EDUCATION, EMPLOYMENT, TRAINING AND SKILLS COMMITTEE

Members present:
Hon. MC Bailey MP—Chair
Mr JP Lister MP
Mr N Dametto MP
Ms M Nightingale MP
Mr BL O'Rourke MP
Mr D Zanow MP

Staff present:
Ms M Telford—Committee Secretary
Dr K Kowol—Assistant Committee Secretary

PUBLIC BRIEFING—INQUIRY INTO THE WORKERS' COMPENSATION AND REHABILITATION AND OTHER LEGISLATION AMENDMENT BILL 2024

TRANSCRIPT OF PROCEEDINGS

Monday, 29 April 2024

Brisbane

MONDAY, 29 APRIL 2024

The committee met at 8.30 am.

CHAIR: Good morning. I declare open this public briefing for the committee's inquiry into the Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2024. I am Mark Bailey, the member for Miller and chair of the committee. I would like to respectfully acknowledge the traditional custodians of the land on which we meet today—the Turrbal people—and pay my respects to elders past, present and emerging. We are very fortunate to live in a country with two of the oldest continuing cultures in Aboriginal and Torres Strait Islander peoples whose lands, winds and waters we all now share.

Welcome everyone and thank you for supporting the committee's work. With me here today are Mr James Lister, member for Southern Downs and deputy chair; Ms Margie Nightingale, recently elected member for Inala; Mr Barry O'Rourke, member for Rockhampton; Mr Darren Zanow, recently elected member for Ipswich West; and Mr Nick Dametto, member for Hinchinbrook, who will be here soon.

This hearing is a proceeding of the Queensland parliament and is subject to the parliament's standing rules and orders. Only the committee and invited witnesses may participate in the proceedings. Witnesses are not required to give evidence under oath or affirmation, but I remind witnesses that intentionally misleading the committee is a serious offence.

I remind committee members that departmental officers are here to provide factual or technical information. Questions seeking an opinion about policy should be directed to the minister or left to debate on the floor of the House. I also remind members of the public that they may be excluded from the hearing at the discretion of the committee.

These proceedings are being recorded and broadcast live on the parliament's website. Media may be present and are subject to the committee's media rules and my direction at all times. You may be filmed or photographed during the proceedings and images may also appear on the parliament's website or social media pages. I remind you to please turn your mobile phones off or switch them to silent mode.

BICK, Mr Bradley, Director, Workers' Compensation Policy, Department of State Development and Infrastructure

HILLHOUSE, Ms Janene, Executive Director, Workers' Compensation Regulatory Services, Department of State Development and Infrastructure

JANG, Mr Cameron, Manager, Workers' Compensation Policy, Department of State Development and Infrastructure

MOXHAM, Mr Rhett, Director, Industrial Relations, Department of State Development and Infrastructure

CHAIR: I now welcome from the Department of State Development and Infrastructure Ms Janene Hillhouse, Executive Director, Workers' Compensation Regulatory Services; Mr Bradley Bick, Director, Workers' Compensation Policy; Mr Cameron Jang, Manager, Workers' Compensation Policy; and Mr Rhett Moxham, Director, Industrial Relations. Before I turn to questions from the committee, would you like to make a short opening statement?

Ms Hillhouse: Thank you for the opportunity to contribute to today's hearing. I am Janene Hillhouse, the Executive Director of Workers' Compensation Regulatory Services which is part of the Office of the Industrial Relations in the Department of State Development and Infrastructure. With me today is Bradley Bick and Cameron Jang from the Workers' Compensation Policy team and Rhett Moxham from the Industrial Relations team.

By way of a brief background, the third independent review of the workers compensation scheme was undertaken by Ms Glenys Fisher and Emeritus Professor David Peetz, with the review report tabled in parliament on 4 October 2023. The review found that the scheme remains strong.

However, it identified emerging trends that could impact on scheme performance. It found that the scheme is well placed to respond to the trends of rising mental injury claims including for secondary mental injuries and lower rehab and return-to-work performance compared with other Australian workers compensation jurisdictions.

