

INQUIRY INTO NSW WORKERS COMPENSATION SCHEME

Organisation: NSW Nurses' Association

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**Submission
of the
NSW Nurses' Association**

to the

**Joint Select Committee
on the
NSW Workers Compensation Scheme**

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Summary

- The Association is opposed to any attempt by the NSW Government to reduce or limit existing workers compensation benefits in this state. In our view, the main problems with the current workers compensation scheme are the fault of employers, not workers.
- Over many years the Association has encountered a persistent reluctance from both NSW Health and private sector employers to provide injured workers with suitable work.
- In our experience, many employers are either unaware of, or wilfully ignore their obligations to provide suitable work to their injured workers.
- By refusing to provide their injured workers with suitable duties, employers are able to shift the cost burden of injured workers entirely to their insurers, who are then liable to pay weekly benefits which would either not otherwise be required or not be of the same quantum. The injured workers themselves then face an uncertain future living on a paltry weekly workers compensation benefit whilst they attempt to obtain work in a labour market where their value is seen as diminished.
- Insurers are unable to exert sufficient influence on employers to comply with their obligations to injured workers, other than by the use of premium adjustment.

- In the Association's view there is a double standard within our workers compensation system. Whilst injured workers are constantly tested and examined by medical practitioners in order to justify their entitlement to workers compensation benefits, there are no such checks and balances in place for employers. At no stage in the workers compensation process is the employer's capacity to provide suitable work to their injured employee tested or examined.
- The Association has detailed 10 case studies illustrating the unwillingness of employers to provide suitable work to injured workers. Due to the extremely precarious employment prospects of injured workers the Association has changed the name of the employee and employer in all but one case.
- The Association has made 7 recommendations designed to encourage employers to provide suitable work to injured workers. Such measures would significantly address the alleged deficit in the workers compensation scheme.
- The Association is disappointed that the only real solution offered by the NSW Government for the alleged deficit within the workers compensation scheme is to reduce benefits for injured workers.
- The underlying assumption within the Issues Paper is that injured workers are either lazy or are fraudulently claiming higher workers compensation benefits either through inflated lump sum or medical claims or by willingly

working less than they are able to. The Association utterly rejects this line of reasoning.

- The Association is concerned that the Issues Paper does not propose a single reform which attempts to impose some additional responsibility on insurers or employers. Nor does the Issues Paper propose a single reform designed to seriously improve occupational health and safety in New South Wales.
- The Association urges the Committee to release adequate data so that premiums across different jurisdictions can be comprehensively examined. Further, we urge the Committee to consider the possibility of increasing premiums (particularly for employers who fail to provide suitable work or who have poor safety records) even on a short term basis to address any alleged deficit in the workers compensation scheme.
- The Issues Paper does not consider the social affect of limiting or reducing workers compensation benefits.
- The Association is opposed to each of the proposed changes in the Issues Paper which would result in a reduction in workers compensation benefits. Generally, the changes would;
 - hurt the most vulnerable of workers

- effectively shift the cost of workplace injuries from New South Wales employers and insurers to the Commonwealth taxpayer
 - disproportionately and unfairly disadvantage workers who work in more dangerous environments such as nurses, midwives and nursing assistants
 - make the New South Wales workers compensation scheme the meanest in the country
 - force many workers to return to work too early and risk re-injury, thus placing further strain on the workers compensation system
- The Association is opposed to the Work Capacity Testing of workers, but would support the work capacity testing of employers.
- The Association is opposed to extending the application of the *Civil Liability Act 2002* (NSW) to work injury damages for the following reasons;
 - this would mean workers who work in dangerous environments (such as many nurses, midwives and nursing assistants) would be less likely to successfully claim damages for serious workplace injuries
 - this would mean that nurses, midwives and nursing assistants in the public health system would have less of a right to claim damages for

workplace injuries simply by virtue of the fact that their employer is a public authority

- The Association supports the use of targeted commutations provided that the level of compensation is fair. Indeed, we urge the Committee to adopt this recommendation along with the Association's recommendations designed to force employers to provide suitable work, as the only changes to the current system. Together, these changes alone would save the scheme a significant amount.
- The Association believes that any attempts to deprive injured workers of benefits should not be examined in isolation. Rather, such reforms should be considered in the context of other attacks by this Government on the rights of working people.

