

RESEARCH AND EVALUATION

NSW Workers' Compensation Reform: A Parody of Evidence-based Policy Making

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The characteristics and evolution of evidence-based policy making in Australia and other mature democracies have been mapped extensively in this journal. This article advances research on the use of evidence in policy making, examining changes in the New South Wales workers' compensation system from 2012 to 2014. This analysis of two phases of policy change, legislative implementation and statutory review, highlights the limitations of building integrated, coherent evidence-based policy in a contentious policy area. The article finds that the collection of wide and detailed evidence will not satisfy requirements of evidence-based policy without political will, transparency, and accountability.

Key words: evidence-based policy, workers' compensation

Scholars have variously described evidence-based policy making (EBP) as an aspiration, movement, and discourse (Head 2009; Marston and Watts 2003). Fundamentally, the term refers to a normative conception that policy should be made on the basis of the best evidence available (Kay 2011). Some have argued that EBP sits within the broader framework of new public management (NPM), which originated in the 1980s in Anglo-English-speaking economies, such as Australia, with ideas that government should become more efficient by throwing off the 'dead hand' of Weberian bureaucracy and embracing managerialism, marketization, and performance management (Hess and Adams 2002; Hood 1983; Hufen and Koppenjan 2014). Critics argued that the neo-liberalist emphasis of NPM on efficiency and management over policy competence eroded the quality of policy making (Tiernan 2011). To overcome this, policy makers

have placed increasing emphasis on EBP to legitimate policy decisions (Head 2008).

In an environment where EBP is widely advocated and endorsed and, typically, evidence from a range of stakeholders is gathered publicly through inquiries and in-house or commissioned research, there is an expectation that policy will be founded on evidence (Bell 2004; Davies 2012). Commentators acknowledge that, in practice, political and other factors limit achievement of this, prompting critics to argue a more appropriate term for such policy making might be 'evidence-aware', 'evidence-informed', or 'evidence-influenced' (Argyrous 2012:457; Watts 2014:34). Indeed, governments can strategically use evidence to 'buffer decisions from public scrutiny', and legitimate or deflect attention from unpopular policies, rather than as a genuine basis for rigorous policy making (Turnpenny et al. 2008:760). Contentious or unsettled policy matters particularly may attract such political or tactical approaches.

Workers' compensation policy is one such contentious policy area. Changes to the New South Wales (NSW) workers' compensation scheme in June 2012 followed the election

The authors are grateful for helpful comments on an earlier version of this article from participants at the Association of Industrial Relations Academics in Australia and New Zealand Conference, Melbourne, February 2014. The authors are also grateful for assistance from Unions NSW.

of the Liberal/National Party in March 2011, after the Labor Party had held office for 16 years. These changes to workers' compensation provide a case study of EBP in this policy space that lacks consensus on objectives and strategies, and in which stakeholders have entrenched conflicts of interest. Between 2012 and 2014, NSW policy on workers' compensation was informed by several evidence-gathering processes, including two inquiries – a public inquiry in 2012 and a commissioned review in 2014. These two evidence-gathering stages elicited submissions from a broad range of stakeholders, including compensation insurers, rehabilitation providers, employers, doctors, trade unions, and lawyers.

Following the first inquiry, the formal policy response, implemented in legislation, closely reflected priorities and objectives articulated by the state government prior to its consultation process. Priority was given to the interests of insurers, employers, and the government itself in reducing their costs, responsibilities, and accountability. Little attention was paid to supporting the medical treatment, rehabilitation, and enduring return to work of injured workers. As a result of the 2012 legislative changes, the financial liabilities of the system declined. The government subsequently announced minor regulatory changes in June 2014, restoring select entitlements to a small group of injured workers. These changes were announced prior to completion of the commissioned review (Perrottet 2014; The Centre for International Economics 2014).

Using the concept of EBP, this article analyzes the approach to NSW workers' compensation policy reform between 2012 and 2014. The analysis begins by outlining the central tenets of EBP. Following this, the article examines sequentially the two formal stages of EBP on the NSW workers' compensation system in 2012 and 2014. For each stage, we discuss the government's policy stance, construction and scope of reviews, consultation processes, and policy outcomes, critically analyzing the policy process through reference to key characteristics of EBP. Our analysis indicates that although government inquiries were conducted to meet EBP expectations, policy decisions were made

before the evidence could be considered. We conclude that the use of government reviews, with their promise, however tenuous, of stakeholder consultation, may serve to deliberately thwart the objectives of EBP. In such cases, the process is a parody of EBP, imitating legitimate policy formation but lacking political will, transparency, and accountability.

