Queensland Nurses & Midwives' Union

Submission to

The Education, Employment and Small Business Committee – Workers' Compensation and Other Legislation Amendment Bill 2019

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106 Victoria St, West End Q 4101
GPO Box 1289, Brisbane Q 4001
(07) 3840 1444
(07) 3844 9387
qnmu@qnmu.org.au
www.qnmu.org.au

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Introduction

The Queensland Nurses and Midwives' Union (QNMU) thanks the Education, Employment and Small Business Committee (the Committee) for providing the opportunity to make a submission to the *Workers Compensation and Other Legislation Amendment Bill 2019* (the bill).

Nursing and midwifery is the largest occupational group in Queensland Health (QH) and one of the largest across the Queensland government. The QNMU is the principal health union in Queensland covering all categories of workers that make up the nursing workforce including registered nurses (RN), registered midwives (RM), enrolled nurses (EN) and assistants in nursing (AIN) who are employed in the public, private and not-for-profit health sectors including aged care.

Our more than 60,000 members work across a variety of settings from single person operations to large health and non-health institutions, and in a full range of classifications from entry level trainees to senior management. The vast majority of nurses in Queensland are members of the QNMU.

In 2018, the QNMU made a detailed submission to the five yearly review of the Queensland workers' compensation scheme. This scheme is currently one of the most efficient in the country and has been for some time. It plays an important role in supporting nurses and midwives and their ability to provide safe, quality care to patients. Our members work under considerable physical and emotional stress that places them at risk across a range of workforce injuries and illnesses. Their health and safety are paramount in maintaining and advancing the future wellbeing of the community.

For these reasons we commend the Queensland government for introducing this bill and the changes it will make to the working lives of many Queenslanders.

While we acknowledge the considerable effort the government has made in restoring and advancing workers' compensation rights, we continue to pursue our longstanding effort to remove or amend two areas of the legislation particularly relevant to our members.

Recommendations

The QNMU recommends:

The parliament pass the bill with the following amendments:

- Removal of all NWE and QOTE caps on incapacity benefits under s.150 of the *Workers Compensation and Rehabilitation Act 2003.* (the Act). The payment should be 100% of average annual earnings which can include allowances, penalties, overtime, bonuses etc. excluding any periods of unpaid leave;

- Removal of ss. 571A, 571B and 571C from the Act.

Cap on Normally Weekly Earnings (NWE) and Queensland Ordinary Time Earnings (QOTE)

Section 150 – Total incapacity—workers whose employment is governed by an industrial instrument - of the Act reads –

(1) The compensation payable to a totally incapacitated worker whose employment is governed by an industrial instrument is, for each week—

(a) for the first 26 weeks of the incapacity, the greater of the following—

(i) 85% of the worker's NWE;

(ii) the amount payable under the worker's industrial instrument; and

(b) from the end of the first 26 weeks of the incapacity until the end of the first 2 years of the incapacity, the greater of the following—

(i) 75% of the worker's NWE;

(ii) 70% of QOTE; and

(c) from the end of the first 2 years of the incapacity until the end of the first 5 years of the incapacity—

(i) if a worker demonstrates to the insurer that the injury could result in a DPI of more than 15%—the greater of the following—

(A) 75% of the worker's NWE;

(B) 70% of QOTE; or

(ii) otherwise—an amount equal to the single pension rate.

(2) However, the amount paid under subsection (1)(b) or (c) must not be more than the amount to which the worker would be entitled under subsection (1)(a).

The 2018 Five Yearly Review of the Workers Compensation Scheme (Peetz, 2018) made two recommendations regarding calculation of NWE.

Recommendation 4.2: The calculation of normal weekly earnings should be changed, by removing references to modes and medians, and instead avoiding the influence of outliers on the statistics by averaging the middle half of pay periods for calculation purposes.

Recommendation 4.3: The government should hold consultations with stakeholders regarding the appropriate treatment, in the calculation of benefits over the first 26 weeks, of award entitlements for payments for additional or unsocial hours, with a view to choosing one of three options: abolishing the distinction between award rates and NWE, with a new, intermediate replacement rate; creating a new distinction between overaward and award entitlements and establishing new replacement rates in such circumstances; or maintaining the status quo.

We recognise these recommendations rely on government consultations with stakeholders which we understand have commenced, however the Act still contains provisions stipulating the percentage of compensation starting at 85% and we continue to advocate for the removal of these caps.

