trends, the impact of such legal costs is likely to remain a contentious issue. The proposal should not, however, be construed as an alternative to the existing regulation of legal professional conduct and would have to be consistent with that regulation.

## Advertising of legal services

145. Further work should be undertaken by WHSQ to consider the effects of advertising of legal services on workers' compensation claims. The existing levels of regulation are

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<sup>111</sup> The point is made in a wider context in the National Legal Reform 2009 discussion paper on legal costs, p.1.

<sup>112</sup> The questionnaires used by the WA Legal Costs Committee about fees charged by lawyers are an interesting example of such an approach: <http://www.legalcosts.wa.gov.au/index.html>

acknowledged, as are the national reforms. Even so, given the number of complaints from a variety of sources that were made during the review, it is apparent that a better appreciation of what is occurring is needed. This would identify whether any additional regulatory intervention is required. WHSQ should aim to complete this examination by mid-2011 and report the results to the Minister.

### Information for claimants about legal costs

146. Sound standards and practice exist in the legal profession about informing clients about potential legal costs.<sup>113</sup> Nonetheless, that could be supplemented by very simple, easy to understand information in the form of a check list. That document would be given by practitioners to clients seeking formal advice or representation in workers' compensation claims. The information could, for example, briefly explain that the client can be charged for such services, describe what the practitioner must tell a client about costs and the client's rights if the client is concerned about the costs, and state how to get further advice. Q-COMP has indicated that it could prepare such a document by the end of 2010. A copy of the document should be supplied at the point of engagement and again at final disposition of the matter. The Queensland Law Society and the Legal Services Commission should be consulted about the proposed document's use and content.<sup>114</sup>

### WCQ's legal resources

147. Some who were consulted expressed their concerns about the effects of the relatively recent increase in WCQ's in-house legal resources and the changes this year in the constitution of the external legal panel.<sup>115</sup> They considered that WCQ often used its internal legal resources to deal with claims where the WCQ officers were not sufficiently experienced. This was seen as making it less likely that there would be an appropriate result.<sup>116</sup> A related concern was that, as a result of a perceived over-emphasis by WCQ on early settlement, WCQ officers were likely to settle a claim for more than was justified. WCQ strongly rejected the claims, pointing to the overall results in matters dealt with by its staff and its strong internal management protocols. It was not possible during the review to ascertain whether the recent changes had any negative effects as described, or, if they did, whether any problems would continue or abate as the greater use of in-house resources became better established. In time, such trends may emerge more clearly.

148. During the review, WCQ convened an interactive stakeholder workshop in which WCQ sought to clarify its position in relation to the handling of common law claims, to provide stakeholders with information about WCQ's performance in the area, and to hear and respond to concerns. Such transparency and interaction is valuable and should facilitate continuous improvement. WCQ intends to continue to hold such workshops, which should allow concerns of this kind to be raised and addressed.

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<sup>113</sup> *Legal Profession Act 2007*, Chapter 3, Part 3.4

<sup>114</sup> The Law Society and the Legal Services Commission have jointly prepared a fact sheet, *Your right to challenge legal costs*. That document has a more specific purpose and is more detailed than what is envisaged here. It might be referred to in the check list.

<sup>115</sup> WCQ conducted a tender for the provision of external legal services. The services are now provided by contracted firms rather than by individual practitioners. The changed arrangements have only recently taken effect.

<sup>116</sup> An interesting suggestion was that WCQ could use its panel lawyers more for training in-house lawyers to develop their skills.

## Recommendations for TOR 4

### Recommendation 4.1

WHSQ should commission periodic surveys, by an impartial third party, of claimants and lawyers (no more frequently than annually, with the results of the first survey to be available by 30 June 2011) to seek to ascertain how much of a settlement has been paid:

- a) to the claimant,
- b) to the claimant's lawyers
- c) for medical services
- d) for anything else.

*Note: Due regard should be had for the privacy of those concerned and for protection of information thus collected – see recommendation 4.2 below.*

### Recommendation 4.2

Any survey results should be de-identified and aggregated in the survey report, so that the confidentiality of any information provided to the person conducting the survey is protected, and the survey reports should be publicly available.

### Recommendation 4.3

Subject to further consideration of the information obtained through the surveys, consideration should be given in 2012 to whether there should be a statutory requirement for such information to be disclosed by legal practitioners to Q-COMP on a confidential basis.