Introduction

The NSW Nurses' Association (the Association) is a union which represents nurses, midwives and nursing assistants in both the public and private sectors across New South Wales. Currently we have approximately 55,000 members. The Association represents both the industrial and professional interests of its members. We often provide advice and representation to members who have suffered an injury in the course of their employment.

The Association does not agree with the assertion in the *NSW Workers Compensation Scheme Issues Paper* (the Issues Paper) that the "*Workers Compensation Scheme is failing the people of NSW, and urgent action is required*"¹. Whilst there are some problems in the workers compensation system, our experience is that it is not failing and we do not believe that "*urgent action*" is required.

In our view, the main problems with the current workers compensation scheme are the fault of employers, not workers. Accordingly, the Association is opposed to any attempt by the NSW Government to reduce or limit existing workers compensation benefits in this state.

¹ *NSW Workers Compensation Scheme Issues Paper*, p.2.

The Failure of Employers to Facilitate a Return to Work

The main problems with the current workers compensation scheme are the fault of employers, not workers. Whilst there are many employers who show a great deal of compassion toward their injured employees, there are also many who view such workers as liabilities which need to be removed from their business.

Over many years the Association has encountered a persistent reluctance from both NSW Health and private sector employers to provide injured workers with suitable work. Such attitudes result in injured workers being either dismissed, pressured to risk re-injury by returning to work too early or pressured to seek work elsewhere. Generally, this tends to occur either;

- a. 6 months after an injury,
- b. after a worker has been certified as permanently unfit for pre-injury duties, or
- c. after a worker has received compensation for a few years.

It is not uncommon for the Association to be contacted by a member at these times, advising that they believe their employer is taking steps to dismiss them. Generally employers begin to pressure their employees at these times in a range of ways. For example;

- Employers often advise their injured workers that unless they become fit for pre-injury duties, they may be terminated.
- Employers often withdraw any suitable work which is being provided and claim that no further work exists.

- Employers often advise workers that unless they become fit for pre-injury duties, they will have to seek work elsewhere.

The reason why such action tends to occur 6 months after an injury is because there is a common misconception among employers that they are able to terminate injured workers after that time. This misconception emanates from section 248 of the *Workers Compensation Act 1987* (NSW) which states;

248 Dismissal within 6 months of injury an offence

- (1) An employer of an injured worker who dismisses the worker is guilty of an offence if:
 - (a) the worker is dismissed because the worker is not fit for employment as a result of the injury, and
 - (b) the worker is dismissed during the relevant period after the worker first became unfit for employment.

Maximum penalty: 100 penalty units.

- (2) For the purposes of subsection (1), the *relevant period* is:
 - (a) the period of 6 months after the worker first became unfit for employment, except as provided by paragraphs (b), (c) and (d), or
 - (b) if the worker is entitled under a State industrial instrument to accident pay as a result of the injury for a period exceeding that period of 6 months—the period during which the worker is entitled to accident pay, or
 - (c) if the worker was entitled under a State industrial instrument to accident pay as a result of the injury for a period exceeding that period of 6 months but that instrument ceased to have effect as such in relation to the worker because of the commencement of Schedule 8 to the *Workplace Relations Act 1996* of the Commonwealth—the period during which the worker would have been entitled to accident pay under the instrument if it had not ceased to have effect, or
 - (d) if the worker (other than a worker referred to in paragraph (c)) is entitled under a Commonwealth industrial instrument (or was entitled under a Commonwealth industrial instrument as in force immediately before the commencement of Schedule 7 to the *Workplace Relations Act 1996* of the Commonwealth) to accident pay as a result of the injury for a period exceeding that period of 6 months—the period during which the worker is (or the period during which the worker was) entitled to accident pay, whichever is the greater period.

