Submission for Workcover WA
Attention: Manager Policy and Legislative Services
Workers Compensation and Injury Management Bill 2021 (Consultation Draft)

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The State School Teachers' Union of WA (Incorporated)

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Introduction

The State School Teachers' Union of WA (Inc.) represents over 17800 members in Western Australia including teachers, school leaders and school psychologists in mainstream educational schools, education support schools, teaching staff within system support worksites and TAFE lecturers. Approximately 75% of our membership is women and we have 150 members who identify as Aboriginal or Torres Strait Islander. Over a third of our membership are over the age of 50.

Since the start of 2020 until September this year we received 430 queries regarding workers compensation matters. In the same timeframe we had over 200 referrals to our contracted external solicitors for assistance with workers compensation claims. This does not include members who engaged their own workers compensation solicitor for such matters.

The SSTUWA takes the opportunity to make this submission to the 2021 Workcover WA Review and makes proposals with specific consideration for the needs and rights for our members and for workers in general in the workers compensation area.

Snapshot: Claims in Public Schools and TAFE

Data taken from WA Government Insurance/Risk Cover Annual Reports:

The SSTUWA was unable to obtain Workers Compensation data for TAFE lecturers as TAFE Colleges do not share this type of data with Government Insurance, WA.

Summary of Claims in Department of Education 2017 to 2021(EOFY):

	2017	2018	2019	2020	2021	Total
New Claims	1997	1901	1933	1894	2106	9831
Finalised Claims	N/A	N/A	2174	2211	1989	4374 (2019 to 2021)
Payments	$38.4m	$39.9m	$42.0m	$57.2m	$48.2m	$225.7m
Paid days lost	59,257	61,954	68,032	68,802	94,970	353,015
FTE absent from work for the Year	N/A	N/A	283	287	396	966 (2019 to 2021)
Estimated average cost per claim	$18,000	$21, 000	$20, 000	$25,854	$24, 257	$21,822 (mean average over 5 years)

N/A: no data in those years reports

Claims by Job Type of whom SSTUWA has coverage within the Department of Education 2017 to 2021 (EOFY):

Job type	2017	2018	2019	2020	2021	Total
Primary School Teacher	N/A	N/A	326	274	278	878 (2019 to 2021)
Secondary School Teacher	N/A	N/A	322	327	300	949 (2019 to 2021)
Special Needs Teacher	N/A	N/A	80	68	73	221(2019 to 2021)
School Principal	N/A	N/A	78	82	70	230 (2019 to 2021)

N/A: no data in those years reports

Mental Stress Claims – Government Insurance Public Sector 2017 to 2021 (EOFY):

	2017	2018	2019	2020	2021	Total
Number of Claims	424	427	454	458	509	2272
Total estimated claims cost	$23.8m	$28.1	$34.5m	$32.1m`	$34.7m*	$153.2m
Total Paid days lost	39, 455	46,009	N/A	N/A	N/A	N/A
FTE absent from work	N/A	N/A	192	192	N/A	N/A
Average days lost per LTI	120.7	132.6	123.2	123.5	N/A	125 (mean average over first 4 years)
Estimated average cost per claim	$56,319	$65, 882	$76,000	$70,100	$68,211	$67, 302 (mean average over 5 years)

N/A: no data listed in those years reports

*The SSTUWA calculated this by multiplying average claim cost with number of new claims.

