

From: The_Liversidge_Letter <the_liversidge_letter@laliversidge.com>
Sent: Monday, November 23, 2020
To: the_Liversidge_letter@laliversidge.com
Subject: Message from L.A. Liversidge - LAL Comments regarding the Speer WSIB Operational Review

Good afternoon,

The government (finally) released the **WSIB Operational Review Report** (find it here: <https://www.ontario.ca/document/workplace-safety-and-insurance-board-operational-review-report>). The purpose of the review was to analyze the Board's practices with respect to: **financial oversight** (the sustainability of the Board's insurance fund and controls over it); **administration** (the effectiveness of the current government model and leadership structure); and **efficiency** (effectiveness and cost effectiveness of the Board's operations, including comparisons to other jurisdictions and private sector insurers). The report provides 25 recommendations. For ease of review I have excerpted each recommendation below followed by my comments.

The Board has issued a response – see it here <https://www.wsib.ca/en/news-release/wsib-welcomes-recommendations-wsib-transition-operational-review>

Should you wish to discuss any of these issues, please feel free to reach out at any time.

Regards,

LAL

Operational Review Report recommendations

Recommendation 1: *The government should adopt a regulation that prescribes a sufficiency ratio corridor of 115% and 125% for the WSIB for the five-year period between 2020 and 2025.* **LAL Comment:** A 115% - 125% corridor is high. Past recommendations from LAL and employer groups suggested a 90% - 110% corridor which is actually consistent with prior WSIB recommendations (as per Steve Mahoney, former Chair). This recommendation will require extensive discussion within the Board's Chair Advisory Groups.

Recommendation 2: *The regulation should also establish the parameters for surplus distribution including prescribing the WSIB to consider surplus distribution when the insurance fund exceeds 115% and require it distributes surpluses if the sufficiency ratio hits or exceeds 125%.* **LAL Comment:** Same comment as #1.

Recommendation 3: *The government should amend the Workplace Safety and Insurance Act to clarify that any legal or policy changes that impose costs on the WSIB should come into effect in the year in which the Workplace Safety and Insurance Board can account for these costs in its rate-setting process.* **LAL Comment:** This is appropriate and consistent with recommendations arising from the 2011 Harry Arthurs' "Funding Fairness Report."

Recommendation 4: *The WSIB should develop a predictive modelling capacity within the organization as part of its effort to improve its pricing and rate-setting processes.* **LAL Comment:** An appropriate common sense recommendation (one would have thought it would have already been part and parcel of the Board's rate setting methods).

Recommendation 5: *As part of the transition to a new rate framework, the WSIB should establish the position of Industry Class Manager with whom employers, industry associations and unions can engage about their issues and circumstances related to specific industry classes.* **LAL Comment:** At first blush this sounds appropriate, however further discussions with employer groups will be necessary to flesh out this concept.

Recommendation 6: *The WSIB should move to an exclusionary model for coverage on a go-forward basis for new employers and industries. This would not affect currently non-mandatory covered industries, but it would apply to any new firms or industries operating in the province.* **LAL Comment:** This is a huge recommendation, however has been *de facto* in effect since Rate Framework was implemented. This must be carefully examined as it will trigger significant level playing field concerns for current employers in non-compulsory industries against new employers in the same industries that begin operations in the future.

Recommendation 7: *The WSIB and the government should extend mandatory coverage to developmental support workers and those working in residential care facilities.* **LAL Comment:** This is appropriate and in fact it is surprising that the groups are not currently covered.

Recommendation 8: *The WSIB and the government should consider consolidating all Schedule 2 employers in the collective liability framework. Moving in this direction would require a transition plan for industry classes, premium rates and Schedule 2 employers who may have ongoing claims. It would also involve consultations on the necessary legislative and regulatory changes as well as the appropriate timeframe for implementation.* **LAL Comment:** This is a massive recommendation and will have an extraordinary impact on Schedule 2 employers and will undoubtedly increase their cash WSIB costs. Currently Schedule 2 employers are essentially on a pay-as-you-go approach and thus do not pay premiums *per se*. Premiums have an added component of projected further costs. This recommendation must be carefully assessed with both Schedule 1 & Schedule 2 employers to ensure there is no cross-subsidization during a transition phase.

Recommendation 9: *The WSIB should modernize the claims process by expanding digital submission of documents and enabling individuals to register online in order to monitor the status of their files through a secure personal portal as soon as possible.* **LAL Comment:** This is appropriate and long over due. The expanded digital systems should ensure employer access in a manner consistent with the WSIA.

Recommendation 10: *The WSIB should move to a self-service model for no-lost-time claims in particular and simple claims in general using a system of online claims and fast-tracked adjudication.* **LAL Comment:** This is appropriate and represents a massive step back in time to when the WSIB administratively segregated administration for lost-time and no-lost-time claims. In fact, in past eras (mid 1970s - early 1980s), the Board had distinctive administrative methods for no-lost-time claims (“A System”), non complex lost-time claims, i.e., claim duration of less than 13 weeks (“B System”) and complex claims, i.e., 13 weeks plus and serious injuries (“C System”). *Déjà vu all over again.*

Recommendation 11: *The WSIB should set separate targets for processing timelines for no-lost-time claims and lost-time claims.* **LAL Comment:** Yes.

