Submission to the First Review of the Workers Compensation Scheme

Legislative Council
Standing Committee on Law and Justice

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1 Introduction

The Public Service Association of NSW (**PSA**) is an active, member-driven union. Our members have a long and proud tradition of improving the lives of the people of New South Wales through delivering a diverse range of services in the public sector and related entities, state owned corporations, TAFE NSW and universities. We represent 37,000 members spread over almost 5,000 worksites.

We welcome the opportunity to participate in this review. The PSA is proud of the skill, professionalism and dedication of its members in working for safer workplaces and a fairer deal for those who have suffered injury or illness at work.

The PSA has been at the forefront of a campaign to oppose some of the changes made to workers compensation in NSW in 2012. This campaign has met with some success, with a few of the harshest amendments being wound-back over the last few years. However, there is still much to be done to make the system fairer for workers and their families.

Workers compensation and returning to work continue to be issues of genuine concern to our members and a significant area of the work of the PSA. While workers compensation and injury management represents over 5 per cent of all inquiries to our Member Support Centre, those inquiries tend to be complicated and complex, requiring multiple contacts and ongoing assistance to finally resolve.

This submission has been developed in consultation with our members and draws upon their insight and experiences. It also draws upon the work the PSA has done in support of our members in recent years.

2 Review of the NSW Workers Compensation Scheme

A good workers compensation scheme promotes a healthy workplace by preventing and reducing risk of illness or injury at work and provides incentives to support injured workers to return to work. It must also be simple and accessible, and should compensate injured workers fairly.

Workers compensation schemes are in the interests of workers and employers alike; they provide access to benefits for injured workers, who in exchange have their rights to common law damages either substantially limited or relinquished entirely. This provides protection and certainty to employers.

Despite the mutual benefit derived to all parties from workers compensation schemes, over the last few decades the cost of workplace injuries in Australia has overwhelming shifted from employers (and their insurers) to injured workers, their families and carers, and the community. This shift has been encouraged by low-cost, low-benefit workers compensation schemes, such as the one currently in place in NSW.

The NSW workers compensation scheme does little to hold employers to account for work-related illness and injuries or to make their workplaces safer. Instead, it unfairly penalises workers who have had the misfortune of suffering an injury at work.

The PSA generally endorses the Unions NSW submission to this review and further supports the recent report produced by the Centre for Workforce Futures at Macquarie University, *The*

Impact on Injured Workers of Changes to NSW Workers Compensation: July 2012 – November 2015, Report No. 3 for Unions NSW.

In addition, we bring to the Committee's attention the following specific issues of concern to our members:

2.1 Workers compensation benefits

Currently, injured workers only receive a percentage of their income while they recover. This is in effect a penalty for suffering an injury at work, compounded by the fact that employers do not pay superannuation entitlements while a worker is claiming workers compensation benefits. As the proportion of pre-injury average earnings received as benefits decreases the longer an injured worker is away from work, the system perversely punishes those who are more severely injured.

Our members report that if injured at work, they will look to take sick leave entitlements, and will only make a workers compensation claim if absolutely necessary. Not only does this shift the cost of workplace injury on to workers, it also results in underreporting of incidents in the workplace and provides no incentive for employers to make worksites safe for their workers.

> ***Recommendation:*** Workers compensation benefits should be paid at 100 per cent while a worker is recovering from a workplace injury.

2.2 Calculation of the Pre-Injury Average Weekly Earnings (PIAWE)

The current method of payment of weekly benefit based on Pre-Injury Average Weekly Earnings (**PIAWE**) can often result in some unusual outcomes if an injured worker is able to return to duties inside of one week or part of any subsequent week. That worker has no incentive to do so when the projected income from their scheduled weekly hours is greater than the PIAWE calculation and/or cap or when time lost from injury in a given week is less than the percentage reduction of the regular income (particularly after 13 weeks, when the reduction is 20 per cent).

In both of these instances, the calculation incentivises workers to not return to work when they are able to do so. Workers who do return to work in either of these scenarios are financially disadvantaged, and this may create instances where an injured worker may suffer by having to pay back an overpayment to their employer. The PSA has dealt with a number of cases in which this has occurred.

This problem could be overcome by paying benefit based on the number of actual days an injured worker was absent by calculating Pre-Injury Average Earnings on a daily basis, and then making the payment in accordance with the worker's regular payment cycle accordingly.

> ***Recommendation:*** Change the payment of benefit so it is based on the number of days absent and calculated in accordance with Pre-Injury Average Daily Earnings.

2.3 Long Term Medical Expenses

The workers compensation system should be underpinned by the goal of restoring a worker's health to its pre-injury state, or as close to it as medically possible. To this end, there should be no arbitrary time limit placed on compensation for expenses incurred. The

12 month time limit initially introduced in 2012 has since been removed, but it has been replaced by other time limits.

The Centre for International Economics noted in its review of the 2012 amendments that the presence of a time limit creates an incentive for treating doctors to bring forward treatment to ensure that it is performed whilst compensated under the scheme, even though the timing of the procedure might not align with the optimum treatment of the injured worker.[1]

On the basis of actuarial figures contained in the Parliamentary Inquiry: *Review of the Exercise of the Functions of the WorkCover Authority*, the complete removal of the medical expenses cap, even at the estimated upper limit, would be affordable given the scheme's current and projected surpluses.