Bill Clause	Comments
cl. 5 Terms used	Proposal: Add an additional term: **'Position'** for a multi-site employer in circumstances where medical evidence supports a transfer to a suitable job vacancy, includes a return to work, in the same job at a different location. This will give greater flexibility and meaning to the word 'position' in subclause (a) in the related definition of 'return to work' also contained in clause 5. Alternatively, this term could be incorporated into other relevant parts of the Act. Adding this provision clearly places a positive obligation on multi-site employers to transfer employees to the same job when the medical evidence supports this and a relevant suitable vacancy exists within a multi-site employer (such as the Department of Education) for the same job. This reinforces a system wide approach to accommodating return to work in the management of injured employees within multi-site employers by transfer, where appropriate. For example, with our teacher members our recommendation would make it clear teachers can return to work to a different school as part of an outcome of a workers compensation process with the Education Department, if medical evidence supports this. It would create a clear obligation on the employer to transfer employees directly, rather than make injured recovering workers undergo the unnecessary burden, which can be stressful, of applying for permanent positions in alternative schools. This proposal is consistent with the purpose of the Bill.
cl. 7 Exclusion of injury: reasonable administrative action	This provision is strongly opposed with preference to maintaining the current section 5 (4). The proposed definition of 'administrative action' is too broad and significantly undermines the basic tenet of safety net protection contained in section 6 whereby a personal injury by accident is defined as an injury arising out of or in the course of employment or while the worker is working under the employer's instructions. Psychological injuries that occur in all circumstances should all be compensable, subject to the existing exceptions, where they occur in the course of employment. Physical injuries do not have a 'reasonable management action' hurdle (or defence available to insurers), nor should they. Psychological conditions should be not treated less favourably and fundamental entitlements eroded, whether the psychological injury unreasonably occurred in the course of employment or not. Generally, psychological claims are already easier to defend (what you can't physically see is easier to deny) and adding further claim hurdles will likely deter more claims. We understand that this occurred when the federal Comcare system was changed as currently proposed now in our WA Bill. This potential provision will operate to increase the complexity and contestability of claims for claimants, imposing an even higher burden on psychologically injured workers trying to resolve claims.

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	It will also mean employees who suffer a psychological injury occurring during reasonable action by the employer are excluded from the compensation system. This will adversely and disproportionately affect our members because our industry has more psychological claims than many others. The provision is proportionately unfair to the class of workers typically defined as 'white collar', such as the majority of our members, who are more likely to suffer a higher proportion of psychological claims than other groups of workers. Furthermore, workers compensation is a 'no fault' system. You generally don't need to prove your employer was at fault.
cl. 10 Prescribed (presumptive) diseases	We support this provision and recommend drafters of the regulations turn their minds to how the regulations may support claims in the public school and TAFE sectors, as well as other industries.
cl. 20 Employer to inform worker of right to claim compensation	We support this new provision but are of the view the penalty for breach should be $10,000, as $5, 000 is too low to be a significant deterrent.
cl. 28 Worker may give claim to insurer if employer defaults	We support this new provision.
cl. 34 Authority for collection and disclosure of information	We oppose this new provision which aims to make these authorities mandatory and irrevocable. Our position is that these authorities require consent and this can be withdrawn if provided. If the parties are in dispute, there is an existing ability currently for an Arbitrator to determine what 'relevant' medical information is. There is also too much uncertain work for the regulations, to particularise the scope of the provision. The provision offends the right and dignity of working people to control information about them. It is unnecessary and oppressive.
cl. 35 Incapacity	We support this new provision.

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after claim made	
cl. 37 Requirement for provisional payments	We support this new provision in principle, however, recommend that the 'provisional payment day' be incorporated in the Bill and not left to the regulations.
cl's-38-40 regarding provisional payments	We support these new provisions.
cl. 41 Provisional payments of medical and health expenses compensation	We support this new provision with the removal of the 5% cap contained in cl 41 (2).
cl. 42 – 45 regarding provisional payments	We support these new provisions.
Part 2 Div. 3- Amount of income compensation cl. 56 - 58	We do not support any proposals to reduce the income of our members. Workers who are covered by an award or enterprise agreement should continue to receive 100% of payments. There should not be a 15% reduction in compensation to those workers, who include our members as proposed. The effect of these clauses is to increase financial hardship on workers by reducing entitlements to compensation. Importantly, the Act should also provide that the applicable guaranteed rate of superannuation is provided with workers compensation payments, just like it is provided with ordinary wages for working when fit. The superannuation retirement incomes of workers should not be unfairly prejudiced by the WA compensations system failing to provide this core and fundamental entitlement. It is also reasonably foreseeable that some injured workers will have increased medical expenses that continue well into retirement after their claims have been resolved and the failure to provide superannuation compensation causes a potential double jeopardy in this regard, if it is not provided for as part of the workers compensation system.
cl. 62 Leave while entitled to income compensation	The SSTUWA supports this provision for the following reasons: It is clear in the proposed provision that a worker is 'entitled to take annual leave or long service leave that the worker could have taken if the worker had not been entitled to receive income protection for that period'. As such, it clarifies that it is not just monetary compensation that the worker is entitled to, it can also include the corresponding time off work as an entitlement. For our union, this will clarify that for compliance purposes, the Department of Education must have systems in place to ensure our members can accrue and take annual leave

