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# Submission to The Finance and Administration Committee

*Workers' Compensation and Rehabilitation and Other  
Legislation Amendment Bill 2015*

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## **Introduction**

The QNU thanks the Finance and Administration Committee (the Committee) for providing this opportunity to comment on the *Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2015* (the bill).

Nurses and midwives are the largest occupational group in Queensland Health and one of the largest across the Queensland government. The QNU - the union for nurses and midwives - is the principal health union in Queensland. The QNU covers all categories of workers that make up the nursing workforce in Queensland including registered nurses, registered midwives, enrolled nurses and assistants in nursing who are employed in the public, private and not-for-profit health sectors including aged care.

Our more than 53,000 financial 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 and midwives in Queensland are members of the QNU.

In our submission we emphasise the critical role the workers' compensation scheme plays in supporting the nursing and midwifery workforce and by extension 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 is paramount in maintaining and advancing the future wellbeing of the community.

## **Purpose of the Bill**

The Bill will achieve the Government's policy objectives by amending the *Workers' Compensation and Rehabilitation Act 2003* (the Act) to:

- remove the current limitation on the entitlement to seek damages that requires a worker to have a degree of permanent impairment as a result of the injury greater than 5% to access common law since the date of the Queensland State election;
- establish the ability to provide additional compensation to particular workers impacted by the operation of the common law threshold, between 15 October 2013 and 31 January 2015;

- introduce provisions for firefighters diagnosed with one of 12 specified diseases that will deem their injury to be work related if they meet the required qualifying period of active firefighting service; and
- remove the entitlement prospective employers have to obtain a copy of a prospective worker's compensation claims history from the Workers' Compensation Regulator; and
- clarify certain procedural aspects of the claims process and reduce regulatory burden through a number of minor miscellaneous amendments (Queensland Parliament, 2015).

We thank the Labor government for honouring its commitment to restoring Queensland's workers' compensation scheme and for introducing legislation for fire fighters who become afflicted with a scheduled respiratory disease so they do not bear the burden of proving they contracted the disease during their duties. We support the transition arrangements for those workers who were left without common law rights by the changes in October, 2013.

The QNU recommends:

- Sections 571C and 571D are omitted from the Act for the reasons stated below.

## **The Nursing Workforce**

Nurses and midwives are the most geographically dispersed health professionals in Queensland and indeed Australia, working independently or collaboratively to provide professional and holistic care in a range of circumstances. They work to promote good health, prevent illness, and provide care for the ill, disabled and dying. Most nurses and midwives work in an area of clinical practice such as medical and surgical, aged care, critical care, perioperative, midwifery, emergency, general practice, community health, mental health, family and child health, rehabilitation and disability, rural and remote health and occupational health and safety.

During the course of their employment, nurses and midwives may experience exposure to a wide variety of physical, chemical, biological, psychosocial or other hazards (Timmins et al., 2008). Within the health and community industry sector, all levels of nursing categories suffer significant numbers of musculoskeletal and traumatic injuries (WorkCover Queensland, 2015a). This is due to a number of factors including exposure to high risk, hazardous tasks (the manual handling of people) and the age of the nursing workforce.

Hazardous manual tasks involve one or more of the following:

- repetitive or sustained force;
- high or sudden force;
- repetitive movement;
- sustained or awkward posture;
- exposure to vibration.

Hazardous manual tasks can contribute to musculoskeletal injuries, which can be permanent and impact on a person's working ability and quality of life, as well as the productivity and economic performance of the company that employs them.

WorkCover Queensland (2015a) describes musculoskeletal disorders (MSDs) as an injury to, or a disease of, the musculoskeletal system, whether occurring suddenly or over time. It does not include an injury caused by crushing, entrapment (such as fractures and dislocations) or cutting resulting from the mechanical operation of plant. MSDs may include conditions such as:

- Sprains and strains of muscles, ligaments and tendons;
- Back injuries, including damage to the muscles, tendons, ligaments, spinal discs, nerves, joints and bones;
- Joint and bone injuries or degeneration, including injuries to the shoulder, elbow, wrist, hip, knee, ankle, hands and feet
- Nerve injuries or compression (e.g. carpal tunnel syndrome)
- Muscular and vascular disorders as a result of hand-arm vibration;
- Soft tissue hernias;
- Chronic pain.

MSDs occur in two ways:

- gradual wear and tear to joints, ligaments, muscles and inter-vertebral discs caused by repeated or continuous use of the same body parts, including static body positions;
- sudden damage caused by strenuous activity, or unexpected movement such as when loads being handled move or change position suddenly.

Injuries can also occur due to a combination of these mechanisms, for example, body tissue that has been weakened by cumulative damage may be vulnerable to sudden injury by lower forces (WorkCover Queensland, 2015a).

The nursing and midwifery workforce is an ageing one. As nurses and midwives grow older, they become prone to these types of injuries as cumulative damage begins to emerge.