*Note: Such disclosure might be direct or through a professional supervisory body, with use of representative samples, if appropriate.*

### Recommendation 4.4

After the results of the first survey are available, a conference should be promptly convened by WHSQ with the Law Society, the ALA, WorkCover, Q-COMP and other interested parties to discuss options for managing legal costs. The fixed party and party costs model used in Victoria should be an option.

### Recommendation 4.5

Further work should be undertaken by WHSQ to identify how the advertising of legal services is affecting claims for workers compensation and whether further action is required to control such activity. This should, if possible, be completed by the end of June 2011 and the results reported to the Minister.

#### Recommendation 4.6

By 31 December 2010, Q-COMP should prepare simple information in a check list for claimants which would explain to them in an easy to understand way:

- a) that a claimant may be legitimately charged for legal and other costs relating to a claim;
- b) that a claimant must be advised by a legal practitioner about such legal costs, including how they are to be met;
- c) what rights a claimant has if the claimant is concerned that the charges may be excessive or otherwise unreasonable;
- d) how to get further advice about legal fees.

#### Recommendation 4.7

A legal practitioner should be required to provide a copy of the check list to a client at the point of engagement and at the final disposition of the matter.

## Chapter Five – Term of Reference 5

*What actions can be taken by scheme stakeholders to improve rehabilitation and return to work.*

### Introduction to Chapter Five

149. The fifth term of reference concerns the operation of the rehabilitation and return to work system. There appears to be general acceptance of the structure of the existing system, but some dissatisfaction among stakeholders about its operation.

### Background

#### Importance of injury management

150. It is generally accepted that early and effective intervention for injured workers to facilitate their return to work is essential for good outcomes for the workers and society. It also reduces pressure on the costs for employers and the workers' compensation scheme and may help productivity and morale at workplaces.<sup>117</sup>

#### National comparisons

151. All Australian workers compensation systems feature requirements that seek to ensure the prompt rehabilitation of injured workers and their early and durable return to work.<sup>118</sup> There are broad similarities that allow comparisons of outcomes. In Australia and New Zealand, comparisons are made in the *Australia and New Zealand Return to Work Monitor*.<sup>119</sup> This allows benchmarking, but scheme design factors and other variables mean that the results are more useful as broad performance measures and indicating trends. There appears to have been a gradual improvement in return to work performance nationally. Queensland performs relatively well, but is not the best performer.

#### Legislative requirements

152. The WCRA and WCR Regulation provide the legislative underpinnings for rehabilitation and return to work in Queensland. Under the legislation:

- a) insurers are responsible for:
  - i. taking practicable steps for the rehabilitation and early return to work of injured workers who are entitled to compensation under the Act;

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<sup>117</sup> Productivity Commission, *National Workers' Compensation and Occupational Health and Safety Frameworks*, Inquiry Report No 27, 2004, p.190.

<sup>118</sup> This is often described as injury management.

<sup>119</sup> The monitor has been prepared for the past thirteen years for the Heads of Workers Compensation Authorities by Campbell Research. Copies of the monitor are available at <http://www.hwca.org.au/home.php>.

- ii. coordinating the development and maintenance of a rehabilitation and return to work plan in consultation with the injured worker, employer and treating ‘registered persons’.<sup>120</sup>
  - b) employers must take all reasonable steps to assist or provide a worker with rehabilitation, including by providing suitable duties, unless that is not practicable<sup>121</sup>;
  - c) larger employers<sup>122</sup> must appoint a rehabilitation and return to work coordinator<sup>123</sup> and have workplace rehabilitation policy and procedures that must be periodically reviewed<sup>124</sup>;
  - d) injured workers must meet their duty of mitigation by participating in rehabilitation as soon as practicable after sustaining an injury and while entitled to compensation (this includes satisfactorily participating in any return to work program or suitable duties<sup>125</sup> arranged by WCQ, a self-insurer or Q-COMP)<sup>126</sup>.
153. The WCR Regulation provides considerable further detail on injury management.<sup>127</sup>
154. Enforcement of an employer’s obligations is by way of:
- a) a penalty of an amount equal to the compensation paid during the non-compliance;
  - b) fines in the case of failure to appoint a rehabilitation and return to work coordinator or to have workplace rehabilitation policy and procedures
155. In the case of a non-complying worker, the sanction is the suspension of compensation.