Accident pay is an entitlement of the worker to payment by the employer, while the worker is unfit for employment, that is described as accident pay in the relevant industrial instrument.

Note. Both Schedules 7 and 8 to the *Workplace Relations Act 1996* of the Commonwealth (which were inserted by the *Workplace Relations Amendment (Work Choices) Act 2005* of the Commonwealth) commenced on 27 March 2006.

- (3) It is a defence to a prosecution for an offence under this section if the employer satisfies the court that:
 - (a) at the time of dismissal, the worker would not undergo a medical examination reasonably required to determine fitness for employment, or
 - (b) at the time of dismissal, the employer believed on reasonable grounds that the worker was not an injured worker within the meaning of this Part.
- (4) The prosecution may establish that an injured worker was dismissed because the worker was not fit for employment as a result of the injury if the prosecution establishes that the injury was a substantial and operative cause of the dismissal.
- (5) This section applies even if the worker became unfit for employment before the commencement of this section.

Whilst it is not generally an offence to dismiss an injured worker more than 6 months after becoming unfit for employment, this does not mean that employers have no obligation to provide suitable work after that time. Furthermore, there is widespread ignorance of the fact that the 6 month period only relates to periods when a worker is totally unfit (see *Banning v Great Lakes Council* [2002] NSWIRComm 47).

Similarly, employers also frequently pressure injured workers after they have been certified as permanently unfit for pre-injury duties despite being fit for other work. This highlights another misconception among employers; that their obligation to provide work to an injured worker ceases when that worker is found to be permanently unfit for pre-injury duties. Section 49 of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) however imposes a positive obligation on employers to provide suitable work to injured workers. This section states;

49 Employer must provide suitable work

- (1) If a worker who has been totally or partially incapacitated for work as a result of an injury is able to return to work (whether on a full-time or part-time basis and whether or not to his or her previous employment), the employer liable to pay compensation to the worker under this Act in respect of the injury must at the request of the worker provide suitable employment for the worker.
- (2) The employment that the employer must provide is employment that is both suitable employment (as defined in section 43A of the 1987 Act) and (subject to that qualification) so far as reasonably practicable the same as, or equivalent to, the employment in which the worker was at the time of the injury.
- (3) This section does not apply if:
 - (a) it is not reasonably practicable to provide employment in accordance with this section, or
 - (b) the worker voluntarily left the employment of that employer after the injury happened (whether before or after the commencement of the incapacity for work), or
 - (c) the employer terminated the worker's employment after the injury happened, other than for the reason that the worker was not fit for employment as a result of the injury.

In our experience, many employers are either unaware of this provision, or wilfully ignore it.

The result is that injured workers either have their employment terminated or are simply not provided with work. This then forces them to rely upon weekly workers compensation payments whilst they search for work elsewhere. It is notoriously difficult however, for an injured worker to find work with a new employer. Many employers require potential employees to declare whether they have ever suffered a workers compensation injury. It is also not uncommon for prospective employers to be informed by a previous employer that a job applicant has suffered an injury. Employers are generally reluctant to employ injured workers for the following reasons;

- Injured workers are seen as a workers compensation risk ie employers fear that a re-injury may occur at their workplace.

- Injured workers are seen as an occupational health and safety risk
- An injured worker's medical restrictions (both in terms of the number of hours which can be worked and the kind of work which can be performed) will not generally match the nature of any available positions. It is understandable that employers seeking to fill a vacancy will generally advertise for and appoint the most suitable candidate. For example, an employer seeking an employee to work 30 hours per week, is unlikely to engage an injured worker who is unable to work more than 26 hours per week. Equally, an employer is unlikely to consider engaging an injured worker who would be able to fulfil an advertised role only if they were provided with additional support and training.
- Injured workers are not seen, and may not be, as productive or valued as employees who have not suffered an injury.

