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Finance and
Administration Committee

Supplementary submission for consideration by Parliamentary Committee of Inquiry into Queensland's Workers' Compensation Scheme

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I wish to raise matters of concern in relation to Section 32(5) of the Act.¹ These matters of concern relate to three areas: fairness, injury exacerbation, and costs.

1. Concerns relating to fairness

I submit there are two major grounds whereby the operation of Section 32(5) of the Act is unfair to workers with psychological injuries. These grounds are:

- Discrimination against injured workers because of the nature of their illness;
- Discrimination against injured workers because of the failure to provide expert assessment of management action.

1.1 Discrimination against injured workers because of the nature of their illness

Workers with psychological injury are discriminated against because they do not have the same access to 'no fault' compensation for their injury as do workers with physical injury. This is clearly recognised by Q-COMP in their submission to the Committee.²

In relation to journey claims (a matter of interest for the parliamentary inquiry), the observation has been made on more than one occasion that, had the worker not been employed with this particular employer, then the worker would not have been en route to their place of employment, the journey accident would not have occurred, and the injury would not have ensued. It is therefore argued that journey claims ought to continue to be covered by compensation.

The same argument can be made about psychological injury. Had the worker not been employed with this particular employer, then the worker would not have developed a psychological injury in response to events at the workplace. The worker with a psychological injury ought therefore be entitled to compensation just as a worker with a physical injury is entitled to compensation and just as journey injuries are currently entitled to compensation.

The argument in favour of 'no fault' compensation for workers with psychological injury can be extended to include events such as performance counselling, terminations, transfers, failure to promote, and demotions. These events would not have occurred had the worker not been employed by this employer.

¹ Section 32(5) of the Act states *inter alia*:

Despite subsections (1) and (3), injury does not include a psychiatric or psychological disorder arising out of, or in the course of, any of the following circumstances –

- (a) reasonable management action taken in a reasonable way by the employer in connection with the worker's employment;*
- (b) the worker's expectation or perception of reasonable management action being taken against the worker;*
- (c) action by the Authority or an insurer in connection with the worker's application for compensation.*

² Statutory claims are 'no fault' claims under the legislation. The exception is claims for psychiatric/psychological injuries ('psychological claims'), which are fault based. Q-COMP Submission to the Finance and Administration Committee inquiry into the operation of Queensland's workers' compensation scheme, page 5

These events arise in complex, interactive work environments where it may be the case that the employer has also contributed to the event: For example:

- Employer has made an unwise appointment to the position;
- Employer has over-estimated employee's capacity;
- Employer has failed to provide an adequate position description;
- Employer has failed to provide clear instructions to the worker;
- Employer has failed to provide reasonable expectations of worker performance;
- Employer has failed to provide adequate induction and/or training;
- Employer has not adequately responded to issues of concern expressed by the employee.

Workers with psychological injuries should have the same access to 'no fault' compensation as do workers with physical injuries. If there are no exclusions for physical injuries, there should be no exclusions for psychological injuries.

It's important to add that what should be compensable is injury or disorder, not short-lived disappointment or resentment. Workers claiming compensation need to have a properly diagnosed psychological injury or disorder, but once diagnosed, that injury or disorder should be just as compensable on a 'no fault' basis as physical injury. It is discriminatory to do otherwise.

1.2 Discrimination against injured workers because of failure to provide expert assessment of management action

Management and organisational behaviour are tertiary-level disciplines. There are professional associations (Australian Institute of Management and Organisational Behaviour College of the Australian Psychological Society) that represent and support professionals in the field as well as providing ongoing professional development. However, decisions about the reasonableness or otherwise of management action are made by individuals in WorkCover and Q-COMP with no particular training, tertiary qualifications, experience or expertise in management theory and practice or its application in work environments which by their very nature are diverse, interactive and complex.

Decisions about the status of a physical injury or the degree of impairment following injury are made by Medical Assessment Tribunals, ie panels of senior medical specialists with substantial expertise in their fields. If these decisions were made by WorkCover claims assessors or Q-COMP review officers, there would be justifiable outrage. But the same employees are authorised to assess a complex and interactive dynamic such as whether the actions of particular people towards a particular employee in a particular context in a particular organisation with particular policies and procedures in a particular industry is 'reasonable' or not. This is unjust and is discriminatory against workers with psychological injury.