The current total incapacity benefits provisions under the Act disadvantage those workers who receive a significant proportion of their ongoing wages from penalties and allowances. The gap in the NWE calculation is widened further when the worker has time off in the previous 12 months for unpaid maternity leave. This period of unpaid leave is included in the averaging calculation for the previous 12-months effectively reducing the worker's overall gross wages and therefore the benefit.

In our estimate, nurses and midwives derive from between 20-30% of their remuneration from shift work penalties on a continuous 24/7 roster. As a workforce where 90% are women, the current NEW calculation is a classic structural barrier that exacerbates the gender pay gap currently standing at 14.09% (WGEA, 2019). At a time when gender pay equity continues to confound policy-makers, the Committee has a unique opportunity to withdraw a long-standing impediment.

The objects of the Act aim to provide 'fair and appropriate benefits for injured workers or dependants and persons other than workers'. In order to the meet this objective, those workers who the public expects to be available to assist 24/7 such as nurses and midwives should not be financially disadvantaged through an injury at work. The following case study is one of a number of similar situations where the QNMU has assisted members.

Case Study 1

A nurse was assaulted by a patient while working in a mental health unit. She sustained a head injury and secondary psychological injury. She was deemed an incapacitated worker by WorkCover and paid 85% of her normal weekly earnings (NWE).

However, prior to her injury, her NWE varied as she regularly worked night shift, overtime and public holidays. These regular variations to her NWE were not considered by WorkCover. Subsequently, this nurse did not receive the true compensation she was entitled too.

Recommendation

The QNMU recommends:

Removal of all NWE and QOTE caps on incapacity benefits under s.150 of the Act. The payment should be 100% of average annual earnings which can include allowances, penalties, overtime, bonuses etc. excluding any periods of unpaid leave.

Disclosure of pre-existing injury or medical condition

In respect to disclosure of pre-existing injuries or medical conditions The 2018 Five Yearly Review of the Workers Compensation Scheme (Peetz, 2018) stated:

The best way to resolve this conflict is not obvious. On the one hand, non-disclosure may lead to aggravation of prior injuries; on the other hand, forced disclosure may do the same thing. Employers may have a right to know whether potential workers are fit to do the job for which they are being hired, but workers also have a right to privacy. Indeed, the current trend towards improving privacy protections in the face of increased intrusions through the collection of information would also suggest the greater importance of worker privacy. In light of that, and of the fact that there are so few cases where benefits have been withheld due to non-disclosure, I do not propose any further tightening of provisions here beyond what already exists.

While we can accept employers have a right to know whether potential works are fit to do the job, we contend these provisions continue to provide a barrier to nurses and midwives whose health and wellbeing are often compromised by the nature of the work.

Sections 571B and 571C of the Act state -

571B Obligation to disclose pre-existing injury or medical condition

(1) If requested by a prospective employer, a prospective worker must disclose to the prospective employer the prospective worker's pre-existing injury or medical condition, if any.
(2) Subsection (1) applies only if the request is made in writing and includes the following information—

(a) the nature of the duties the subject of the employment;

(b) that if the prospective worker knowingly makes a false or misleading disclosure, under section 571C, the prospective worker or any other claimant will not be entitled to compensation or to seek damages for any event that aggravates the pre-existing injury or medical condition.

(3) However, subsection (1) does not apply if the prospective worker is engaged, as a result of the employment process, by the prospective employer before the worker has had a reasonable opportunity to comply with subsection (1).

571C False or misleading disclosure

(1) This section applies if a prospective worker—

(a) has a pre-existing injury or medical condition; and

(b) knowingly makes a false or misleading disclosure under section 571B in relation to the injury or medical condition; and

(c) is employed under the employment process.

(2) The prospective worker or any other claimant is not entitled to compensation or to seek damages for any event that aggravates the pre-existing injury or medical condition.

Under these provisions, employers may request a worker to disclose pre-existing injuries or medical conditions. If a worker knowingly provides false or misleading information and subsequently reinjures the pre-existing condition, rights to claim compensation and damages are extinguished.

Aside from the invasive character of these provisions, there are a number of implications for our members, particularly around the requirement that the 'nature' of their duties be included in the request for disclosure by the prospective employer when there is no guidance as to how prescriptive this might be. Pre-employment disclosure of an existing condition could invariably lead to discrimination against an employee without recourse.

We recognise employees still have access to discrimination laws and general protections under the *Fair Work Act 2009* (nurses and midwives in the private sector only) where relevant, however it would be very difficult to prove the employer did not take the prior worker's compensation claims into account.

These laws also shift the burden of disclosure to employees ostensibly making them 'experts' in determining whether their injury or medical condition (minor or otherwise) would be aggravated by the potential employment. Their only method of assessing the possibility is based on the employer's description of the duties.