In short, by refusing to provide their injured workers with suitable duties, employers are able to shift the cost burden of injured workers entirely to their insurers, who are then liable to pay weekly benefits which would either not otherwise be required or not be of the same quantum. The injured workers themselves then face an uncertain future living on a paltry weekly workers compensation benefit whilst they attempt to obtain work in a labour market where their value is seen as diminished.

In the Association's view, insurers are in the ideal position to prevent this cost shifting by employers. However, it is the Association's experience that insurers are unable to exert sufficient influence on employers to comply with their obligations to injured workers, other than by the use of premium adjustment. Our understanding is that insurers do not conduct a rigorous analysis of whether their clients are able

to provide suitable work to injured workers. Insurers generally are left to accept at face value the employer's indication that no such work is available. Consequently, the insurer then sends the injured worker a letter identifying their obligation under section 38 of the *Workers Compensation Act 1987* (NSW) to seek suitable employment ie with another employer. This section states;

38 Partially incapacitated workers not suitably employed—special initial payments while seeking employment

(1) Entitlement

If:

- (a) a worker is partially incapacitated for work as a result of an injury, and
- (b) the worker is not suitably employed during any period of that partial incapacity for work,
the worker is to be compensated in accordance with this section during each such period as if the worker's incapacity for work were total.

(2) Maximum period of entitlement

The maximum total period for which the worker may be so compensated is 52 weeks.

(3) Rate of compensation

When a worker is so compensated, the compensation is payable at the relevant rate prescribed by this Act for the period of incapacity concerned. However, after the first 26 weeks of incapacity, the rate is the greater of the following rates:

- (a) 80% of the worker's current weekly wage rate (that is, 80% of the rate prescribed by this Act for the first 26 weeks of incapacity),
- (b) the statutory indexed rate (that is, the rate prescribed by this Act for a period of incapacity after the first 26 weeks).

(4) Worker to seek suitable employment

Compensation is not payable to a worker in accordance with this section during any period unless the worker is seeking suitable employment during that period (as determined in accordance with section 38A).

Whilst subsection (1) indicates that this section applies to a worker who is not suitably employed, section 43A defines suitable employment to be when a worker is employed "*in work*". In other words, by ignoring their obligation to provide injured workers with work, employers are able to trigger their insurer to invoke section 38 above and impose an obligation on the worker to look for work elsewhere. Once

again, this is a mechanism by which employers are able to offload injured workers and shift the cost burden associated to insurers and the wider workers compensation scheme.

An added consequence of this is that highly skilled nursing and midwifery workers potentially then have to leave the health industry in order to find work. This clearly exacerbates the nursing shortage in this state and creates a 'brain drain' by the loss of often experienced and skilled workers from the health sector. In our experience, the industry is in constant need of senior nurses to provide support and mentorship to junior staff.

In the Association's view there is a double standard within our workers compensation system. Whilst injured workers are constantly tested and examined by medical practitioners in order to justify their entitlement to workers compensation benefits, there are no such checks and balances in place for employers. At no stage in the workers compensation process is the employer's capacity to provide suitable work to their injured employee tested or examined. In our view, the responsibility for rehabilitating and caring for injured workers is a joint responsibility; whilst the worker has a responsibility to seek work and comply with their return to work plan, so too should the employer comply with their responsibility to provide work to that worker if possible prior to that worker being required to job seek. As well, we believe the Government has a responsibility to intervene in the market to ensure injured workers are properly supported. An economist may view injured workers as a form of market failure. Currently, the extent to which injured workers are provided with suitable work is largely left to the market and this inevitably results in such workers being disadvantaged.

Unfortunately, the Association is frequently forced to invoke dispute resolution procedures with employers who move to offload injured workers. Such disputes are not easily resolved because it is often difficult to prove that an employer has suitable work available.

It is particularly disappointing that such disputes are often with NSW Health, which is meant to be a model employer. The Association finds it remarkable that in a health system which needs nurses, Local Health Districts are frequently unwilling to provide an injured nurse with a few days of partial duties per week. Given that the relevant Local Health District is often the largest employer in the area and NSW Health is the largest employer in the state, it is astonishing that they continue to claim that suitable work cannot be accommodated.