The amendment bill gives effect to the accepted legislative recommendations from the review, with key amendments designed to do a number of things. They will better support workers with a physical injury to prevent a secondary mental injury occurring once they come into the scheme. It will ensure better rehabilitation and return-to-work outcomes by ensuring a written plan is in place for an injured worker and that they have a say in this process. It will give workers a stronger voice by codifying rights including to choose their own treating doctor and to seek advice from their union or lawyer. It will expand the list of deemed diseases for firefighters. The bill also improves the regulator's ability to undertake compliance and enforcement activities by providing better regulatory tools like compliance notices to deal with circumstances where enforcement action is warranted and it may not be in the public interest to prosecute.

In addition, the bill implements the recommendations of the five-year review and the decision impact analysis statement for regulatory proposals to extend workers compensation coverage to gig workers and bailee taxi and limousine drivers. Many gig workers while undertaking work in employee-like circumstances do not meet the current definition of 'worker' in the act and are not covered by the workers compensation scheme. This means that they may be uninsured or underinsured if they sustain an injury. The bill provides a head of power to prescribe gig workers as workers and platforms or intermediaries as employers where they are a regulated worker or a regulated business. That is subject to a minimum standards order and minimum standards guidelines or a collective agreement made by the Fair Work Commission. This approach provides certainty and national consistency to industry by ensuring the government is appropriately guided by national decisions of the Fair Work Commission on the legal status of gig workers under the commission's expanded industrial relations jurisdiction.

I do confirm that coverage of gig workers under the bill is not automatic. On the making of an order by the commission a regulation will need to be made. In making a decision to regulate it would be open to the government to consider the terms of the order, including any industry insurance arrangements and how those arrangements compare to workers compensation. It would also be open to consider the impacts on the scheme's sustainability as well as the industry. These issues would be considered as part of a separate regulatory impact analysis for that regulation and further public and industry consultation.

Significant consultation has occurred throughout the review and preparation of the bill with scheme stakeholders, and details of this are outlined in the written briefing. Some of the provisions commence on proclamation to allow for the commencement of federal legislation and time to work with stakeholders to develop guidance and educate employers, insurers and medical specialists on key aspects of the proposed changes.

Finally, outside of workers compensation matters, the bill amends the Industrial Relations Act 2016 for national consistency and to better align Queensland's appeals pathways and the Labour Hire Licensing Act 2017 to ensure it remains contemporary and compatible with human rights. I note that we have provided the committee with a written briefing paper and given this I do not intend to address the other proposed amendments in any detail at this stage. My colleagues and I are happy to address any specific questions committee members may have in relation to the bill.

CHAIR: Thank you very much. Is there anything from other officers? If you are good, we will go to questions.

Mr LISTER: What data or anecdotal evidence does the department have regarding the number of injured workers who are dissatisfied with their rehabilitation provider as the act currently stands?

Ms Hillhouse: The review found that there was anecdotal evidence in relation to a worker's lack of choice around their rehabilitation provider. One of the reasons for that was that there is a body of work referred to as It Pays to Care. It is a document that for the committee's reference was developed by the Royal Australasian College of Physicians and the Australasian Faculty of Occupational and Environmental Medicine. It finds that there are poorer outcomes when insurers are not managing all of the biopsychosocial influences on a worker. One of those is in relation to a worker's sense of choice and a worker's sense of being able to advocate for themselves. The review made those recommendations based on that evidence.

Mr O'ROURKE: How will the bill support workers who have primary and secondary mental health injuries?

Ms Hillhouse: The bill makes a number of amendments that will support workers with mental injuries, and we just referred to one of those. That is through the provision of choice both in relation to workplace rehabilitation provider or confirming that a worker has a choice in relation to their treating medical specialist which is a current common law right. It also ensures that workers understand what the next steps are in relation to their rehabilitation and return to work. It does that by tightening up the current provisions in relation to rehabilitation and return-to-work planning and ensuring that workers are consulted—that where it is practicable and appropriate for them to be consulted during that planning that that actually occurs.