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	at another time, if they are unable to take that leave during the period it is deemed to occur in our Award, due to a compensable injury. (Note: Our Award deems annual leave to occur during the summer student vacation period for the bulk of our members covered by the Award in clause 42 (2)). It provides for a definition of, and an entitlement to, 'teacher's vacation entitlement' for the purpose of receiving income compensating during a student vacation period. It provides that entitlement to workers compensation is not affected by an entitlement to annual and long service leave or the worker having any teacher vacation entitlement for that period. It provides that the worker accrues, annual, long service and sick leave during the income compensation period. It makes it clear that a worker is not entitled to receive sick leave and injury compensation at the same time and provides for sick leave to be reinstated or paid out if an employer pays a worker any amount as sick leave for a period the worker subsequently received income compensation.
Subdivision 4 – Reducing, suspending and discontinuing income compensation (from cl. 63)	In general, the SSTUWA opposes the diminution of workers compensation income based on a new definition of 'suitable position' contained in the proposed new clause 165 and incorporated into this proposed subdivision. To the extent the proposed Bill creates a lesser entitlement based on a potentially broader notion of a 'suitable position' (in cl 165) incorporated into the definition of a 'return to work' (in cl 5) and other parts of the proposed Bill, the SSTUWA does not support enhancing the employer's ability to substantially reduce compensation more easily and/or vary the worker's job status. The Bill should create a clear positive obligation on employers to transfer workers (within a reasonable distance) where appropriate by placing an obligation on multi-site employers to transfer employees to the same job, when the medical evidence supports this, and a relevant suitable vacancy exists within a multi-site employer (such as the Department of Education) for the same job the employee was employed to do, at the time of their injury. This reinforces a system wide approach to accommodating return to work in the management of injured employees within multi-site employers by transfer, where appropriate. This will most likely significantly aid return to work of some cases with large employers involving psychological injury claims. We refer you to our proposal to include a definition of the word 'position' in our response to clause 5 above. Further, the proposed Bill makes it easier to for an employer/insurer to cease or reduce payments in some circumstances, for example, there is no longer a 21-day notice period required before payments can be ceased or reduced. We oppose such diminution of conditions within the workers compensation system.
Division 4 - Compensation for medical	The SSTUWA oppose any cap at all on medical expenses. We are informed that the federal Comcare system does not place a cap on medical expenses. If there is a dispute about medical expenses, there should be a power for the arbitrator to deem an appropriate expense.