It is the Association's experience that many Local Health Districts resort to any and every excuse to avoid having to redeploy injured workers. This flies in the face of the clear intent of NSW Health policies to provide such workers with priority appointment (see NSW Health Policy Directive PD 2011_032 *Recruitment and Selection of Staff of the NSW Health Service*). Frequently the Association and a Local Health District will agree to attempt to resolve such disputes by referring a nurse for to a functional assessment by an agreed practitioner. Unfortunately, our experience is that even when such an assessment concludes that a nurse is capable of performing the role in question, the Local Health District will find additional reasons to refuse to deploy the worker.

Below are a number of case studies which are indicative of the general unwillingness of employers to accommodate injured workers. The identities of the parties involved in these matters have generally been changed to protect against the injured workers being victimised as a result of this submission.

Case Studies

Case Study 1 – Emily Orchard's Experience

Position: Registered Nurse

Employer:

Place of work:

Emily Orchard is a Registered Nurse employed by the '

In April 2007, Ms Orchard was attempting to resuscitate a patient who had gone into cardiac arrest. During this incident she suffered an injury to her back.

Ms Orchard is aged in her twenties. Since the injury she has had four operations and has required time off work to recover from each. Generally however, between April 2007 and April 2011 the ' provided Ms Orchard with suitable work in various areas.

In April 2011, Ms Orchard's treating doctor indicated that in the long term she should consider a career outside of nursing. After this view was expressed, the

immediately withdrew suitable duties. Consequently, since April 2011 Ms Orchard has been forced to rely on weekly workers compensation payments.

Ms Orchard's medical restrictions enable her to work 8 hours per day 2 days per week. She has a lifting limit of 10kg with limited bending as tolerated.

Later in 2011, Ms Orchard identified a position at _____ which she is able to perform. This is a Special Care Nursery position working 16 hours per week. In November 2011, Ms Orchard applied for this position and was unsuccessful. She was provided with no reason for this despite numerous enquires.

In January 2012, the _____ advertised for more full time and part time positions in the Special Care Nursery. Ms Orchard applied again. At around this time Ms Orchard's treating doctor, Dr Fiona Long, examined the Jobs Demand Check List attached to the relevant position descriptions and concluded that Ms Orchard is capable of working in the Special Care Nursery positions. A medical certificate to this effect was then provided to the _____ as part of the application process. Ms Orchard was still not offered a Special Care Nursery role.

In a letter dated 6 March 2012, the NSW Nurses' Association (the Association) wrote to _____ regarding their obligations under Policy Directive 2011_032 *Recruitment and Selection of Staff of NSW Health Service*. That policy requires that prior to the advertisement of a position _____ must consider whether an injured worker could be placed into the position and give priority accordingly. The _____ still however, refused to appoint Ms Orchard to the Special Care Nursery.

On Friday 9 March 2012, the Association met with _____ regarding this matter. During this meeting _____ indicated that the reasons for refusing Ms Orchard's return to work in the Special Care Nursery were as follows:

- _____ had withdrawn suitable work and would not overturn this decision as a principle
- _____ claimed that Ms Orchard was inappropriate in the Special Care Nursery because of 'skill mix issues'

Thereafter, the Association requested that the skill mix material be provided, however this was refused.

The Association subsequently commenced dispute proceedings whereupon the parties agreed to have Ms Orchard's suitability for the Special Care Nursery position assessed by an independent functional assessor jointly paid for by the parties. The specific functional assessor would be a person agreed upon by the parties.

After assessing Ms Orchard, the independent functional assessor concluded that she is able to perform the Special Care Nursery role. Remarkably however,

_____ continued to refuse to place Ms Orchard in the Special Care Nursery, despite previously agreeing to the functional assessment. _____ now claims there are other impediments to Ms Orchard's placement, namely her skill levels.