Characteristics of EBP

As Staley (2008:4) observes, EBP 'is policy based on evidence of its efficacy'. However, although the concept has a normative component, in any particular policy area there can be a diverse range and quality of evidence, and the choice on which to base policy may not be that evidence that objectively is the 'best' but rather one that meets particular interests (Head 2013). Thus, while evidence collection is commonplace in policy making today, the use to which evidence is put reflects differing notions of the role it can play. To examine the concept of EBP, we draw on four distinct characteristics commonly ascribed to it, and then consider the uses to which evidence is put.

These dimensions include political will, nature of evidence, capacity of policy makers, and transparency and accountability.

Political will to undertake EBP relies on a policy environment receptive to evidence and option testing, and an openness of individual policy makers to 'begin with a question, rather than an answer', with regard to evidence that disconfirms objectives, ideologies, and assumptions (Davies 2012; Freiberg and Carson 2010; Head 2008; Hufen and Koppenjan 2014; Stewart 2004; Turnpenney et al. 2008).

Nature of evidence refers to varying forms and quality of evidence. Evidence varies according to research methods (qualitative and quantitative, empirical and anecdotal) and techniques (surveys, case studies, and experiments). Quality of evidence also depends upon the inclusiveness and expertise of sources (including, for instance, stakeholder diversity) and adequate timeframes to ensure both quality and sufficient opportunity to analyze and integrate findings (Argyrous 2012; Banks 2009).

Capacity of policymakers for EBP depends upon policy makers and advisors possessing expertise to gather and analyze complex data, including the ability to evaluate competing and conflicting research findings and coherently integrate them (Bell 2004; Hess and Adams 2002; Lindquist and Tiernan 2011; Parsons 2004).

Transparency and accountability in EBP involves consultation, debate, dialogue, deliberation, and mutual learning as well as processes for incorporating these into policy (Bell 2004; Kay 2011). Transparency requires inclusivity, with effective mechanisms for stakeholder engagement (Argyrous 2012; Banks 2009). Accountability allows for scrutiny of government policies through testing, analyzing, and interpreting evidence used to justify decisions (Argyrous 2012; Hufen and Koppenjan 2014).

The normative characterization of EBP in terms of these four dimensions is essentially a checklist, without indicating the relative importance of its elements or uses made of research data. As Head (2013:397) observes ‘analytical evidence does not give rise to policy decisions in a straight-forward way’ because of the complex decision-making processes involved in translating evidence into policy, the numerous sources of evidence potentially available, and the fact that evidence itself is contestable. The use of evidence is also subject to the political nature of the activity, with bureaucrats bound by government priorities, electoral cycles, stakeholders, and lobbyists of varying influence (Watts 2014).

Weiss (1979) identified distinct ways in which research is ‘used’ in policy making: to *problem solve* and influence policy making directly, to *inform* and influence policy, to *politically* legitimate a policy position, and – finally – to *tactically* deflect criticism from unpopular policy outcomes. Staley (2008:12) argues that ‘using research in an ad hoc or selective basis is not the same as evidence-based policy’. Nonetheless, although political and tactical uses may not conform to the ‘aspiration’ of EBP, they do contribute to evidence-informed or evidence-influenced policy making. Rather than conducting a genuine search for truth, policy makers may choose evidence that

confirms preferred political or ideological positions (Head 2013; Weiss and Bucuvalas 1980).

A number of case studies in Australia have examined the adequacy and use made of specific sources of evidence in particular instances of policy making such as juvenile crime, firearms policy, and economic policy (Chapman 2009; Marston and Watts 2003; McPhedran and Baker 2008). This case study of NSW workers’ compensation policy examines EBP when a wide and conflicting range of evidence is gathered.