Between 2008 and 2012, the average age of all employed nurses and midwives remained at about 44 years, however the proportion aged 50 and over grew from 35.1% to 39.1% (Australian Institute of Health and Welfare, 2013, p. 11).

Australian Bureau of Statistics (2014) data for the period July, 2013 to June, 2014 indicates the highest work-related injury or illness rate by aged group was 50-54 with 52 per 1000 persons who had worked at some time in the last 12 months. WorkCover Queensland's (2015b) data shows that around 63 per cent of claims from Queensland health and community care workers aged between 50 and 59 years are due to musculoskeletal injuries and diseases.

## **Nursing Workloads and Patient Safety**

The workplace health and safety of nurses and midwives is intrinsic to ensuring patient safety. Heavy workloads that affect nurses' and midwives' health and safety also impact on their ability to provide safe, quality care.

National and international studies have irrefutably proven the number, skill mix and practice environment of nurses and midwives directly affect the safety and quality performance of health services. Health services with a higher percentage of Registered Nurses and increased nursing hours per patient will have lower patient mortality, reduced length of stay, improved quality of life and less adverse events such as failure to rescue, pressure injuries and infections. (Aiken et al., 2014; Tubs-Cooley et al., 2013; Lankshear et al., 2005; McHugh et al., 2013). These studies indicate:

- Every one patient added to a nurse's workload is associated with a 7% increase in deaths after common surgery (Aiken et al., 2014);
- Every 10% increase in bachelor-educated nurses is associated with a 7% lower mortality (Aiken et al., 2014);
- Every one patient added to a nurse's workload increased a medically admitted child's odds of readmission within 15-30 days by 11% and a surgically admitted child's likelihood of readmission by 48% (Tubbs-Cooley, et al., 2013).

In Western Australia, increased nursing hours have resulted in 1088 life years gained based on prevention of 'failure to rescue' adverse events. The cost per life year gained was \$8907, which is well below the reasonable cost-effective threshold in Australia of \$30-60,000 per life year gained (Twigg et al., 2013).

Further, a study of Victorian and Queensland public hospitals estimated hospital acquired complications such as pneumonia and urinary tract infections added 17.1% cost to a hospital admission (Jackson, et al., 2011). Improved nurse staffing and skill mix levels will reduce

these types of adverse events and minimise unnecessary costs (Aiken et al., 2014; Lankshear et al., 2005; Twigg et al., 2013).

In honouring its pre-election promise, the Queensland Government (2015) announced in the 2015-16 budget it had committed:

- \$110.7 million over four years, in addition to internal funding, to offer up to 4,000 additional places to new Queensland nurse and midwifery graduates and 16 new nurse educator positions in Queensland Hospital and Health Services;
- \$101.6 million over four years, in addition to internal funding, to employ 400 experienced nurses to help patients navigate the health system;
- \$11.4 million over four years to restore a school aged nurse service in the Logan area and surrounding suburbs and to expand this service to other vulnerable Queensland communities;
- to introduce legislation for minimum nurse/patient ratios in the public sector from 1 July, 2016.

This commitment to nurse/patient ratios along with restoring the workers' compensation scheme and reinstating the rights of injured workers that were withdrawn under the previous government will have a significant positive impact on health services for Queensland.

## **Common Law Thresholds**

Queensland's dual system of statutory and common law has delivered comparatively low premiums, low disputation levels, low claims management costs and return to work performance. The Queensland workers' compensation scheme has a 'short tail' in that the weekly benefits cease when one of four possibilities related to capacity to work, duration of the incapacity and maximum allowable benefits occur. The 'short tail' is offset by allowing injured workers to seek damages at common law. So the scheme has a set of characteristics that give it accessibility and overall balance, reasonable cost levels for employers and fair and appropriate benefits for injured workers, dependants or others. There were no sound reasons beyond satisfying a group of vocal employers for changing such an efficient system.

To its great credit, the LNP dominated Finance and Administration Committee (2013, p. xvii) of the previous parliament recognised that

*imposing thresholds on accessing common law rights would improperly remove rights from one group of citizens that are available to other citizens. Imposing thresholds on WPI would break the nexus between worker's compensation and the ability of injured workers to perform their pre-injury employment. The*

*Committee recommends retention of the existing provisions relating to access common law.*

Contrary to the committee's recommendation, the former government made legislative amendments effective from 15 October, 2013 to introduce a greater than five per cent threshold for seeking damages for an injury. Aside from the disregard shown to the parliamentary process, this decision left many Queensland workers with no recourse to pursue compensation through the common law. We strongly opposed the introduction of common law thresholds even for those claims assessed as 0% whole person impairment.