One of the other things and probably the most significant thing that it does do is for workers who have a physical injury it introduces a provision which is a new obligation on insurers to make sure that they are minimising the risk of secondary mental injury for workers with physical injuries. One of the things that we do know is that in particular for musculoskeletal disorders it is not uncommon for a worker to develop a secondary psychological injury, and in the scheme we have seen a greater prevalence of those. The bill makes sure that insurers are doing appropriate assessments and taking appropriate steps through the management of the claims and through their systems to ensure that the risk of that occurring is minimised.

Mr ZANOW: Having employed a lot of people for a long time in the construction, quarrying and concrete industry, probably one of the biggest challenges as an employer is finding the right professionalism to assess whether or not a worker has had some sort of mental issue arising from a physical injury. Most of the issues in the industry that I came from were physical injuries. The mental health of that worker needs to be assessed quite carefully. How in-depth has this study been to ensure that we do not go overboard with this? I think some people play on it and pull on the mental health issues these days and they really do not have mental health issues from something quite benign as breaking a toe. How in-depth has this study been?

Ms Hillhouse: What we do understand is that secondary mental injuries are more prevalent in musculoskeletal disorders—so soft tissue trauma, fractures, muscular trauma. It is not unusual, and I think that the research shows that 38 per cent of people with those types of injuries may have some kind of distress compared to the normal population. In order to be covered for a secondary mental injury in the workers compensation scheme it needs to be diagnosed by a medical practitioner. The medical practitioner has to provide a certificate of capacity and then a determination would need to be made by the insurer to ensure that it is a work related mental injury.

Mr ZANOW: The insurer uses their best judgement then. Is what you are saying?

Ms Hillhouse: There is case law and there is a legislative requirement that in order to be paid compensation for a mental injury work has to have been a significant contributing factor and that the injury was not caused by reasonable management action. They are some of the current tests in the legislation that a secondary mental injury has to meet in order to become accepted within the scheme.

The bill puts the obligation on insurers. In addition to considering if somebody has a medical certificate and they have been diagnosed with an injury, all reasonable steps must be taken to be able to identify early whether they have concerns that a person may be at risk of developing that injury—whether they have concerns in relation to whether they are coping or not with the injury, whether they might, for example, be under financial distress or whether there are some components to their claim which might place them at higher risk.

Mr ZANOW: To what extent can a third party have input between the worker and the insurer? What sort of interference can they have? What support is there for a worker if they need a support person? Of course, we talk about support people across the board these days if there is an issue in the workplace. What has been looked at in terms of a support person such as a union or parent and how much influence or input can they have in the assessment?

Mr Bick: It is a medical model, so it is driven by the medical advice from the doctor.

Mr ZANOW: So it is more medical advice than someone else?

Mr Bick: Yes. They can certainly have a support person to help them with their interactions with the insurer. The bill also does that by enshrining a right. A worker has the right to seek advice from a lawyer or a union. Yes, it is a medical model.

Mr ZANOW: Or any third party outside of that? You said a union or someone else. A support person could be a parent or it could be a spouse?

Mr Bick: Yes, absolutely. We do get cases where people's parents are representing them in the scheme, so they are the main point of contact with the insurer as part of that process. The other parties that are involved in that involve workplace rehabilitation providers as well. They are part of that chain of people who are supporting that worker's return to work.

Ms NIGHTINGALE: How will the bill support workers who have primary and secondary mental health injuries?

Mr Bick: In relation to secondary psychological injuries, the bill aims to prevent them occurring from when they come into the scheme. We want people to get better, not get worse when they come into the scheme. As Janene mentioned before, the bill does put a head of power in for an obligation for insurers to take reasonable steps, including providing reasonable services to prevent a secondary psychological injury arising from a physical injury. We are certainly not talking about anything that is very difficult at this point in time. We are talking about matters such as insurers establishing protocols and expectations around claims; managers having direct and proactive communication with workers; setting expectations for employers and workers around their role as part of the rehab and return-to-work process; and a focus on empowering the worker through that process. The bill does that through allowing the worker's right of choice if they are dissatisfied with their workplace rehabilitation provider; not having their employer present during medical examinations; being able to choose their own treating doctor; and making sure insurers put information in a form that is easy to understand. It is a big system. Hopefully not many people have to go through it, but when you do go through it it is generally a new process, so making sure that communication is very clear and easy for people to understand.