2. Concerns relating to injury exacerbation

It is in the interests of all stakeholders to limit the duration of a work-related injury, minimise any risk of injury exacerbation, potentiate recovery, and maximise the opportunities to return the worker to a productive role in the workplace.

Section 32(5) of the Act militates against these objectives in relation to workers with psychological injuries.

Section 32(5) of the Act is adversarial both in its intent and its application. It requires the injured worker to engage in a process whereby the worker has to prove the employer has been 'unreasonable'.

Given the adversarial nature of the process, there is significant potential for exacerbation of the worker's psychological injury because the worker has to:

- Engage in an adversarial process at a time of substantially diminished psychological capacity;
- Respond to adversarial statements made by the employer that, by their very nature, make no concessions to context, the worker's perspective, or the complex nature of workplace interactions;
- Respond to adversarial statements made by the employer that, by their very nature, put the worker in a negative light;
- Argue a case for 'unreasonable' behaviour by the employer without any criteria for what constitutes 'unreasonableness' under the Act or any criteria for how WorkCover employees might assess 'unreasonableness'.

This is a destructive process with significant potential to exacerbate the primary psychological injury, retard recovery, further erode any remaining relationship of trust between employer and employee, and destroy any prospect of the injured worker returning to the workplace where the injury occurred.

The mind is like no other organ of the body. Once damaged, it heals slowly. Sometimes it never heals or only partially heals. Unlike physical injury, a psychological injury can be re-awakened as a result of environmental stimuli and complex brain processes. Rather than protect the injured mind as you would a wound or broken limb, Section 32(5) of the Act imposes additional, and, I submit, unreasonable demands. This is damaging and unjustifiable.

3. Concerns relating to costs

As far as I can ascertain, it would appear that Section 32(5) of the Act was introduced to reduce the cost of operating the scheme by curtailing the access of workers with psychological injuries to statutory compensation.

I submit however that the savings accrued by keeping the majority of workers with psychological injury out of the scheme³ are diminished by the costs of keeping such workers out of the scheme.

There are substantial costs directly and indirectly attributable to the operation of Section 32(5) of the Act. These costs are incurred by WorkCover, Q-COMP, QIRC, employers, injured workers, Commonwealth-funded social welfare, Medicare, and various insurers. The operation of Section 32(5) also creates additional demand on a range of professional services, in particular legal and health services.

3.1 Direct Costs of Section 32(5)

The operation of Section 32(5) of the Act results in higher operating costs for WorkCover, Q-COMP and the Queensland Industrial Relations Commission (QIRC).

3.1.1 Cost of WorkCover resources to assess claims for psychological injury

In 2011-12, the average time taken to decide on an application for statutory compensation was 6.2 days. The average time taken for psychological injuries was 26.9 days.⁴ The average decision time for accepted psychological injuries was 18.4 days, but for rejected psychological injuries was 32.5 days.⁵

³ WorkCover rejects 60% of claims for psychological injury. Data from Q-COMP 11/12 Statistics Report, Table 17

⁴ Q-COMP 11/12 Statistics Report, Table 16

⁵ Q-COMP 11/12 Statistics Report, Table 17

Given that, in 2011/12, 97.8% of rejections of psychological injury claims arose out of Section 32(5) of the Act,⁶ it can be argued that substantial WorkCover resources can be saved by repealing Sections 32(5)(a) and (b) of the Act. This saving in resources would arise because there would no longer be any need for WorkCover to address the issue of management action and whether it was reasonable or not.

It is reasonable to conclude that, if the nature of management action were not a consideration in assessing claims for psychological injury, then the resources required by WorkCover to assess such claims would be substantially reduced with a concomitant reduction in costs. This saving would apply in the case of both approved and rejected claims, but more so in the case of rejected claims (estimated at 1,753 claims rejected under Section 32(5)⁷).