The Case of NSW Workers’ Compensation 2012–2014

In 2012, the recently elected NSW Liberal/National Party government embarked upon substantial policy and legislative change to the NSW workers’ compensation system. Eleven separate workers’ compensation systems operate in Australia: one in each Australian state and territory and one each for Australian government employees, the defence forces, and seafarers. Employer funded and government administered, these systems provide a form of ‘no-fault’ insurance for Australians injured while working. Governments periodically review and amend the systems, often with a view to ‘competing’ more successfully with other jurisdictions by offering lower premiums to employers (Purse 2011:238).

Recent changes in NSW case involved a two-stage process, with the first suite in 2012 and minor changes announced in 2014. In terms of evidentiary bases for the policy changes, we focus on the government-funded inquiries that constituted the main evidence-gathering process. We analyze the policy-formation process in terms of the four dimensions of EBP outlined earlier.

Stage One: 2012 Joint Parliamentary Select Committee Inquiry

In March 2012, the NSW government received an actuarial report estimating a projected AU\$4.1 billion deficit for the compensation

scheme. The government determined that workers should return to work sooner to reduce the 'long tail' of compensation claims and that employer premiums must be minimized to 'compete' with neighbouring states. On 23 April 2012, the Minister for Finance and Services released an *Issues Paper* comparing the NSW scheme with other jurisdictions and detailing the need for urgent action to stem its perceived financial failure (Pearce 2012). One week later, the government established a Joint Parliamentary Select Committee to inquire into the scheme. The eight-member Select Committee was composed predominantly of Liberal Party members and allies.

The Select Committee was guided by the primary objective expressed in the *Issues Paper*: to reverse the deteriorating financial performance of the workers' compensation system. However, the *Issues Paper*'s 'guiding principle' was that the object of a workers' compensation system 'is to provide income support, medical assistance and rehabilitation support for workers injured during the course of their employment' (Joint Select Committee on the NSW Workers' Compensation Scheme 2012: Appendix 2.135). The *Issues Paper* recommended 16 options for change, detailed below:

1. improve benefits for severely injured workers;
2. remove coverage for journey-to-work claims;
3. prevent nervous shock claims from relatives or dependents of deceased or injured workers;
4. simplify the definition of pre-injury earnings and include real earnings;
5. provide earlier step-downs in weekly benefits;
6. provide financial disincentives to prevent long-term dependency of partially injured workers;
7. apply work capacity testing to enable cessation of weekly benefits once capacity returns;
8. cap duration of weekly payments to fixed timeframe;
9. remove pain and suffering as a separate category of compensation;
10. allow for only one claim to be made for whole-of-person impairment;
11. limit to one assessment of impairment for lump sum, commutations, and work injury damages;
12. apply provisions of *Civil Liability Act* to work damages claims;
13. cap duration of entitlement to medical benefits;
14. strengthen regulatory framework for health providers to ensure only evidence-based treatment and a return-to-work focus;
15. target commutations; and
16. exclude strokes and heart attacks unless work is a significant contributor.

The call for submissions, advertised on 5 May 2012, provided a 12-day window. Four days after the submission period closed, the Select Committee began public hearings with invited stakeholders. The Select Committee's report was published on 13 June 2012. Two weeks before the Select Committee had even tabled its report, the minister asked parliamentary counsel to start drafting the legislation (Hon Primrose and Hon Cotsis, 2nd Reading Debate, Leg Council 20 June 2012). Within 6 days of the report's publication, legislative changes were introduced to parliament, passing the lower house on 22 June, and enacted on 27 June 2012. Foreclosing discussion, the government tabled the bills in the lower house an hour before debate commenced. Parts of the reforms were effective retrospectively from 19 June 2012.

The Select Committee Inquiry elicited 353 submissions from diverse stakeholders. These included the following: employers (110), injured workers and their families (78), employer groups (25), rehabilitation providers (19), trade unions (16), lawyers and legal associations (15), insurers (11), medical practitioners and providers (9), academics (6), and other parties (7) including WorkCover itself. Evidence was also gathered from 83 witnesses at public hearings. At the Select Committee's request, Pricewaterhouse Coopers (PwC) provided two sets of cost estimates: one for a benefit model consistent with the *Issues Paper* options, the

other for an alternative model proposed by the Australian Bar Association and that PwC determined would result in significantly higher premiums. Prior to the consultation process, the government had access to various sources of evidence including actuarial evaluations, historical data, and analysis from multiple government and scholarly inquiries on workers' compensation schemes across Australia.

