The Research Director
Finance and Administration Committee
Parliament House
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Dear Research Director

OPERATION OF QUEENSLAND'S WORKERS' COMPENSATION SCHEME

Thank you for providing an opportunity to lodge this late submission and seek committee approval, to the Finance and Administration Committee (the Committee) for its Inquiry into the Operation of the Queensland Workers' Compensation scheme (the Scheme).

Submission

The paramount concern I have is that certain sections of the Queensland Workers Compensation Act (the act) are grossly unfair, particularly to a person with Psychological disabilities, with significant hurdles placed in their way they need to overcome to enable any workers compensation entitlements.

I make this observation as a carer of an injured female worker with long-term mental impairments that have included multiple protracted hospital admissions, the last being for 5 months. This injured worker is a constituent of Mr Ray Stevens, the member for Mermaid Beach and the Manager of Government Business in the house.

I provide the below example of the unfairness, in parts of the scheme concerning persons with disabilities suffering aggravation psychological injuries in Queensland employment.

The injured worker I care for returned to the workplace part time after her hospital admissions in an attempt to gradually better her position and eventually return to full time employment without the need of Centrelink support. She was employed for 4 years before her aggravation injury and suffered significant abuse at her workplace that caused her an extremely severe aggravation of pre existing psychological injuries and to cease work thereafter.
On her behalf, I lodged a Workers Compensation claim that was accepted by Workcover. The perpetrator had apologized to her at the time of injury for his conduct and this was recorded in the perpetrators statement to workcover. The employer that caused the injury through failing to take action against that perpetrator when advised of his continuing harassment, then went on to apologize to the perpetrator for the injured workers reaction to the abuse, whilst completely ignoring the injured worker and denying any knowledge of the injured workers disclosed disabilities and the fact the employer was paid $1,000 to take her on by

Centrelink and received wage subsidies. This obviously caused the injured worker further distress.
The employer sought a QComp review and is alleged to have supplied false and misleading grounds and other false information. QComp set aside the workcover decision even though the review officer found that the injured worker had suffered a personal injury, that injury arose out of her employment, and the employment was a significant contributing factor and that it was partly established that the perpetrator did cause her aggravation injury. As the onus of proof was on the injured worker to prove unreasonable management action in an unreasonably way and the injured worker could not prove this at the time, the injured worker was not entitled to compensation. She had all of her medical treatment entitlements and wages cut and was forced to appeal the decision. This caused her further severe aggravation with no having the financial means to afford necessary medical treatment.

The unfair affects of this review decision

1. **The employer was able to lodge a review allegedly with false and misleading grounds.** Workcover investigated under section 534 of the act and stated it would be too hard to get a prosecution as it comes down to what was in the mind of the employer and the employer would simply deny the allegations or state they made a genuine mistake. This part of legislation is "toothless" and heavily biased in favour of the employer in allowing the employer to simply deny any allegations put to them.
2. **The employer allegedly submitted false and misleading information to support their appeal.** As the onus of proof is on the injured worker, everything put forward by the employer was accepted into evidence with the review officer not required to test the credibility of the employer's evidence, the injured worker could then not prove otherwise. In the case of this injured worker she alleges among other things that she was paid under a lower NSW award as opposed to the higher Queensland award even though she was working totally in Queensland as well as not having her superannuation entitlements paid for a protracted period and when those allegations were put to the employer, the employer was simply able to state "no comment" with the onus being on the injured worker to prove otherwise. Accordingly, there was no unreasonable management action found with respect to this or any other allegation. The employer only needed to state "no comment" in all their responses with the injured worker having the onus to prove the allegations all within the 25 days time limit of Section 545 of the act. This is heavily biased in favour of the employer.

3. **The employer being the applicant to the review under section 545 of the act is able to apply for an extension of time if needed, the injured worker is not.**
   The employer did not apply for an extension of time, however the injured worker did apply for an extension of time and that request was declined due to section 545 of the act. The injured worker needed an extension of time to apply for Freedom of information documents from her Disability employment

consultant that showed a record of her workplace problems that was needed to prove unreasonable management action, accordingly the review officer never sighted this evidence and could not wait a extra few weeks due to the legislation, that required a quick decision making process. Now the injured worker has to wait at least six months for an appeal hearing, where is the quick decision making process for the injured worker now. This is heavily biased in favour of the employer and a denial of Natural justice.

4. **The employer being the applicant to the review under section 545 of the act is able to apply for a right of appearance or make representations, the injured worker is not.**
   The employer was able to make representations and have a right of appearance, the injured worker who needed to explain the complex circumstances relating to her injury was not afforded any right of appearance, accordingly she was denied natural justice.