CHAIR: That is very good timing. The member for Hinchinbrook has just arrived. Welcome, Nick. We have all had a question; I will throw to you.

Mr DAMETTO: I am fine for now, thank you.

CHAIR: No problem at all.

Mr LISTER: I have been looking in the explanatory notes at the list of stakeholders involved in the preparation of this bill. I note that none of the red unions or employee associations were listed in those groups consulted. Given that the bill enshrines an explicit definition of the organisations that can assist as being registered industrial organisations, why was it that the red unions such as the TPAQ and the MPAQ were not consulted?

CHAIR: You used the term 'red unions'.

Mr LISTER: Yes.

CHAIR: Because they are not actually registered unions, are they?

Mr LISTER: They are not registered unions; they are employee associations. It appears to me there is a stake in this for them. Is there any reason why they were not included in the consultation or is there an error in the explanatory notes?

Mr Bick: In relation to consultation on the review, there was a targeted consultation approach. It was the key stakeholders that we usually talk to which are registered industrial organisations, medical, legal and allied health providers. They are always in the mainframe in terms of whom we consult with. The legislation is not specific around how the conduct of that review should occur either, so there are no requirements for how more consultation should occur. We generally consult with those key scheme stakeholders as part of anything that we do.

Mr O'ROURKE: Can you tell the committee more about the way in which the department has decided to approach who is and who is not a worker for the purpose of workers compensation?

Ms Hillhouse: Are you referring to the extension of the definition of 'worker' to cover gig workers?

Mr O'ROURKE: Yes.

Ms Hillhouse: There have been a number of reviews conducted in relation to gig workers over the last five to seven years. Those reviews recognise that the nature of arrangements do vary in relation to gig workers. There is a group that currently is not covered by the definition of 'worker', and that group is generally considered to be independent contractors. Various reviews found that some of these could be considered vulnerable workers. Being that they are unaware of their employment rights, they might have a high risk of being disadvantaged due to being lower skilled, lower paid workers. They also come with lower bargaining power. It recognised this can be compounded by the insurance arrangements they have. This particular group of gig workers may voluntarily have to access their own insurance arrangements or they might be provided with accident insurance by the

platform or the intermediary they are undertaking gig work for. We understand that the public accident policies they may be covered by do not really compare to workers compensation, so in many ways even if they are covered by a private accident insurance policy they are underinsured.

For example, a gig worker would not be covered for any psychological injury that is sustained because, given the nature of those contracts, they are generally excluded. They may only be entitled to a period of up to 30 days of income support. Their hospital fees may be capped at $5,000. They may only receive around $750 in relation to return-to-work services despite how severe their injury might actually be. This was obviously a concern. It did show us that the cost of injuries within the gig industry, especially around gig workers, was being transferred from the platforms and shifted through to gig workers themselves. At the moment, they bear up to around 70 per cent of the costs of a work related injury. The community, which includes our hospital services, would bear around 27 per cent of the cost, with the intermediary of the gig platform only bearing around four per cent of those costs.

The bill understood there is a clear need to really look and make sure the appropriate workers compensation coverage was being provided to this especially particularly vulnerable workforce. That workforce is considered to be employee-like. It was also recognised that it was not for the workers compensation scheme to determine the legal status of a worker. At the moment, if you have a look at our current definition of 'worker', it covers people who undertake work under a contract where they are considered to be PAYG, so withholding tax is actually taken. What we do currently in the legislation is link into a nationally consistent definition of who would be covered as a traditional worker. When considering how to cover gig workers, a similar approach was taken—that is, we do not determine the legal status. At the moment, we understand that the legal status will be determined by the Fair Work Commission through determining certain workers to be regulated workers. They might be determined to be an employee-like worker or a regulated road transport worker. The change to the definition will make sure there is the ability for the government to consider and, if appropriate, make a regulation to cover those particular workers once the Fair Work Commission has made a determination of their legal status.