WorkCover Queensland (2017) itself states that where a worker has a pre-existing condition

> *the focus should be on risk, **not the individual**. The question that should be asked is 'is there an uncontrolled risk?' Individual factors such as age and obesity are considered but they are not the first or only factors.*

Employers have an obligation to ensure the health and safety of all workers. If they are concerned about an individual's ability to do their job, the employer can refer the worker to a health professional for an assessment. The employee should not have to make a self-assessment prior to employment when they may have limited knowledge of a work environment that is the employer's responsibility to ensure is safe.

We are also concerned at the reluctance of nurses and midwives to actually pursue a workers' compensation claim for fear they may damage future employment prospects. This concern was borne out by a number of members who indicated to us they would not pursue workers' compensation due to the potential impacts on future employment. In our view, it is essential these provisions are withdrawn so that workers in Queensland can expect genuine fairness and equity in employment practices.

We provide the following case studies to support these claims.

Misuse of Disclosure information

Case Study 2

The QNMU assisted a member who had sustained a non-work related injury. On advising the employer, the member was requested to complete a 'critical job analysis checklist' disclosure document on the basis the member had not completed one prior to commencing employment.

The document also included a reference to a request to disclose pre-existing conditions both physical and psychological and previous WorkCover related claims that may be relevant to the critical job demands. It advised false or misleading information would result in forfeiture of the right to Workers' Compensation entitlements for aggravation of injuries as this related to non-disclosure of pre-existing conditions.

Our concerns with this document included:

- The 'critical job analysis checklist' was for a position not relevant to that in which the member was employed;
- It contained grossly overstated and irrelevant physical demands of the tasks involved e.g. a requirement for nurses to lift greater than 15kg despite the member advising such a requirement was not relevant to her position;
- When queried about the tasks, the relevant manager confirmed such a physical requirement was not necessary, the document was generic in nature and it had been sourced from the interstate administration.

The QNMU uses the above scenario to highlight how members are severely disadvantaged by sections 571B and 571C of the Act. Furthermore, it clearly outlines how employer practices can differ from the legislation. We contend that any reasonable overview of these sections of the Act clearly indicate their latent abuse.

Compounding the potential for employers to simply overlook those workers who disclose pre-existing conditions are the likely impacts on those who sustain an injury and the employer or the insurer contends the worker had failed to disclose a pre-existing condition. Workers compensation benefits are withheld despite the employee's lack of information on the work environment and the requirements of the job at the time of engagement.

Assessment of pre-existing injury or medical condition that might be aggravated by performing the duties of the job.

Case Study 3

The QNMU assisted a member employed at a major Brisbane hospital who was given a 'show cause' letter requesting her to demonstrate why her employment should not be terminated due to her inability to perform the inherent requirements of the position.

The member's 'show cause' included a reference to a medical report from an occupational physician who was of the opinion the member was unable to undertake "heavy lifting" required in the position.

Our concerns with the process included:

- While the member was seen by the occupational physician on only one occasion, two reports were provided to the employer; the first indicating that while the member was unable to perform her role as a nurse due to her inability to lift, there was no risk to patients;

- The second report determined there was a risk to our member due to "heavy lifting" and "pushing and pulling" but now the risk extended to patients. The occupational physician arrived at this determination without further physical assessment of the member or additional information from the employer.

  After discussion with the employer and the member, we believe there was no evidence that our member would be required to perform "heavy lifting" as asserted by the person requested to perform the assessment. Indeed, the employer provided advice to the QNMU that the work area in question used appropriate people manual handling technologies that removed significant risk from people manual handling.

  This example demonstrates the difficulties for an assessor in evaluating the pre-existing injuries or illnesses that could be aggravated despite their expertise in such assessments.

  Again, we stress the dangers the current legislation represents and why we are seeking the withdrawal of all disclosure requirements.

Recommendation

The QNMU recommends ss. 571A, 571B and 571C are omitted from the Act.

References

Peetz, D. (2018). The Operation of the Queensland Workers' Compensation Scheme: Report of the Second Five-Yearly Review of the Scheme.

WorkCover Queensland (2017). Musculoskeletal Disorders FAQs retrieved from https://www.worksafe.qld.gov.au/injury-prevention-safety/hazardous-manual-tasks/musculoskeletal-disorders-faqs

Workplace Gender Equality Agency (2019). Australia's gender pay gap statistics retrieved from https://www.wgea.gov.au/data/fact-sheets/australias-gender-pay-gap-statistics