Thus, the Select Committee had a considerable volume of quantitative and qualitative data including expert knowledge, stakeholder perspectives, and financial and economic modelling. Although the submissions generally recognized a need to address the deficit, concerns and recommendations differed across stakeholder groups. Yet, overall, the policy changes closely aligned with the *Issues Paper*, with 14 of the 16 recommended options for change being implemented (all except points 12 and 14). Contrary evidence had little influence. Moreover, the consultants' actuarial reports supporting predetermined policy reform were privileged over other evidence.

Almost all submissions, except those from WorkCover and the Australian Medical Association (AMA), strongly advocated significant changes to the system. There was substantial support for a restructure of the entire scheme, with WorkCover continuing to oversee it (99 submissions).

Table 1 shows 122 submissions advocated better governance by WorkCover, and importantly, many argued for greater accountability of various scheme participants. Overwhelmingly, these demands targeted WorkCover and contracted insurers, rather than injured workers and lawyers. Despite this pattern, the subsequent legislation increased the monitoring and accountability of injured workers and legal practitioners, but largely stripped insurers of transparency requirements and accountability (Markey et al. 2013).

There is a considerable disjuncture between the general content of submissions, which largely disagreed with the *Issues Paper* options, and the Inquiry's conformity with the *Issues Paper* in its recommendations. Table 2 documents submissions in terms of how they addressed six key *Issues Paper* options and the types of

evidence provided, mapping them against the Select Committee's recommendations. In drawing these connections, Table 2 indicates that in most of its recommendations, the committee paid little attention to the majority of submissions.

The proportion of submissions arguing for and against particular *Issues Paper* options does not directly provide a measure of credibility of the Select Committee's conclusions, but a strong mismatch exists between evidence presented in submissions about shortfalls in the existing scheme and the recommendations made. Submissions advocating retention of existing workers' protections were largely ignored, regardless of the quality of supporting evidence. Two such matters canvassed most forcefully (Table 2) were calls to improve, first, the management of insurers and administering compensation and, second, WorkCover's structure and governance. Further, the quality of evidence supporting many recommendations is significantly poorer in terms of research methods. Overall, evidence tended to be used only if it justified predetermined policy decisions.

The political will for change was reportedly anchored in the actuarial advice of PwC. This advice, financed by WorkCover and compiled using data that WorkCover supplied, could not be verified with independent sources (Joint Select Committee on the NSW Workers' Compensation Scheme 2012: Appendix 6). Although the PwC report was peer reviewed by Ernst and Young (EY), there were significant exclusions from the scope of peer review, including the actuarial assumptions utilized. Opponents publicly criticized changes in actuarial assumptions that had led to a doubling of the scheme's estimated deficit over a 12-month period. Furthermore, although both actuarial reports recognized a significant portion of the projected deficit was temporary, the government labelled it a financial 'crisis'. Evidence presented in the audit reports and those submissions advocating cost reductions were privileged over other evidence, even when robust but contradictory data were available.

The potential for stakeholders to substantiate or test government policy proposals is facilitated by the transparency provided in regard

Table 1. Calls for increased accountability from scheme participants

Number of submissions	Calling for greater accountability from
122	WorkCover Authority NSW
102	Contracted insurers
65	Medical practitioners
64	The rehabilitation process (as administered by WorkCover, insurers, employers, medical practitioners, and rehabilitation providers)
50	Injured workers claiming compensation
34	Employers
17	Legal practitioners

to underlying evidence. In this case, although public submissions, actuarial reports, and annual reports were publicly available on the Select Committee's website, the government withheld statistical information critical for providing the necessary context for EBP, including information on workplace injuries, illnesses and fatalities, compensation claims, and compensated injury outcomes. In 2010, WorkCover ceased to publish Statistical Bulletins previously rich in this data (the 2012/13 Statistical Bulletin was, however, released in October 2014).