Mr ZANOW: Given that a worker may request a different workplace rehabilitation provider if they are dissatisfied with them, how many times can they do this?

Mr Jang: The amendments in the bill would allow an insurer to refuse the request of the worker in one of two circumstances: one, where it is not reasonably practicable for the new provider to be selected; and, two, where the new provider would have an adverse impact on the worker's rehabilitation. That sort of framework would allow an insurer to take account of previous requests made by a worker. For example, if it was determined that those requests were made frivolously or the chopping and changing of providers would not support recovery, the insurer would have the capacity to refuse that request.

Mr ZANOW: There is a mechanism to stop revolving doors?

Mr Jang: That is correct.

Mr O'ROURKE: What penalties will apply to insurers that do not meet the proposed 10 business days time frame to provide a return-to-work plan?

Ms Hillhouse: The obligation for a rehab and return-to-work plan sits on insurers.

Mr Bick: Currently that obligation is 50 penalty units, but that general obligation to ensure rehabilitation and return to work is proposed to increase to 500. The reason is that, when we were drafting the bill and looking at a number of the other penalties that were sitting inside the legislation, there were some very low penalties that existed in the legislation. I think there is one for returning an identity card for an authorised officer which sits at around 40 penalty units, yet one of the most key, central provisions in the legislation is about getting workers back to work, and that insurer obligation was sitting just at 50. As you know, legislation changes and amendments occur. We had claims-farming amendments introduced a couple of years ago that put the bar for law practice certificates at 300 penalty units, which is more of an ancillary kind of offence in the legislation. When we had a look at that, there was a decision made that as part of the drafting we would increase the penalties.

In relation to the rehab and return-to-work plan being done in 10 days, I just want to point out there is flexibility in that as well because we realise that it is a living document. In certain situations it is not going to be something you are going to have done on day 10 and it is all done and dusted; it is something that is going to be updated. You could have a worker who is suffering from a severe physical injury, in hospital or with a severe psychological injury and as a result of that the insurer can only go so far because they do need to consult with the injured worker as part of developing that plan. There is some in-built flexibility in there for that 10-day time frame. We want insurers to have a written

plan as much as they can in that first 10 days and then it is updated and reviewed as their worker progresses. It sort of goes back to some of the data point before. What we learned from a national rehabilitation and return-to-work survey was that Queensland was sitting amongst the lowest—I think it was late 60 per cent—in terms of workers not having a written rehab and return-to-work plan in place. Without a written plan how do you know where you are going? So we have to make sure that occurs.

CHAIR: Thank you. That was very helpful.

Mr DAMETTO: Thank you to the department for presenting to the committee today and briefing us. It has been quite informative for everyone here. I understand there was a 2023 review of the workers compensation scheme. Was there a catalyst to push for this legislation? Were there any incidents in the workplace or was there one incident or issue that arose as a catalyst for the drafting of this legislation?

Ms Hillhouse: Under the legislation our scheme is required to be reviewed every five years. The 2023 review was the third in a series of five-year reviews. It has as its terms of reference considering whether the scheme itself is meeting its objectives as defined in the legislation as well as looking at any emerging issues that may impact on the scheme. The idea of the five-yearly review is to make sure that the scheme stays in touch, stays current and is tackling issues early.

Mr DAMETTO: It is keeping up to date with how industry is moving and how society is moving at the same time?

Ms Hillhouse: Yes, very much so.

Ms NIGHTINGALE: Has the department undertaken any modelling on the effects of the proposed changes on the financial sustainability of WorkCover?