> ***Recommendation:*** The limitation on compensation for on-going medical expenses should be removed.

2.4 Injured workers close to 'retiring age'

The time limits introduced in 2012 that apply to workers who are 65 years of age or older are disadvantageous to older workers. Currently, almost 4% of the public sector workforce is older than 65. This proportion is growing, and a career which extends beyond this age is fast becoming the norm in many areas. The denial of workers compensation to an injured worker who intended to work beyond 65 is likely to result in a significant loss of expected earnings and retirement savings.

There is a widespread economic consensus that increasing workforce participation amongst older Australians is an area with fruitful returns to national productivity. It is therefore inconsistent with encouraging older workers to remain in, or re-enter, the workforce to provide a lower standard of workers compensation.

Cutting this cohort off from full access to payments under the workers compensation system also represent a significant shifting of costs from the employer, in whose service the worker was injured, to the taxpayer through reliance on social security and Medicare.

> ***Recommendation:*** All age dependent thresholds should be removed from the legislation.

2.5 Definition of disease injury and deemed diseases

The 2012 amendments created a higher bar for workers to receive compensation for disease injuries, requiring that employment be the *main* contributing factor and not simply a cause of the injury. This can make it excessively difficult for a worker suffering from a disease injury to make a claim, and ignores the reality that disease acquisition will often involve cyclical and mutually contributing work-place and non-work factors. As a consequence, the identification of the 'main contributing factor' is almost impossible.

It also represents another example of costs shifting from the workers compensation system on to the individual and the wider health care system in situations where work was a factor in acquiring a disease. This implies that it is acceptable for employment to contribute to a

[1] The Centre for International Economics, June 2014, *Statutory review of the Workers Compensation Legislation Amendment Act 2012,* pp 59-60

worker acquiring disease or making a disease worse.

In a related point, the list of diseases taken to be work-related contained in the Regulations needs to be reviewed and expanded to be more relevant to today's workplace. In a recent report commissioned by SafeWork Australia, Professor Tim Driscoll, *Deemed Diseases in Australia: August 2015,* reviewed the latest scientific evidence on the causal link between diseases and occupational exposures for use by Australian jurisdictions considering a revision to the deemed diseases list in their workers' compensation legislation.

> ***Recommendation:*** Amend the definition of 'disease injury' so that employment need not be the main contributing factor and review the list of diseases deemed work-related.

2.6 Returning to work

Meaningful engagement with the workplace is crucial to positive rehabilitation and health outcomes for injured workers, and it is the experience of the PSA that injured workers want to return to work if they have capacity to do so. However, too many of our members have had to fight their employer to prove that they are able to fulfil the inherent requirements of their pre-injury role, or if they are unable to return to the role, to force the employer to fulfil its obligations to find suitable alternate employment. Some of our members simply give up in frustration and either leave or are medically retired.

This is unacceptable for an employer as large as the NSW government. The NSW Public Sector Capability Framework should make it easier to assess an injured worker's capabilities and to find a suitable role somewhere within an agency or department, or if that is not possible, somewhere else within the public sector. We are yet to see the Capability Framework used to benefit injured workers returning to work.

Legislation should place a greater onus on employers to legitimately attempt to find alternative and reasonable work for an injured worker.

> ***Recommendation:*** An employer should continue to participate and co-operate in the establishment of an injury management plan, including the finding of suitable work, while there are reasonable prospects of the worker undertaking meaningful work with reasonable adjustment.

2.7 Journey claims

The 2012 changes have created significant confusion in relation to the payment of journey claims. In our experience, the limitation has led to insurers refusing to accept liability for claims of this nature on a systematic basis.

This matter is of particular concern given that a significant portion of our members work in regional areas and are exposed to lengthy commutes and that another significant portion of our members perform shift work on a 24-hour rotating shift basis – both of which contribute to driver fatigue. Many of our members can also be recalled to duty at any time of the day or night, creating a further risk.

Journey claims have always been a very small proportion of workers compensation claims, even before the 2012 changes. However, the impact on workers who were injured for the sole reason that they were travelling either to or from their place of work can be significant. It

is unreasonable that these injured workers should be excluded from the workers compensation scheme.

Recommendation: Journey claims should be reinstated.

2.8 Topping up workers compensation payments

Previously, injured public sector workers were able to 'top up' workers compensation payments with their own sick leave entitlements. This allowed workers to maintain their current level of pay and meet their ongoing payments for rent, mortgages and other costs of living. However, since 2012 agencies have refused to allow this arrangement for injured workers, forcing many of our members into significant financial hardship for no other reason than they were injured at work.

The PSA has repeatedly raised this issue with the NSW government without success, and so was left with no other alternative than to apply to the Industrial Relations Commission for relief. This case is being contested by the NSW government and has not yet been concluded.

Recommendation: If benefits are not increased to 100 per cent of Pre-Injury Average Earnings, then clarify that public sector workers are permitted to make up for any shortfall by accessing entitlements to their own sick leave.