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Your ref: D20/197983

Dear Ms Donnelly

State Insurance Regulatory Authority investigation into three Corrective Service workers [sic] compensation claims

I am writing on behalf of the Secretary of the Department of Communities and Justice (**Department**) and on behalf of Corrective Services New South Wales (**CSNSW**) to provide a response to the “Report on the SIRA investigation into three Corrective Services workers [sic] compensation claims” (**SIRA report**).

I attach for your consideration a table of CSNSW’s comments in relation to individual paragraphs of the SIRA report. Further to those comments, I am concerned in relation to the perceived lack of procedural fairness involved in producing the SIRA report, and in relation to the conclusions drawn by the State Insurance Regulatory Authority (**SIRA**) regarding CSNSW’s dual roles as employer and self-insurer.

At the outset, I note that the current status of the SIRA report is unclear. I am aware that SIRA was intent on completing the SIRA report in order to provide it to Parliament (see below in relation to Standing Order 52). However, it is unclear whether the SIRA report is currently at the draft stage or has been finalised. CSNSW would appreciate confirmation of this fact from SIRA.

Having reviewed material held and the contents of the SIRA report and recommendations, I make the following comments and observations:

1 Factual background

- 1.1 Ms Sue Wilson was appointed as General Manager of the Metropolitan Remand and Reception Centre (**MRRC**) in early 2015. Around the same time, inmate numbers at the MRRC were increased, and additional staff posts were created to reflect that increase. Ms Wilson identified that the link between security functions at the MRRC could be improved with the creation of an Operational Manager position. This was filled by Senior Assistant Superintendent (**SAS**) [REDACTED]
- 1.2 One result of the new Operational Manager position was that the chain of command from the Immediate Action Team (**IAT**) was affected. Previously, IAT members reported to the Manager of Security, however, following establishment of the new Operational Manager position, the IAT was instead required to report to the Operational Manager. This led to disagreement between IAT members and Ms Wilson, including altercations with SAS [REDACTED] and threats of industrial action, as

set out in Ms Wilson's statements dated 11 November 2015. As a result of these disputes, Ms Wilson came to the view, from a management and organisational perspective, that a cultural change within the IAT was required.

- 1.3 On 26 May 2015, Ms Wilson held a meeting with IAT members during which she advised that IAT members ██████████ and ██████████ were being reallocated to non-IAT posts. The reallocation took place in response to the conduct of these three employees, including documented aggressive behaviour towards SAS ██████████. This conduct included not attending the meeting on 26 May 2015, which was a usual briefing that they were required to attend as part of their role as IAT members. Prior to deciding to reallocate these staff members to non-IAT posts, Ms Wilson had made several unsuccessful attempts to meet with the staff members individually to discuss their conduct. Following the meeting on 26 May 2015, a stop work meeting was held by Public Service Association (PSA) Prison Officers Vocational Branch (POVB) members, who withdrew their labour. CSNSW promptly notified the Industrial Relations Commission (IRC) of the dispute and requested an urgent hearing.
- 1.4 President Walton of the IRC heard the matter on the following day, 27 May 2015. He engaged in private conferences with the PSA. At the hearing, CSNSW advised that the staff in question had not been subject to disciplinary action under the *Government Sector Employment Act 2013 (GSE Act)*; however, they had behaved inappropriately towards a senior officer, and Ms Wilson had taken appropriate action to address that behaviour by reallocating the staff members temporarily to different posts. The change in posts did not affect the rate of pay or shift patterns of the employees. President Walton recommended that the parties meet to discuss the matter and report back to the IRC.
- 1.5 On 28 May 2015, a 48-hour incident notification was submitted on behalf of each employee, advising of a ██████████ sustained on 26 May 2015.
- 1.6 On 29 May 2015, a meeting took place at the MRRC ██████████ and ██████████ were present, supported by representatives from the PSA, including the local delegate, ██████████ and the PSA Industrial Officer, ██████████. Ms Wilson was also at the meeting. At the meeting, following consultation with their union representatives, ██████████ and ██████████ offered to remain out of the IAT if Ms Wilson assigned ██████████ back into the IAT. Ms Wilson took the view that the necessary cultural change to the IAT could not be made if ██████████ remained on the IAT, as he was hostile to SAS ██████████ management decisions.
- 1.7 On 3 June 2015, agreement was reached following further conciliation with President Walton. It was agreed that the three employees would return to IAT duties on 13 July 2015 and would be assigned to non-IAT posts until that date. In the meantime, Ms Wilson would have a discussion with each employee concerning his behavioural issues. A state-wide review of the IAT would also be expedited.
- 1.8 On the same date, QBE advised ██████████ and ██████████ that provisional liability had been reasonably excused, as no medical certificates had been provided, and requested additional information. QBE advised ██████████ that provisional liability had been reasonably excused, as reasonable management action was taken on 26 May 2015.