3.1.2 Cost of Q-COMP resources to review rejection by WorkCover of claims for psychological injury

Psychological claims currently represent 4.3% of all claims for statutory compensation but represent 31% of all review applications to Q-COMP.⁸

As 97.8% of all rejections for psychological injury claims in 2011/12 were based on Section 32(5) of the Act,⁹ the statistical data would indicate that the reviews carried out by Q-COMP of WorkCover decisions to reject such claims will be reviews of decisions based on Section 32(5) of the Act. The number of such reviews is estimated at 555.¹⁰

It is reasonable to conclude that, if the nature of management action were not a consideration in assessing claims for psychological injury, then the number of matters taken to Q-COMP for review would be substantially reduced (by an estimated 555 in 2011/12) with a concomitant reduction in costs.

3.1.3 Cost of QIRC resources to review rejections by Q-COMP of claims for psychological injury

There are costs associated with taking a matter to the QIRC following failure of appeal to Q-COMP. Of all workers' compensation matters taken to the QIRC, 41% are for rejected claims for psychological injury.¹¹ The number is estimated at 197.¹²

It is reasonable to conclude that, if the nature of management action were not a consideration in assessing claims for psychological injury, then the number of matters taken to the QIRC would be substantially reduced (by an estimated 190+) with a concomitant reduction in costs.

3.1.4 Effect of costs of Section 32(5) on WorkCover premiums

It is a reasonable assumption that the operating costs of WorkCover and Q-COMP are built into premiums to employers. The higher the operating costs of these two bodies, the higher the premiums. So while premiums will come down because of the restricted access to 'no fault' compensation by workers with psychological injury, premiums will go up because of the costs incurred by keeping such injured workers out of the scheme.

⁶ Q-COMP 11/12 Statistics Report, page 18

⁷ Estimate based on data provided in Q-COMP 11/12 Statistics Report, Table 17 and page 18

⁸ Q-COMP submission to Finance and Administration Committee inquiry into the operation of Queensland's workers' compensation scheme, page 5

⁹ Q-COMP 2011/12 Statistics Report, page 18

¹⁰ Estimate based on data provided in Q-COMP 11/12 Statistics Report, page 19, and data provided in Q-COMP submission to Finance and Administration Committee inquiry into the operation of Queensland's workers' compensation scheme, page 5

¹¹ Q-COMP submission to Finance and Administration Committee inquiry into the operation of Queensland's workers' compensation scheme, page 5

¹² Estimate based on data provided in Q-COMP 11/12 Statistics Report, page 49, and data provided in Q-COMP submission to Finance and Administration Committee inquiry into the operation of Queensland's workers' compensation scheme, page 5

The operating costs of the QIRC are, presumably, primarily borne by the state. However there are also operating costs to Q-COMP when a matter goes to the QIRC because of Q-COMP's costs in preparing the matter for hearing as Q-COMP is one side to the dispute.

3.2 Indirect costs of the operation of Section 32(5)

Section 32(5) of the Act is adversarial and it is adversarial between an individual (the worker) and an organisation (the employer).

Adversarial processes by their very nature create conflict and dissent and are not ones that optimise co-operative and speedy resolution. By their very nature, adversarial processes are stressful. They are particularly stressful for the injured worker because there is an imbalance of power and access to resources in favour of the employer. All of this occurs at a time when the injured worker is least able to engage with the process and manage the associated stress.

There is potential for substantial collateral damage associated with the operation of Section 32(5) of the Act. This potential for collateral damage surfaces in a number of ways:

3.2.1 Psychological cost to injured workers

There is potential for psychological cost to an injured worker in having to prove to WorkCover that the employer is liable under Section 32(5) at a time when the worker is least able to function psychologically. This psychological cost has the potential to:

- aggravate the existing psychological injury;
- delay recovery from the injury;
- further erode what remains of the relationship of trust between the employee and the employer; and
- further impede any return to work by the injured worker either to the place of employment where the injury occurred or to an alternative place of employment.

This issue is also addressed in Section 2 (Concerns relating to injury exacerbation).