#### Roles of insurers and Q-COMP

156. As mentioned, WCQ and the self-insurers have key roles and responsibilities in the injury management system. WCQ is the dominant insurer and the outcomes of its programs in this area have an important influence on its overall operations and ultimately on premiums. Recent evidence<sup>128</sup> indicates the outcomes remain up to national benchmarks. WCQ has recently revised its approach and is implementing a plan for 2010-11 that aims to secure improvements. Self-insurers’ responsibilities in this area are regulated by the Act and by their licence conditions.
157. Q-COMP accredits workplace rehabilitation policy and procedures and registers rehabilitation and return to work coordinators. Q-COMP has developed training materials

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<sup>120</sup> Section 220.

<sup>121</sup> Section 228.

<sup>122</sup> WRC Regulation, ss.99C and 99D.

<sup>123</sup> Defined in s.41. The criteria for and functions of a rehabilitation and return to work coordinator are specified in the WCR Regulation, ss.99A and 99B.

<sup>124</sup> Sections 226 and 227.

<sup>125</sup> Defined in s.42.

<sup>126</sup> Sections 231 and 232.

<sup>127</sup> WCR Regulation, Part 6.

<sup>128</sup> *Australia and New Zealand Return to Work Monitor*, op. cit.

in these areas.<sup>129</sup> Q-COMP also includes return to work data in its annual statistical reports.<sup>130</sup>

## Main Issues relating to TOR 5

158. The main issues which were identified in the review broadly relate to the need for a greater focus on return to work and rehabilitation, including:
- a) taking a stronger approach to securing compliance with the statutory obligations of employers and workers,
  - b) better linkages between the work of WCQ and Q-COMP in relation to return to work and rehabilitation,
  - c) better guidance material for all interested parties,
  - d) better training and support for rehabilitation and return to work coordinators,
  - e) examining whether HSRs could perform functions in this area, and
  - f) the adequacy of existing protection under the WCRA for dismissed injured workers.

## Discussion of issues relating to TOR 5

159. There is room for improvement in this area. The actions by Q-COMP and WCQ to provide better programs and results should be commended. Even so, the WCRA needs to reflect the importance of return to work and rehabilitation by including them in its primary objects.
160. Recognising the role of effective rehabilitation and return to work coordinators, there should be ongoing improvements in their training and support. WHSQ, Q-COMP and WCQ should collaborate on securing the more effective use of such co-ordinators and that of workplace health and safety officers in workplaces. This would involve promoting their value to workplaces, providing training that recognises their complementary roles, ensuring that they have ready access to relevant advice and information, and monitoring their effectiveness.
161. Greater use could be made of HSRs. Consideration should be given to widening the functions of HSRs (which are now prescribed by the WHSA) to include functions relating to facilitating the return to work and the rehabilitation of injured workers at workplaces. This might be timed to complement the implementation of the national *Work Health and Safety Act* in 2012.<sup>131</sup>

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<sup>129</sup> *Functioning as a rehabilitation and return to work coordinator*, developed by Q-COMP, and provided by RTOs is a nationally accredited course that satisfies AQTF requirements.

<sup>130</sup> Available at <http://www.qcomp.com.au>.

<sup>131</sup> Section 68 of the model national *Work Health and Safety Act* sets out the powers and functions of an HSR in wide terms.

162. More emphasis should be given to securing compliance with the obligations on employers and workers under the WCRA. The present consequences of such non-compliance are only financial (the repayment by an employer to WCQ of payments of compensation, the suspension of a non-participating worker's benefits and some fines). There should also be access to enforceable directions to secure compliance.

163. In addition, the protection for an injured worker under Chapter 4, Part 6 of the WCRA against dismissal is somewhat narrow by being limited to reinstatement to the worker's former position.<sup>132</sup> The provision should be amended along similar lines to the unfair dismissal provisions of the *Industrial Relations Act 1999*, by permitting the Industrial Relations Commission (IRC), where such reinstatement is impractical, to order the worker's employment in another position that the employer has available that the IRC considers suitable. The IRC should also be empowered to make any other order (including an interim order) that appears necessary to the IRC for ensuring that the reinstatement or re-employment is fair and effective. The orders might, for example, include an order requiring reasonable adjustments to be made at a workplace.<sup>133</sup>

## Recommendations for TOR 5

### Recommendation 5.1

Return to work and rehabilitation should be a primary object of the WCRA.

### Recommendation 5.2

There should as soon as possible be stronger enforcement of:

- a) the period within which a notice of claim is given under s.133 of the WCRA;
- b) an employer's obligations as to an injured worker's return to work and rehabilitation;
- c) a worker's obligations as to return to work and rehabilitation.