5. **The injured worker is now required to lodge an appeal in the Industrial Relations commission.**
   The injured worker is unable to find any legal firm to take the matter on, as the claim is deemed commercially unviable due to the nature of the injured workers previous injuries and her part time employment status. Legal aid does not take on employment matters, QPILCH is unable to find any Pro Bono legal assistance and now the worker is left unrepresented and subject to possible adverse legal costs if her appeal fails. Further, the injured worker who now has substantial mental impairments is expected to self-represent in running the appeal. The injured worker who has mental incapacity is unable to do this. The injured worker now relies on the voluntary assistance of her carer and power of attorney to pursue her entitlements unrepresented. This is biased in favour of the employer who has no legal expense or costs exposure in responding to the appeal.

6. **Significant hurdles in overcoming section 32 (5), reasonable management action in a reasonable way.**
   The injured worker in order to prove unreasonable management action and overcome section 32(5) is now required to prove the employer's negligence at the statutory claims stage in place of the common law stage for the appeal to be accepted. Effectively, if you suffer a psychological injury under section 32(5) of the act, the scheme appears a "fault" scheme and not a "no fault" scheme as there is no other way of proving unreasonable management action in an unreasonable way without proving negligence on the part of the employer It appears this part of the legislation is designed to close the floodgates on non-genuine psychological injury claims, however it also closes the floodgates on genuine claims. If the Government deems section 32(5) of the legislation as being fair and reasonable, the Government should then include ALL injuries either physical or psychological be subject to reasonable management action under section 32 (5) not just psychological injuries, as it is no different having a non genuine claim for physical injury that has no

visible injury such as a back, shoulder complaint or other injuries, than it is to having a non genuine claim for psychological injury. This would never occur as then 95% of injured workers would have their claim denied, as the onus of proof would be on them to prove unreasonable management action. This part of the scheme is heavily biased in favour of the employer and appears discriminatory conduct against the disabled worker who has already suffered a previous psychological injury. Effectively it places the highest level of proving a claim on the least able persons in our society to do so, all without any legal assistance.

7. **A breach of the Act does not create a civil action for damages.**
   Even though the employer has breached the Work Health and Safety act and caused the injury by failing to do something, the injured worker cannot use that breach as unreasonable management action due to the legislation. There is not a proper deterrent for the employer to maintain a safe workplace.

Amendments needed

• Free Legal assistance from Government appointed independent solicitors as per the recent amendments to the NSW scheme should be made available at the statutory claims process for all claims or in the alternative, at least for people with disabilities, who are very vulnerable workers once injured and do not have the financial resources of others or able to be funded by Legal Aid. Even the recent harsh changes made to the NSW Workers Compensation scheme provides free legal assistance for workers and without the risk of an adverse costs order. This would have the advantage of "weeding out" the questionable claims with totally independent and free legal advice and this must reduce disputes and therefore costs. At the very least, the NSW scheme should be followed in respect of legal costs matters.

• That no costs orders be made in the statutory claims process for all injured workers as per the NSW scheme or in the alternative against any person with disabilities who has suffered an aggravation injury in the workplace and is forced to appeal a decision. Again, the NSW scheme is fair and reasonable, the Queensland scheme is a long way behind. An injured worker should not be subject to losing their home due to an adverse legal costs finding, especially if caused by an employers false representations in order to save on their workcover premiums.

• Section 545 of the act should be amended to provide that an injured worker can apply for an extension of time to gather further evidence to support there claim that is required for the review process when they are not the applicant. This would reduce appeal costs for all parties. In the alternative, amend the legislation so that the review officer can grant an extension of time to either party to afford natural justice.

• Section 545 of the act should also be amended to provide that an injured worker could apply for a right of appearance or make representations when not the

applicant. This would reduce appeal costs for all parties and afford natural justice to the injured worker instead of only affording natural justice to the employer.

• That an employer, who is not self-insured, not be allowed to appeal a workcover decision. In the alternative that genuine grounds must exist for a review to be granted to any employer, not grounds merely fabricated because the decision is not agreed with and may result in an employers premium increase, and that the onus of proof for establishing those grounds be on the employer.

• Reasonable Management Action provisions in relation to claims for psychological injury in Section 32(5) of the act should be amended to contain the much fairer provisions similar to what is provided for in section 11A of the NSW Workers Compensation act, which is much more favourable to persons with disabilities and others generally.