How did the 2012 policy making process measure up in terms of the four dimensions of EBP? Establishment of the Joint Select Committee Inquiry on workers' compensation signified a political will to gather evidence from parties and stakeholders. The process successfully attracted a considerable volume of submissions, including quality research-based evidence. However, political willingness to develop policy that would incorporate this body of evidence and thereby address systemic problems was undermined by the process. Regardless of the capacity of decision makers, the timeframe for submissions, public hearings, and policy formation was vastly inadequate to enable careful consideration and integration into policy, particularly given the volume and diversity of evidence involved. Only 32 working days elapsed between commencement of the public submission period and presentation of the reform bill to Parliament. Moreover, the mismatch between evidence accumulated and policy adopted suggests little transparency or accountability in the policy process. Overall,

however, it is the lack of political will for genuine dialogue demonstrated best by the drafting of the bill while the committee was still considering evidence, which undermined the prospect for EBP in this case.

Stage Two: 2014 Statutory Review of the Workers' Compensation Legislation Amendment Act 2012

The second stage of policy making was triggered by a requirement in the *Workers Compensation Act 1987* to review the 2012 legislation under certain circumstances, one of which was actuarial advice projecting that the scheme would return to surplus (Clause 27(1), Part 19H, Schedule 6). Within 18 months of amending the legislation, the \$4.1 billion deficit had turned into a \$1.4 billion surplus and the number of active compensation claims had fallen by 23%. The NSW government quickly reduced employer premiums not once, but three times, by 7.5% from 30 June 2013, 5% from 1 January 2014, and a further 5% from 30 June 2014.

The statutory terms of reference for the review included determining whether the policy objectives of the amendments remained valid and whether the legislation remained appropriate for securing those objectives. To conduct the review, the NSW government commissioned the Centre for International Economics (CIE) in early 2014. At this time, the CIE was well known for its expertise in economic analysis of transport and infrastructure, trade and investment, environment, water and health services, but not well known for previous work in relation to workers' compensation policy.

Table 2. Mapping submissions alongside policy changes

Issues Paper	Submissions	Types of evidence in submissions	Select Committee	Policy change
Improve benefits for severely injured workers	72 in favour including 15 employers, 0 against	Empirical, expert, and anecdotal, with 57 advocating a broader definition of 'severely injured'	Recommendations 1 and 2	Implemented consistent with Issues Paper with narrow definition of 'severely injured' incorporating approximately 900 workers
Remove coverage for journey claims	26 in favour 40 against	Advocates in favour offered only opinions – to copy other jurisdictions and/or remove issues over which employers had no control Advocates against offered empirical evidence of better insurance in other jurisdictions	Recommendation 3	Implemented consistent with Issues Paper and inquiry recommendation
Prevent nervous shock claims for relatives or dependants, and heart attack or stroke claims	32 in broad support 35 against	Mostly opinions were offered by advocates for and against	Recommendation 4 (nervous shock only)	Implemented consistent with Issues Paper
Cap weekly payments duration	32 in favour 68 against	Only opinions and anecdotes supporting this change Substantive empirical evidence of factors influencing return to work, as well as anecdotes and opinions	Recommendations 6 and 7	Implemented consistent with Issues Paper and inquiry recommendations
Cap medical coverage duration	32 in favour 70 against	Only opinions and anecdotes supporting this change Substantive empirical evidence of factors influencing return to work, as well as anecdotes and opinions	Recommendation 9	Implemented consistent with Issues Paper and inquiry recommendations

(Continued)

Table 2. Continued

Issues Paper	Submissions	Types of evidence in submissions	Select Committee	Policy change
Strengthen regulatory framework for health providers	65 in favour (including 34 employers) 1 against (AMA)	Substantive empirical, expert evidence and examples provided	None	No changes
No mention	102 advocate improving management of insurers (49 employers) 0 against	Substantive expert evidence and examples	Recommendation 26	No changes
- Improve management of insurers administering compensation				
No mention	122 advocate better structure and governance for WorkCover (61 employers) 0 against change	Substantive expert evidence and examples	Recommendations 16 and 17	A separate inquiry, 'Review of the exercise of the functions of the WorkCover Authority' commenced on 11 November 2013
- Better structure and governance from WorkCover				

During the 8-week inquiry, CIE received over 400 submissions, contacted 150 stakeholders, and subsequent consultations included meetings with 36 groups and six workshops. However, unlike most government-run inquiries, CIE's report did not identify stakeholder contacts or the organizations and individuals who made submissions. The review also drew on submissions published by the NSW Legislative Council's Law and Justice Committee, which was conducting a concurrent inquiry into Workcover's operations. Significantly, however, CIE does not appear to have drawn on the submission or 2013 Annual Report of the Workcover Independent Review Office (WIRO 2013), despite the valuable statistical data it contained on the scheme's operation and its evidence of significant shortfalls in various aspects including the work capacity assessment provisions, curtailed workers' rights to legal representation and behaviour of scheme agents.