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and health expenses (from cl. 70)	If the Government will not agree to remove the proposed 60% cap, then in the alternative, workers should have the right to go to the arbitrator to argue for an increase above the cap if their circumstances require more expenditure. Specifically, regarding clause 79, it is also our view that the limitation period on claimants having the right to apply to the arbitrator for an increase in special expenses (the general limit for the claim) be increased from 5 years to 6 years in line with limitation periods for other claims in an employment setting (see for example, section 82A of the *Industrial Relations Act 1979*).
Division 6 – 8 Lump sum compensations for permanent impairment (div 6) and compensation for other specified reasons (div 7-8) (from cl. 94)	In the provision of lump sum payments for permanent impairment compensation for workers it is our view that entitlements should be based on the principle that workers who suffer permanent injuries should be no worse off than a person who suffers any comparable injury by virtue of a car accident and/or as part of a public liability claim. To do otherwise is to devalue the injuries of working people vis – a – vis others who suffer injuries. Once this basic principle is adopted all compensation tables should be amended accordingly to provide parity in the proposed bill in division 6 - 8 of part 2.
Division 9 Compensation for death of a worker (from cl. 128	In the provision of compensation for the death of a worker it is our view that entitlements should be based on the principle that in claims involving the beneficiaries of workers who have died, claimants should be no worse off financially than the beneficiaries of those who have died by virtue of a car accident and/or as part of a public liability claim. To do otherwise is to devalue the lives of working people vis – a – vis other lives. Once this basic principle is adopted all compensation tables should be amended accordingly to provide parity in the proposed bill in division 9 of part 2.
Division 11 Settlement of Compensation claim cl. 146-156	In our consultations serious concerns have been raised regarding the proposed changes in this area, particularly in relation to what are commonly referred to as section 92 (f) deeds in the current system. It is usually unnecessary to have to admit liability to settle, as is the present case in the current workers compensation dispute settlement procedure. The current proposal in the draft Bill contains a prohibition on registering settlement agreements unless a decision has been made that the employer is liable to compensate the worker, either by liability being accepted (or taken to have been accepted), by the insurer or self-insurer, or by liability having been determined by an arbitrator (refer to draft clause 148 (1) (a)). This is a very unusual proposal, and we cannot see any logical reason for it. In many jurisdictions, including in other employment related settings, parties are free to settle on the basis that there are no admissions of liability. In relation to claim resolution, we envisage this proposal will add time, expense, and stress to the system, including for workers. A larger bureaucracy will be needed, and claims will take far longer.

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	The SSTUWA supports a dispute resolution system that is as simple and fair as possible and provides opportunities to the parties to resolve matters expeditiously at the lowest possible level. The current proposal is likely to lead to many more matters escalating to arbitration that would have resolved at a lower level if the parties had had the choice to settle without admission of liability.
Part 3 Injury Management Division 1 General cl. 157	The term 'employment obligation period' should be amended to replace the words '12 months' with '24 months'. This amendment will go some way to ensuring that workers have a reasonable time to be assessed after injuries in the recovery phase to make more considered decisions about future capacity for work.
Employer must establish injury management system cl. 158	The penalty for an employer failing to adhere to this provision should be at least $10 000 (not $5 000) as the lesser amount is not a sufficient deterrent.
Subdivision 1 Duty of employer to establish and implement return to work program cl. 159	The penalties for an employer failing to adhere to this provision should be at least $10 000 (not $5 000) as the lesser amount is not a sufficient deterrent.
Duties of a worker cl. 162	The proposed bill introduces a new burden upon workers by creating an additional new duty to attend mandatory case conferences between the worker and the insurer and/or employer notwithstanding the workers and their medical practitioners' views on whether the conferences are necessary or reasonable in the circumstances. This proposal is strongly opposed. Firstly, mandatory case conferences are unnecessary during the return-to-work process which is managed by the relevant doctor/s and rehabilitation providers, secondly, they are open to be used by those with opposing interests to put undue pressure on workers (without any checks on abuses of process), thirdly they create unnecessary work which may increase the costs for workers and inefficiently waste scarce resources in the workers compensation system. Additionally, attending conferences because they are mandatory (although seemingly lacking in purpose) is unnecessarily stressful, time consuming and diverts energy from the workers recovery process.
Consequences of refusal or failure to comply with a duty in the above provision cl. 163	This proposed draft clause further seeks to create an additional burden on workers. It permits the suspension of workers entitlements if they refuse to participate in a case conference thus creating an additional new method payment can be suspended. We strongly oppose this proposal. If a worker believes a conference is unnecessary, there is no right for workers to ask for reasons, so they can consider the request in more detail, prior to attending. The provision lacks sufficient accountability measures given the potential serious consequences of non-compliance. There are no penalties on employers/insurers if the provision is abused by the employer for a purpose inconsistent with the productive rehabilitation of the employee and no way for the