Section 11(a) of the NSW act provides that ;
"*No compensation for psychological injury caused by reasonable actions of employer****.*** *No compensation is payable under this Act in respect of an injury that is a psychological injury if the injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the employer with respect to transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of workers or provision of employment benefits to workers.*

Where as Section 32 (5) of the Queensland act provides in part that ;

Injury does not include a psychiatric or psychological disorder arising out of, or in the course of, any of the following circumstances—
Reasonable management action taken in a reasonable way by the employer in connection with the worker's employment;

Examples *of actions that may be reasonable management actions taken in a reasonable way—*
• action taken to transfer, demote, discipline, redeploy, retrench or dismiss the worker
• a decision not to award or provide promotion, reclassification or transfer of, or leave of absence or benefit in connection with, the worker's employment

Case law in Queensland has determined that examples of reasonable management are open to any incidents of management action in employment with the onus of proof being on the injured worker to prove unreasonable management action in an unreasonable way.
In NSW, reasonable management action is limited to solely what is described in the act, with the onus of proof being on the employer if section 11(a) is used as a defense.
The Queensland legislation should be amended to the same or similar to the NSW legislation with the removal of the word *examples,* thereby limiting management action to the provisions set out in the NSW act.

This would then be fairer to injured workers and still deny claims with respect to transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of workers or provision of employment benefits to workers unless found unreasonable management in an unreasonable way.

The interpretation of what constitutes “reasonable” management action is currently far too broad, which results in many legitimate claims being excluded based on these provisions alone. One only need look at how many psychological injury claims get rejected compared to how many physical injury claims get rejected to know that something is very wrong in this regard.
The subjective interpretation of what is or is not regarded as “reasonable” is further exacerbated by the vested interest that self-insurers have to save money directly by rejecting claims. Further complications which add to the unfairness of these current provisions include the use of a “global view” of management actions by those reviewing rejected claims (where, if not all actions are deemed to be “unreasonable”, the claim can still fail) and the subjective interpretation that management actions may be imperfect while not being necessarily regarded as “unreasonable” also makes getting such claims accepted even more difficult. Claims which have failed on the basis that management’s response to bullying which caused a psychological injury was deemed “reasonable” while ignoring the actual event or events that caused the injury in the first place.
In the absence of witnesses, if a worker’s version of events, which caused the psychological injury, differs from a manager’s version of events (particularly when the manager claims to have acted “reasonably”), the manager’s version is usually accepted over that of the worker leading to unfair rejection of claims.
Ideally, the “reasonable management action” provisions should be removed altogether due to their subjectivity and, therefore, obvious unfairness.
Alternatively, the concept of “reasonable management action” needs to be reviewed and amended to better define it to make it fairer for injured workers, because at the moment, it is heavily weighted towards the insurer and too open to subjective and self-serving interpretation, making it unfair for injured workers and even more unfair for injured workers with pre existing disabilities.

•The Act should be amended to provide better assistance for workers with disabilities suffering aggravation injuries in the workplace, currently the Act is silent on this. Section 106 of the Queensland Anti-discrimination act 1991 provides exemptions for discrimination within the Queensland Workers Compensation Act relating to disabled workers. Disabled workers should be encouraged to enter the workplace by having adequate protection should they suffer an aggravation of injury without being forced back onto Centerlink benefits because they have been injured in their employment through no fault of there own and cannot pursue there legal entitlements due to the lack of assistance available.

•That the legislation should be amended in order that any breach of the Workplace Health and Safety Act can provide evidence of unreasonable management action in an unreasonable way, thereby discouraging employers from maintaining unsafe workplaces and practices. It is absurd to suggest if an employer causes injury to an

employee and that there is no penalty that the injured worker is entitled to, with the government receiving any fines imposed on the employer and the injured worker not even getting the benefit of using this WHS breach in a common law claim for negligence against the employer.

In summary, workers with a disability who get injured at work through no fault of their own end up being thrown out of the workers' compensation system onto the work scrapheap, dependent on social security benefits with little or no help to find suitable alternative employment and, therefore, with poor prospects of ever finding other employment, not to mention their ongoing medical treatment and other associated costs.

Certain parts of the current legislation contained in the body of this submission appear more "third world "type legislation when compared to the much fairer NSW legislation, even after the recent harsh changes implemented in that state.

It is hard to believe that in our so called "modern society" a disabled worker could be employed on one side of the street at Coolangatta in Queensland and be afforded significant hurdles to gain workers compensation entitlements if they suffer an aggravation psychological injury, whilst another worker employed in NSW on the other side of the street in Tweed Heads suffering the same injury in the same circumstances is afforded no such hurdles.

It is a basic human rights issue to protect the most vulnerable persons in our society who are injured in the workplace, accordingly it is submitted changes to the Queensland scheme are urgently required to bring it in more in line with the provisions contained in the NSW scheme in providing a fairer scheme for all, particularly for persons with pre-existing psychological injuries returning to employment.

I thank the committee for consideration of my submission and make myself available should the committee wish to call me as a witness.

Yours Sincerely,

[redacted]

cc
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