Given the limited terms of reference, the CIE report focuses not on evaluating the system's operation, but on analyzing the appropriateness of the seven principles that underpinned the 2012 Act. These principles encompassed prevention, minimizing employer premiums, encouraging injured workers to return to work, supporting seriously injured workers, and reducing the regulatory burden on stakeholders (Pearce 2012). The authors conclude that, although there are potential obstacles to achievement of the principles, and conflicts between them, the principles remain valid, and the legislation is essentially fit to achieve these objectives.

CIE criticized various aspects of the 2012 legislation's operation. It identifies some unintended and undesirable outcomes linked to accessing thresholds and entitlements, inequitable outcomes that detract from the guiding principles, and unnecessary complexities in processes. The report also identifies several areas in which outcomes have been 'weaker', including barriers to the enduring return to work of injured workers, the time limiting of medical expenses, and limited support for less seriously injured workers to recover and regain financial independence (pp. 8–9).

In detailing key areas for future government consideration (pp. 14–19), the report fails to mention a number of matters that it had earlier indicated were major concerns of stakeholders, including the following: the increased power of insurers without commensurate checks and balances, retrospective nature of changes in benefits, difficulties for low-income workers due to financial benefits reducing over time, lack of focus on rehabilitation and early intervention, employers not supplying suitable alternative duties, and time limits and lump sum rules not allowing for deteriorations and relapses in conditions. In this, the report treads a cautious political line, providing an ambiguous analysis that the government can easily ignore.

CIE reported its findings on 30 June 2014, but minor changes to the regulations were announced 4 days prior – on 26 June 2014 (Perrottet 2014). Regulatory changes included extending access for a small group of injured workers to medical treatment and benefits, weekly payments upon reaching retirement age, and weekly income benefits while disputed assessments of work capacity are resolved.

In terms of the four EBP principles, in the 2014 stage of workers' compensation policy making, it is transparency and political will that have been lacking, rather than evidence and the capacity to use it. Although CIE's final analysis did not address sufficiently or coherently concerns and shortfalls in the existing system, it did demonstrate capacity to evaluate competing and conflicting evidence. However, in constructing such limited terms of reference for the inquiry, and proceeding behind the scenes with regulatory changes uninformed by evidence, the government has demonstrated its lack of interest in meaningfully considering evidence that disconfirms its existing policy position or accounting for policy decisions made.

Conclusion

The EBP framework offers a means to enhance the quality of policy making by encouraging policy formation based on evidence collected through 'debate, consultation and deliberation' (Kay 2011:239; Tiernan 2011). However,

examination of NSW worker's compensation policy since 2012 demonstrates that even when an apparent commitment to gathering evidence exists, policy makers may give primacy to one that aligns with predetermined objectives and assumptions. The NSW government's use of evidence in each of the two stages reviewed was tactical and political. Indeed, although the government funded evidence-gathering inquiries, it had already determined the regulatory changes it would make prior to each inquiry reporting its findings. Extremely tight deadlines associated with each inquiry, and the limited terms of reference for the CIE review, heavily curtailed evidence collection and deliberation processes. Nonetheless, each inquiry attracted hundreds of submissions from interested stakeholders. Thus, the processes gave an initial appearance of consultation and some evidentiary basis to legitimate the policies adopted and stem criticism from stakeholders who would find the outcomes deleterious.

As many scholars have observed, policy making is always an 'inherently political exercise' (Turnpenny et al. 2008:772). Further, Davies (2012:50) observed, the employment of evidence to legitimate a predetermined decision is not necessarily 'sinister or Machiavellian'; any interaction with evidence is preferable to policy based on 'blind faith'. However, this case study calls into question the value of adopting an EBP approach in the absence of political will or transparency and accountability to utilize the evidence.

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