Recommendation 12: *The WSIB should continue to adjust and refine its process for claims adjudication to ensure that claims are being managed by the right people at the right time.* **LAL Comment:** Yes, of course.

Recommendation 13: *The WSIB and the government should consider consolidating the WSIB’s multiple layers of appeal into a single appeals function within the WSIB before appeals move to the Appeals*

Tribunal. Moving in this direction would require consideration of the format and design of the new appeals function within the WSIB, timelines for appeals decisions, human resource issues and possible incremental resources to the WSIAT to address any resulting increases in its appeals caseload. **LAL Comment:** This is a significant recommendation and will require extensive development. The WSIB currently has a single stage appeal system at the Appeals Resolution Officer. Whatever design changes are considered, efficiency must not supplant fairness.

Recommendation 14: *The WSIB and WSIAT should establish a new Quality Table to identify and anticipate trends through data analytics and actual case outputs in order to better inform adjudication guidelines and decision-making.* **LAL Comment:** This has been a long-standing LAL recommendation since 1985 when the WSIAT was first formed. Presently, both the Board and the Appeals Tribunal act as adjudicative islands and have done so for the better part of 35 years (with the exception of the time Ron Ellis was the Chair of the Tribunal and an *ex officio* member of the WSIB Board of Directors), particularly since the reforms of 1997 (Bill 99 – the current WSIA) which adjusted the Appeals Tribunal’s jurisdiction.

Recommendation 15: *The Minister of Labour, Training and Skills Development should work with the Attorney General to ensure that legal representatives (including paralegals) participating in the occupational health and safety system are meeting a high ethical standard and properly serving their clients.* **LAL Comment:** This would appear to be a function of the Law Society of Ontario: “*The Law Society of Ontario governs Ontario’s lawyers and paralegals in the public interest by ensuring that the people of Ontario are served by lawyers and paralegals who meet high standards of learning, competence and professional conduct.*” <https://lso.ca/about-lso> .

Recommendation 16: *The WSIB should maintain a statistically relevant number of audits related to claim suppression through the implementation of the new Rate Framework.* **LAL Comment:** Since the inclusion of **section 22.1** (claims suppression), to my knowledge, no evidence complaint or audit results have suggested there is wide spread claim suppression, Perhaps that is the point of the recommendation.

Recommendation 17: *The Ministry of Labour, Training and Skills Development should increase budget funding for the Office of the Worker Adviser and the Office of the Employer Adviser to better serve workers and employers.* **LAL Comment:** The report does not really make a case for this recommendation. However, while the offices of the employer and worker adviser currently flow through the Ministry of Labour a more appropriate reporting structure may be through the Ministry of the Attorney General.

Recommendation 18: *The government should amend the Labour Relations Act to clarify that labour unions must provide representation on behalf of their members in the occupational health and safety system including the Workplace Safety and Insurance Board.* **LAL Comment:** This would seem appropriate. We have had many workers approach us for advocacy services when their union has declined to take their case and they are technically barred from the Office of the Worker Adviser’s assistance (WSIA s. 176(1)).

Recommendation 19: *The Office of the Chief Prevention Officer should work with the WSIB and the Ministry of Labour to coordinate better data collection and analysis — including developing a set of future-oriented indicators to better anticipate workplace trends.* **LAL Comment:** This goes without saying and is surprising that the recommendation needs to be articulated.

Recommendation 20: *The government should change its funding model for prevention-related programming by providing dedicated funding to the health and safety associations for specialized training and services and launching a competitive funding pool for more general health and safety*

services and training. **LAL Comment:** This recommendation should effectively trigger a complete review of the current structure and efficacy of health and safety advice in Ontario.

Recommendation 21: *The government should enter into three to five-year transfer agreements with the Health and Safety Associations.* **LAL Comment:** This runs as part of recommendation 20.

Recommendation 22: *If the government changes the funding model for prevention-related programming, it should consider increasing the overall funding available for these activities.* **LAL Comment:** A case is not really advanced in the paper for increased overall funding.

Recommendation 23: *The WSIB board of directors should regularly prepare and provide a list of required board competencies to the minister to help inform appointment decisions.* **LAL Comment:** This seems appropriate.

Recommendation 24: *Appointments to the WSIB board of directors should have staggered expiration dates to ensure that several directors' terms do not expire at the same time.* **LAL Comment:** Of course.

Recommendation 25: *The WSIB and the government should work with an independent adviser (such as Infrastructure Ontario) to conduct a review of the organization's real property portfolio, including how the Workplace Safety and Insurance Board manages it, in order to identify possible efficiencies.* **LAL Comment:** No comment really required.

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