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	workers to prevent unnecessary costs that may be associated with the potential abuse of this power. Furthermore, the worker is at real risk under subclause (3) of the provision, if they are perceived as failing to comply or refusing to comply with attendance at a conference, as an order may be made to cease the entitlement to income compensation, in respect of the injury in relation to which the duty arose. The provision, when read with the rest of this subdivision, is harsh and unreasonable considering the vulnerability of injured workers.
Attendance at return to work conference cl. 164	For the reasons cited above we do not support mandatory attendance at case conferences and note that the scope of the regulations (in subclause 3) to do so does not provide that there must be explicit reasons for the case conference provided to the worker in writing and that the worker has a right to reply to the proposal to attend, if they disagree with, or seek further clarification regarding, those reasons. The provision, is harsh and unreasonable considering the vulnerability of injured workers.
Subdivision 3 Employment obligations relating to return to work. Suitable employment cl. 165	As previously stated, the SSTUWA opposes the diminution of workers compensation income based on a new definition of 'suitable position' contained in this proposed new clause 165 and incorporated into other proposed subdivisions. To the extent the proposed Bill creates a lesser entitlement based on a potentially broader notion of a 'suitable position' which has been incorporated into the definition of a 'return to work' (in cl 5) and other parts of the proposed Bill, the SSTUWA does not support enhancing the employer's ability to substantially reduce compensation and/or reduce the worker's job status more easily. There must be requirements embedded into the provisions that require employers/insurers to make demonstratable and reasonable steps to mitigate loss to professional status and income. For example, a clear way for the proposed bill to do this is to create a positive explicit obligation on employers to transfer workers (within a reasonable distance) by requiring multi-site employers to transfer employees to the same job, when it is in an employee's medical interests to do so and a relevant suitable vacancy exists within a multi-site employer (such as the Department of Education), for the same position the employee was employed to do, at the time of their injury. It would then be very clear, that a teacher who has a psychological injury rendering them unfit to work in the school they suffered the injury in, but fit to work in other schools, must be transferred expeditiously to another teacher position in a new school with a comparable vacancy within reasonable commuting distance, rather than potentially demoted to a different role (such as a teacher assistant, as it is not a suitable vacancy in the circumstances) or be forced to apply for and win a teaching position via a competitive process, thereby creating delay and placing an unfair burden and stress on the recovering worker. This reinforces a system wide approach to accommodating return to work in the management of injured employees within multi-site employers by transfer, where appropriate. This will most likely significantly aid more efficient return to work of some cases with large employers dealing with site specific psychological injury claims. Getting workers back to work faster and reducing costs overall by the removal of bureaucratic hurdles is imperative as a first step.