- 1.9 On 10 June 2015, ██████████ was suspended with pay following his arrest by the NSW Police Force (**Police**) as a result of a Police investigation for an alleged assault of an inmate.
- 1.10 On 7 July 2015, QBE advised that ██████████ claim was declined as reasonable management action was taken in relation to workplace behaviour.
- 1.11 On 9 July 2015, QBE confirmed that ██████████ had withdrawn his worker's compensation claim.
- 1.12 On 21 August 2015, as a result of a Police investigation ██████████ and ██████████ were arrested by Police for an alleged assault of an inmate. On 25 August 2015, they were suspended with pay as a result of the arrest.
- 1.13 On 28 August 2015, WorkCover certificates were provided on behalf of ██████████ and ██████████ diagnosing ██████████ and stating that the date of injury was 26 May 2015.
- 1.14 On 4 September 2015, Brian Davies and Associates was engaged by QBE to undertake a factual investigation of the matters.
- 1.15 On 11 October 2015, the Brian Davies reports in relation to ██████████ and ██████████ were finalised, identifying the arrest by Police (of 21 August 2015) as the cause of the reported injuries.
- 1.16 On 20 November 2015, QBE advised ██████████ that his claim had been declined, as the incident amounted to reasonable management action in relation to discipline, performance management, demotion or transfer, failure to follow lawful directions, and acting aggressively in a meeting with his manager.
- 1.17 On 25 May 2016, ██████████ lodged a dispute with the Workers Compensation Commission.
- 1.18 On 5 June 2017 ██████████ requested a review of his declined claim.
- 1.19 On 22 September 2017, QBE advised that the decision in relation to ██████████ had been reviewed, and that the decision to decline the claim was maintained. It also advised that the finding of the Independent Medical Examiner was that the injury was related to the arrest by Police on 21 August 2015, not the incident on 26 May 2015.
- 1.20 On 7 December 2017, the matter came before the Workers Compensation Commission, and the parties agreed to pay workers compensation benefits to ██████████ as from 1 April 2017. This was despite the fact that no WorkCover and/or medical certificates were received or submitted on behalf of ██████████ between 13 November 2015 and 16 May 2017.
- 1.21 On 11 January 2018, the Workers Compensation Commission ordered a lump sum payment to be made to ██████████
- 1.22 In 16 May 2018, icare (Insurance and Care NSW) directed QBE to accept ██████████ claim with payments commencing on 4 May 2017, as recommended by WorkCover certificates.
- 1.23 On 24 July 2019, ██████████ resigned as part of the settlement of his work injury damages claim.

2 CSNSW's role as employer

- 2.1 In the SIRA report, SIRA is critical of CSNSW for the manner in which SIRA considers it to exercise its dual roles as employer and self-insurer. Contrary to the statement in the SIRA report, however, CSNSW does not, itself, employ staff. Under section 21 of the GSE Act, the Government of New South Wales employs persons in the Public Service, including in roles as correctional officers.
- 2.2 Section 22 of the GSE Act provides that public service employees are “employed in” each of the three kinds of public service agencies that are established under the *GSE Act*. The heads of those agencies, whether a Secretary (in the case of Departments) or other office-holder, exercise the function of employer on behalf of the Government of New South Wales: see ss. 26 and 31 of the GSE Act.
- 2.3 CSNSW is not a public sector agency for the purpose of the GSE Act. Rather, it is an administratively created branch of the Department. Section 3(1) of the *Crimes (Administration of Sentences) Act 1999 (CAS Act)* provides that “Corrective Services NSW means that part of the Department of [Communities and] Justice comprising the group of staff who are principally involved in the administration of this Act”. In order to enable CSNSW to carry out its functions, staff are employed in the Department and are then assigned to a role within CSNSW. CSNSW neither employs those staff, nor is it responsible under the legislation for exercising the function of employer. The function of employer is carried out by the Secretary of the Department, as delegated by section 26 of GSE Act, but the Secretary is actually not the employer – as discussed above, the employer is the Government of New South Wales.
- 2.4 While section 231 of the CAS Act provides for the employment of staff, it contemplates that those staff will be employed under the *GSE Act* rather than directly by CSNSW. The three employees with which the SIRA report is concerned were employed as correctional officers, as contemplated by section 231(c) of the *CAS Act*.
- 2.5 The Commissioner of Corrective Services (**Commissioner**) has responsibilities in relation to staff who are assigned to roles within CSNSW. Under section 235 of the *CAS Act*, the functions of correctional officers are determined by the Commissioner, and correctional officers must exercise their functions “in connection with the administration and management of correctional complexes and correctional centres in such manner as the Commissioner” may direct. While the Commissioner has some statutory functions that are similar to those which would usually be exercised by an employer, neither CSNSW nor the Commissioner is an employer in the sense that the SIRA report appears to contemplate.

3 Role of self-insurer

- 3.1 Section 211B of the *Workers Compensation Act 1987 (WC Act)* provides that government employers are self-insurers for the purpose of the WC Act. Accordingly, the words “government employer” in section 211B of the WC Act should be read consistently with the word “employer” in the GSE Act, with the result that CSNSW is neither a government employer nor, consequently, a self-insurer under the WC Act.
- 3.2 Regardless of whether CSNSW is an employer and/or a self-insurer, it is readily foreseeable that the functions and responsibilities to be carried out by a government entity in those two capacities may, at times, be inconsistent. I note that this would be a similar concern for the majority of New South Wales government entities. In order

to avoid future confusion, clear guidelines would be welcomed from SIRA as to the responsibilities of each of the players in the workers compensation space.