### Recommendation 5.3

Additional enforcement powers should be provided under the WCRA in relation to return to work and rehabilitation obligations, including, where compliance cannot be achieved otherwise, powers to give enforceable directions to employers.

### Recommendation 5.4

By 31 December 2010, WCQ and Q-COMP should develop their respective RTW and rehabilitation policies and programs in consultation with each other to make them complementary and to facilitate better understanding of the potential demand for RRTW services when claimants cease to be within the scope of WCQ's programs. Such policies and programs should be reviewed in consultation at least annually.

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<sup>132</sup> It might be noted that in such cases an aggrieved worker may also have enforceable rights under the *Anti-Discrimination Act 1991* and the *Fair Work Act 2009*.

<sup>133</sup> See s.5(2) and 6(2) of the *Disability Discrimination Act 1992* (Cwth).

### Recommendation 5.5

Q-COMP should at least annually, in consultation with WCQ and self-insurers, review and revise its best practice guidance for any person with RTW and rehabilitation obligations or needs under the workers' compensation system. This might, for example, relate to the conduct of employers, claimants, legal representatives and medical and related professionals advising claimants or insurers. Such guidance should take account of any relevant minimum advisory standard made by Q-COMP.

### Recommendation 5.6

Q-COMP should at least annually examine the effectiveness of RRTW coordinators and whether further training and support by Q-COMP should be provided to them.

### Recommendation 5.7

No later than 30 June 2011, WHSQ, Q-COMP and WCQ should develop mechanisms to encourage the more effective use of WHSOs and RRTW coordinators up to and after the introduction of the model *Work Health and Safety Act* in 2012, including by:

- a) promoting the value of WHSOs and RRTW coordinators to employers in securing better prevention of work-related harm as well as better return to work and rehabilitation outcomes;
- b) supporting training that recognises and strengthens the complementary roles of WHSOs and RRTW coordinators;
- c) making relevant information and advice readily available to WHSOs and RRTW coordinators;
- d) monitoring the use and effectiveness of WHSOs and RRTW coordinators to improve the support available to them.

### Recommendation 5.8

Consideration should be given to authorising a suitably trained health and safety representative to be entitled to perform functions that facilitate the return to work and rehabilitation of an injured worker to a workplace (as part of the implementation of the model *Work Health and Safety Act*).

### Recommendation 5.9

The WCRA provisions (Part 6) relating to the reinstatement of an injured worker should be strengthened by allowing the Industrial Relations Commission:

- a) where reinstatement to the worker's original position is impractical, to order the worker's employment in another position that the employer has available that the IRC considers suitable;
- b) to make any other order that appears necessary to the Commission for ensuring that the reinstatement is fair and effective, including an interim order.

## Appendix: List of persons and bodies consulted

Association of Self-insured Employers of Queensland  
Australian Association for Exercise & Sports Science  
Australian Hand Therapy Association  
Australian Industry Group  
Australian Lawyers Alliance  
Australian Manufacturing Workers Union  
Australian Osteopathic Association  
Australian Orthopaedic Association  
Australian Physiotherapy Association  
Australian Rehabilitation Providers' Association Queensland  
Australian Workers Union  
Bar Association of Queensland  
Builders Labourers Federation  
Chamber of Commerce and Industry Queensland  
Construction Forestry Mining Energy Union  
Department of Justice and Attorney-General (Electrical Safety Office)  
Department of Mines and Energy  
Department of Transport and Main Roads  
Finity Actuary Pty Ltd  
Housing Industry Association  
Legal Services Commission  
Liquor, Hospitality and Miscellaneous Workers' Union  
Master Builders Association  
Motor Accident Insurance Commission  
Occupational Therapist Australia  
PricewaterhouseCoopers  
Q-COMP Board  
Q-COMP Chairperson  
Q-COMP Board former Chairperson  
Q-COMP Medical Assessment Tribunal Chairperson  
Q-Super  
Queensland Council of Unions  
Queensland Law Society  
Queensland Nurses Union  
Queensland Public Sector Union  
Queensland Resources Council  
Queensland Speech Pathology Australia  
Queensland Teachers Union  
Shop Distributive and Allied Employees Association  
Taylors Solicitors  
The Australian Psychological Society Ltd  
The Chiropractors' Association of Australia Ltd  
Workplace Health and Safety Board  
WorkCover Queensland Chairperson  
WorkSafe Victoria