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	It makes sense all round to include such employer obligations explicitly. Our economy is currently facing skill and labour force shortages for professionally registered teachers (and presumably other classes of professional workers). Reasonable, enforceable steps should be taken to accommodate workers. We refer you to our proposal to include a definition of the word 'position' in our response to clause 5 above. This submission is complementary. In circumstances where there is not a suitable vacancy for a comparable position, the proposed bill has much more work to do to prevent loss for workers. In our view there needs to be positive obligations on the insurer/employer to match as far as possible, the income and skill level of the workers original position. Relevantly, it is important that any loss in income which arises from a transition to alternative suitable duties is classed as compensable loss and paid up to the prescribed amount to the worker. The current notion and threshold of 'suitable' duties in the proposed bill is far too low, with a high propensity to create further and significant financial losses to injured workers.
Employer must make employment available during incapacity cl. 166	Refer to our submission regarding cl 165 above. This current provision is inadequate and needs to incorporate our suggested changes to strike an appropriate and fair balance for injured workers. Furthermore, in our view the 'employment obligation period' should be 24 months to allow sufficient time for the 'dust to settle on' the workers injury to provide a better understanding of the workers true working capacity post injury.
Dismissal of injured worker cl. 168	We refer you to our proposal under cl 157 for the term 'employment obligation period' to be amended to replace '12 months' with '24 months'. Subject to this amendment we support the proposed amendment. 24 months will provide sufficient recovery time, ensuring workers have a reasonable time to be assessed in the recovery phase, to allow more considered decisions about future capacity for work in the position workers held at the time the injury occurred. This will better preserve employment rights for injured workers.
Division 3 Certificates of capacity. Issue of certificates of capacity cl. 169	We support this provision providing clarity regarding the details required in certificates of capacity.
Treating medical practitioner cl. 170	We support this provision providing for the fundamental rights of workers to choose their own treating medical practitioner.
Employer, insurer, agent of insurer must not be present at	We support this new provision prohibiting employers and their representative's attendance at medical examinations and note this proposal reflects the current governments 2021 election commitment.

Bill Clause	Comments
medical examination. cl. 171	It is important to protect the integrity of medical examinations and the rights of workers to dignified medical treatment. Relevant information obtained via medical examination can then be considered by the parties.
Division 4 Workplace rehabilitation Provision of workplace rehabilitation by approved workplace rehabilitation provider. cl. 172	We support this provision stating that workplace rehabilitation is an expense of the employer associated with injury management and is not a form of compensation. This clarity may go some way towards progressive cultural change via increasing the incentives on employers to prevent workplace injuries to reduce their own direct labour force costs.
Part 5 Insurance, Division 2 Employer obligations cl. 212	We support this provision. It requires the employer to keep relevant insurance records for 7 years in accordance with the regulations and provide them to WorkCover WA in certain circumstances and also make records available for inspection in certain circumstances.
Part 5 Insurance, Division 3, Improvement notice to be issued to insurer cl. 236	We support this new provision empowering WorkCover WA to issue and publish improvement notices issued to licenced insurers.
Part 7 Common Law from cl. 411	There should be consistency of entitlements to claim damages for negligence. The current Act and proposed draft Bill limits common law claims for workers. The proposed draft further prevents the parties (worker and insurer) agreeing to a settlement inclusive of common law damages unless the worker has a whole of person impairment above 15%. We are concerned with the arbitrary and restrictive nature of these provisions. It is our view that entitlements to common law damages should be based on the principle that workers who suffer permanent injuries should be no worse off than a person who suffers any comparable injury by virtue of a car accident and/or as part of a public liability claim. To do otherwise is to devalue the injuries of working people vis – a – vis others who suffer injuries. Once this basic principle is adopted, part 7 of the draft Bill should be amended accordingly to empower workers to claim adequate damages from their employer for negligence in appropriate circumstances. We understand that if the thresholds were lowered to 5%, they would be in line with other personal injury claims, including motor vehicle accident claims.
Part 10 Disclosure of claim information for pre-	The SSTUWA strongly supports this provision and recommends that the prohibition on pre-employment screening be extended within this clause where relevant to cover multi-site employers where an employee applies for an internal position with their current employer and the workers compensation information is not relevant to the role (for example, no workplace accommodations are required due to a previous claim or return to work program).

Bill Clause	Comments
employment screening cl. 505	For our members in specific TAFE colleges and the Department of Education, having access to similar protections for internal positions will ensure that irrelevant previous workers compensation claims will not be communicated. This will reduce the perception, real or otherwise of discrimination, prejudice, or bias in the employment applications of existing employees based on previous workers compensation claims. Further, this clause should extend to all public sector workers applying for internal positions with the same employer to ensure consistency in standards across the public sector. It will serve to protect all public sector workers applying to move positions within their existing public sector employer.