3.2.2 Resource cost to injured workers

There is potential for resource cost to an injured worker in having to prove to WorkCover that the employer has been 'unreasonable' under Section 32(5). This resource cost may extend to engaging specialist personal injury lawyers to prepare a case.

3.2.3 Resource cost to employers

There is potential for resource cost to the employer in having to argue the case that their management action was reasonable and that it was taken in a reasonable way. This resource cost may extend to engaging external consultants and/or specialist employment lawyers to prepare a case.

3.2.4 Breakdown in employment relationship

There is potential for a complete breakdown in the employment relationship such that the injured worker resigns or is 'restructured out of' or in some other way 'terminated from' the organisation. The potential for this breakdown exists irrespective of whether the claim is approved or not. Under Section 32(5) of the Act, one side wins and one loses. Because it does not operate as 'no fault', Section 32(5) is adversarial and therefore has the potential to create animosity, resentment, a sense of powerlessness, and a feeling of having been denied 'justice'. Under these circumstances, it is difficult if not impossible for a productive employment relationship to ensue particularly where an injured worker is denied the claim.

3.2.5 Cost of social welfare payments for unsuccessful applicants for compensation

There is potential for an increased demand for social welfare payments because of income-deprived workers whose claims for compensation for psychological injury are unsuccessful. These payments include sickness benefits for injured workers who have retained their employment and Newstart payments for injured workers who have either resigned or lost their employment. These increased demands for social welfare payments will be reflected in the national accounts.

3.2.6 Cost of income insurance payments for unsuccessful applicants for compensation

There is potential for increased demand on income insurance payments for injured workers who have such insurance cover. This increased demand for insurance payments will be reflected in increased premiums for income insurance.

3.2.7 Costs associated with ongoing psychological injury

There is potential for ongoing costs associated with psychological injury exacerbated by the adversarial process of applying for statutory compensation under Section 32(5). These costs are direct (eg Medicare claims, hospital stays, medication, allied health treatment, private health insurance claims) and indirect (eg lost productivity, cf 3.2.8).

3.2.8 Costs of lost productivity

There is potential for substantial loss of productivity because of the adversarial nature of Section 32(5). This lost productivity surfaces in a variety of ways and can occur for a number of reasons; for example:

- Increased loss of productive output by the injured worker for the economy as a whole because of extended absence from employment (In 2011/12, 79% of claims for psychological injury were made by workers in the age range 30-59,¹³ arguably highly productive ages where the economy was benefitting from the cumulative experience of employees at or approaching career peaks);
- Increased loss for the employer of productive output by injured worker arising out of the exacerbation of the psychological injury, or resignation/termination of the worker;
- Allocation of employer resources to replacement of injured worker including resources for recruitment, induction, training, and accumulation of job-related experience;
- Allocation of government-funded resources to retrain injured workers and/or to assist with the re-employment of injured workers.

3.2.9 Increased demand on professional services

There is potential for increased demand on professional services such as legal, medical and other health-related services. This increased demand arises out of, for example:

- Demand on medical and allied health services because of aggravation of psychological injury arising out of adversarial nature of Section 32(5);
- Demand on legal services because of adversarial nature of Section 32(5) and the need for professional legal advice and representation, particularly if the matter goes to the QIRC. This demand is created by the employee, the employer and Q-COMP.

¹³ Q-COMP 11/12 Statistics Report, Table 13

4. Summary

In summary, I submit that Section 32 (5) of the Act is counter-productive for several key reasons:

- It discriminates against workers with psychological injuries and is therefore unfair.
- It is adversarial in its intent and its application.
- It has significant potential to exacerbate psychological injury.
- It creates its own direct and indirect costs.

I further submit the fairest and most productive course of action is to repeal Sections 32(5)(a) and 32(5)(b) of the Act thereby eliminating discrimination against workers with psychological injuries and eliminating the potential for injury exacerbation.

I also submit that repealing Sections 32(5)(a) and (b) of the Act will result in significant cost savings which will offset the additional costs of extending statutory compensation to all workers with *bona fide* psychological injuries.

Thank you for consideration of this supplementary submission.

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