The QNU regularly assists members with assessments of work related impairment. Since the introduction of thresholds, the real concern to the QNU has been the loss of common law claims for individuals assessed as having 0%-5% whole person impairment. The QNU has assisted nurses and midwives whose employers have terminated their employment after an assessment of 0% work related impairment when the employer became aware of a pre-existing condition aggravated in the workplace. Quite often a pre-existing condition, particularly those associated with the spine, are a result of the ageing process and occur during the manual handling component of a nurse or midwife's duties.

Analysis of the QNU's internal 2012-2013 data (prior to the legislative changes) indicated the vast majority of permanent impairment assessments for nurses' injuries are aggravations of pre-existing conditions with 83% assessed as having a work related impairment of 10% or less. Of the remaining 17% of assessments only 4.5% had a work related impairment greater than 15%. In the 2014 calendar year, the QNU assisted 93 nurses and midwives in all health sectors with dismissals due to ill health or complex return to work matters that involved significant representation.

In our experience, nurses and midwives who do enter into common law claims have often experienced poor treatment in rehabilitation such that they are no longer able to carry out their duties effectively. Even where impairment is assessed at 0%, some members remain unable to continue in their role as the inherent requirements of nursing work include manual handling.

The QNU believes that one factor contributing to common law claims and the quantum of these claims is the return to work outcome. Where employers provide the employee with suitable work, there is less likelihood they will seek a common law claim to secure their financial future.

QComp (2015a; 2015b) industry comparison data for the health care and social assistance division gives an indication of the impact of the legislation on the number of workers' compensation claims and return to work rates.

In the Hospitals sub-division for the years 2012/13 (before changes to the Act) to 2013/14 (after changes to the Act):

- the incident rate per 1,000 employees (time lost claims) decreased from 16.7% to 14.4%;
- the return to work rate at claims finalisation decreased from 97.5% to 96.7%.

In the Residential Care Services sub-division for the years 2012/13 (before changes to the Act) to 2013/14 (after changes to the Act):

- the incident rate per 1,000 employees (time lost claims) decreased from 55.3% to 45.3%;
- the return to work rate at claims finalisation decreased from 97.5% to 96.4%.

This data indicates that while the number of claims has decreased so too have the return to work rates. The nexus between these two data sets does not support the argument that return to work rates would increase if a common law claims threshold was introduced and bears out anecdotal evidence we have received from members.

A breakdown of finalised claims for 2013/2014 in both the Hospitals and Residential Care Services sub-divisions indicates strains/sprains and diseases of musculoskeletal system remain the most common form of injury by far.

Hospitals sub-division:

- Strains/sprains 39.6% of total injuries;
- Diseases of musculoskeletal system 28.9%.

Residential Care Services sub-division:

- Strains/sprains 41.2% of total injuries;
- Diseases of musculoskeletal system 30.5%.

Nationally, among the 208,100 females who experienced work-related injuries or illnesses in the period July, 2013 – June, 2014, 29% were employed in the 'health care and social assistance' industry (ABS, 2014).

## **Disclosure of pre-existing injury or medical condition**

The QNU acknowledges and supports the bill's omission of section 571D, however, the previous changes to the Act introduced by the LNP enabled employers to request a worker to disclose pre-existing injuries or medical conditions. If a worker knowingly provided false

or misleading information and subsequently reinjured the pre-existing condition, rights to claim compensation and damages were extinguished. An employer also had the right to request a prospective employee's workers' compensation claims history statement with the consent of the employee.

Aside from the invasive character of these changes, there were 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 was 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 that employees still had access to discrimination laws and general protections under the *Fair Work Act 2009* 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 shifted 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 was based on the employer's description of the duties.

WorkCover Queensland (2015a) 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.

Our other major concern at the time of the changes was 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 the QNU they did not intend pursuing workers compensation due to the potential impacts on future employment. Unfortunately, the bill does not omit disclosure requirements allowed by s571B and potential loss of benefits under 571C of the Act. In our view, it is essential these provisions are withdrawn so that workers in Queensland can expect a return to fairness and equity.

We provide the following case studies to support these claims.

## **Misuse of Disclosure information**

The QNU assisted a member employed prior to the October, 2013 Workers' Compensation changes 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 that 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 his document include:

- It did not adhere to reassurance from the Regulator and WorkCover that such disclosures were only relevant to prospective employees post October, 2013;
- 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 the tasks with the relevant manager who confirmed that such a physical requirement was not necessary, the document was generic in nature and it had been sourced from the interstate administration.

The QNU uses this scenario to highlight how members are severely disadvantaged by sections 571B and 571C. Furthermore it clearly outlines how employer practices can differ from the legislation.

We contend that any reasonable overview of these sections of the Act would have foreseen their potential abuse.

Compounding the potential for employers to simply overlook those workers who disclosed pre- existing conditions are the potential 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.**

The QNU 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 that the member was unable to undertake "heavy lifting" required in the position.

Our concerns with the process include:

- 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 QNU 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 around disclosure. This is

why we are seeking the withdrawal of all disclosure requirements in the current Act.

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