- 3.3 As an entity with responsibilities toward staff who are employed under its umbrella, the Department takes the view that its principal obligation is to ensure that sick or injured staff are able to safely return to work as soon as is practicable. The Department understands that other public service agencies have a similar view of their obligations. QBE (in this particular case) has the role of managing the claim on behalf of icare, and icare has the role of acting as (self) insurer. While CSNSW has a duty to work together with icare and QBE in establishing the facts and providing other assistance to help assess the claim, this is not CSNSW's primary responsibility.
- 3.4 Under section 24 of the *State Insurance and Care Governance Act 2015*, one of SIRA's functions is to "encourage and promote the carrying out of sound prudential practices by insurers" under (relevantly) the workers compensation legislation. I am not aware of any guidelines or other policy document outlining the manner in which SIRA says that government employers ought to balance their competing obligations as employer and insurer.
- 3.5 From the SIRA report, it appears that SIRA does not share CSNSW's view as to the responsibilities of CSNSW in these circumstances. In view of the above, I respectfully submit that, if SIRA wishes to be critical of CSNSW for the manner in which it balances the competing roles of 'employer' and 'self-insurer' (as above, neither of which, at law, it is), it has an obligation to first provide some guidance as to how the conflicting/competing roles ought to have been carried out.

4 **Standing Order 52**

- 4.1 As to the timing of the CSNSW response, I note that pressure was exerted on CSNSW to produce its documentation, as SIRA claimed that it required it for the purposes of compliance with a Standing Order 52 call for papers from the Legislative Council. SIRA's understanding in this regard was, respectfully, incorrect. The requirement for production of documentation under a Standing Order 52 is accepted to be only that documentation in existence at the time of the motion being passed. I note that CSNSW claimed public interest immunity in respect of three (3) documents only, not the 800 documents suggested in the SIRA report (see 1.1.62 of the SIRA report). Further, I note that all requested information was provided by the Crown Solicitor's Office on behalf of CSNSW by 16 October 2020. However, the SIRA report was actually produced to Parliament on 14 October 2020, which was before receipt of that information. On that basis, we would like to request that the SIRA report be reviewed, pending confirmation of its status as discussed earlier.

5 **Procedural fairness**

- 5.1 It is my understanding that, in creating the SIRA report, SIRA spoke to the three employees concerned. No interviews, from my enquiries made, appear to have been held by SIRA with any individual currently employed at CSNSW in relation to the matters dealt with in the SIRA report, and, as such, the statements made in the SIRA report are of concern.
- 5.2 While the SIRA report may not have any direct legal consequence in the sense contemplated by administrative law, it is, nevertheless, a report created under statutory authority (it cites section 22 of the *Workplace Injury Management and Workers Compensation Act 1998*) and may have significant effects for CSNSW and

the Department. The report uses language that is critical of the conduct of CSNSW and, draws negative conclusions as to the manner in which CSNSW has carried out its functions and responsibilities, as above, in part seemingly based on an erroneous understanding to what those functions and responsibilities are.

- 5.3 On behalf of CSNSW and the Department, I object in the strongest possible terms to the criticisms that are levelled at CSNSW, in circumstances where no opportunity was given to it as a body, or to individual staff members, to clarify, add to, or deny the facts and allegations relied upon by SIRA in drafting the SIRA report. Particular concern is held in respect of that part of the SIRA report which implies that there was a misrepresentation to the IRC – a matter which is clearly untrue and which could have been explained had CSNSW been consulted at any stage in the SIRA report's creation (in this regard, see the attached table of comments).

6 Closing comments

- 6.1 As is evident from the foregoing, the SIRA report raises a number of issues that are of concern. Setting aside objections to the manner in which the SIRA report was created, and concerns with some of the contents of the SIRA report, it is clear that there is ongoing confusion in relation to the various roles that government entities are required to play under the workers compensation legislation. The Department and CSNSW would welcome assistance from SIRA and icare in developing policies and procedures which will avoid similar confusion moving forward.
- 6.2 In recognising the responsibilities it owes to staff employed under the *CAS Act*, CSNSW is anxious to ensure that it acts in a manner that is consistent with providing a safe and effective workplace. I, and personnel in CSNSW and the Department, look forward to working further with SIRA, icare, SafeWork NSW and other relevant bodies to continue evolving CSNSW's practices in that regard.

As a final aside, I note that the SIRA report and Executive Summary do not use the correct title for this Department. If possible, it would be appreciated if this could be corrected.

I would be happy to discuss any and all of the above with SIRA at a convenient time, in order to resolve the issues that have arisen. Please do not hesitate to contact me by email at
or by telephone on

Yours sincerely

Brigitte Fairbank

Executive Director, People

10 December 2020