Ms Hillhouse: The proposed changes are not expected to impact on the financial sustainability of WorkCover. There are a number of costs attached with the proposed changes. One of those is in relation to the changes and extension of the deemed diseases for firefighters with specific cancers, which has a cost of around $15.4 million; otherwise there may be some up-front servicing costs and increasing costs due to the fact that there are, as we have mentioned, a number of different obligations being placed on insurers for example, including the new obligation to minimise the risk of secondary psychological injuries.

WorkCover estimates that those additional costs may range from $19 million to $22 million. It recognises that those costs are being expended with the purpose of improving claims outcomes as well as durations. That costing does not take into account any cost savings which may actually occur as a result of the benefits from improving rehabilitation and return-to-work outcomes and minimising the number of secondary mental injuries within the scheme. At the end of last financial year WorkCover had a funding ratio of 138.9 per cent and ended last financial year with an operating surplus. These costs are able to be absorbed.

Mr LISTER: This is probably a pretty simple question for you, but I would like to have a bit of insight myself. What does the state government mean when it talks about being a 'model employer' in relation to WorkCover and workplace injuries?

Ms Hillhouse: Are you referring to the recommendation of the five-year review around implementing a model employer status around rehabilitation and return to work?

Mr LISTER: That is where I saw the term, but I have heard around the place that the government aspires to be a model employer. What does that mean in layman's terms?

Ms Hillhouse: In layman's terms, a model employer around rehabilitation and return to work, no matter who you are as an employer, would generally mean that you are taking a person centred approach to how you engage and undertake the support that you provide and how you meet your obligations in workers compensation for rehabilitation and return to work. At its heart it means you put the injured worker at the centre, which means everything from making sure you are engaging really well with your worker around all of the different steps, that you are engaging really well with the employee to understand what role you can play in a worker's rehabilitation and return to work. You are looking at what suitable duties you may actually have available that would help support that worker to get back to work early. You are staying in touch with the worker. You understand their injury and you are really staying very connected throughout the process.

They are really the basics. It is not considered rocket science. It makes a lot of sense. It is being connected and being actively engaged and understanding that supporting rehabilitation and return to work has benefits not only for an injured worker in terms of reducing the impact of injury on them but also for you as an employer as well as for the scheme more broadly in terms of reducing costs.

Mr O'ROURKE: You have already touched on the deemed diseases for our firefighters that are to be included in the additional cost. Is there any other information in that space that you think would be beneficial for the committee to be aware of in that consideration?

Ms Hillhouse: The extension of the presumptive legislation very much recognises the findings of the World Health Organization's International Agency for Research on Cancer. It released some additional findings that started to very much support that firefighting can have a link to cancer in firefighters. The inclusion of the 10 new diseases will make sure that Queensland firefighters are covered for the same diseases that they would be covered for regardless of which other jurisdiction they work in across Australia. Queensland will actually have the most comprehensive list. Its coverage does align with other jurisdictions.

Ms NIGHTINGALE: Can you tell the committee how requiring an insurer to form their own opinion about whether it is practicable for an employer to provide suitable duties and take certain steps to accommodate a worker will speed up the compensation process?

Ms Hillhouse: The review identified that it had concerns that insurers were not undertaking validity checks, so it is about asking questions of employers when employers say they do not have suitable duties. The bill includes a requirement on insurers to actually consider the written evidence that an employer provides in and around whether they have suitable duties, which is a current requirement, and to consider whether or not they have any concerns as to whether further investigations could have been undertaken around whether or not there might be suitable duties at that workplace.

We think this will be a conversation between an insurer and an employer where they will be able to ask and respond to questions—and potentially for the insurer to also have the opportunity to educate employers—around what suitable duties may actually look like for a worker. The outcome of any consideration by an insurer is the same outcome as would currently exist. For example, if an employer is unable to provide suitable duties, an insurer may still arrange for suitable duties which the employer would have to pay the costs for as part of their premium.

CHAIR: I think we have asked all the questions we would like to ask the officials. Thank you very much for your presentation and being so responsive to the questions from committee members. We very much appreciate it. I declare this briefing closed.

The committee adjourned at 9.08 am.