The Association rejects these claims and believes _____ will rely on any and every excuse to avoid redeploying this injured worker.

This dispute is listed for arbitration in July 2012.

By refusing to provide Ms Orchard with suitable work, / has forced her to rely upon weekly workers compensation benefits at the expense of the insurer and the wider workers compensation scheme.

Case Study 2 – Monica's Experience

Position: Assistant in Nursing

Employer: CharityCare

Monica is an Assistant in Nursing employed by CharityCare. In August 2008, Monica suffered an injured to her right wrist after it was tightly squeezed by a resident. This resulted in Monica relying more on her left arm. Consequently she suffered an additional injury to her left rotator cuff in October 2008.

Between 2008 and 24 May 2011 she performed suitable work which mainly involved administrative tasks such as scanning large numbers of documents for aged care accreditation purposes.

On 24 May 2011, Monica complained to CharityCare that the door to the room with the scanner was too heavy. CharityCare then directed Monica to perform Recreational Activities Officer duties from this date instead.

On 8 June 2011, CharityCare sent Monica a letter claiming that she had requested a reduction in her hours of work and that there had been "*difficulties*" in finding an agreed date for her to meet the rehabilitation provider. This letter also indicated that as a result suitable work would be withdrawn until July 2011.

Later that day Monica was told by her manager to say farewell to her colleagues. She was also later told that her locker had been opened and the contents would be mailed to her. On 9 June 2011, the insurer, Allianz Australia, sent Monica a letter advising her of her obligation to "*take reasonable steps to obtain suitable employment from another employer*" pursuant to section 38 of the *Workers Compensation Act 1987* (NSW). Monica was afraid that she was being terminated.

At the same time, CharityCare was advertising for two Recreational Activities Officer positions at the facility (one full time and one part time). Monica applied for these positions.

On 16 June 2011, the NSW Nurses' Association (the Association) wrote to the employer;

- refuting their suggestion that Monica had requested a reduction in her hours (rather, she had merely enquired as to how the time spent in hydrotherapy would interact with her suitable duties),
- refuting their suggestion that there had been difficulties in arranging meeting times (rather, on 6 June 2011 the rehabilitation provider had

asked whether Monica could meet the following day, but she advised that she had a pre-existing dental appointment),

- pointing out CharityCare's obligation to provide work pursuant to workers compensation legislation, and
- raising our concern that it appears that CharityCare was planning to terminate her.

On 17 June 2011, Allianz Australia sent Monica a letter enclosing a new Injury Management Plan which detailed the obligations of Monica, her Nominating Treating Doctor, the Rehabilitation Provider and the Case Manager. The Plan did not however, impose any obligations on the employer. The Association contacted the insurer to query this and Allianz admitted that the Plan should have detailed the employer's obligations. We understand that a revised plan was later issued.

On 30 June 2011, a meeting was held between CharityCare, Monica and a representative of the Association. The Association representative made it clear that;

- CharityCare has an obligation to provide suitable work,
- Monica is able to continue with the administrative work if the scanner is simply moved into another room, and
- Monica is able to continue to perform Recreational Activities Officer duties and CharityCare clearly has this work available as it has advertised for two positions.

During this meeting CharityCare agreed to investigate whether Monica is able to perform the Recreational Activities Officer roles. It was also agreed that she would be assessed by an occupational therapist. That occupational therapist later concluded that if Monica can obtain clarification from her doctor as to the extent of some of her medical restrictions, she will probably be able to perform a Recreational Activities Officer role.

After further negotiations, CharityCare advised the Association that it is aware of some administrative work at other facilities which Monica may be able to perform. Monica clarified her medical restrictions with her doctor and provided this information to CharityCare.

On 7 August 2011, CharityCare offered Monica a permanent position performing administrative work 4 days per week. Monica subsequently accepted this offer and, as far as we are aware, continues to work in that role.

In our view, had it not been for the intervention of the Association, Monica's employment would have been terminated.

By refusing initially to provide Monica with suitable work, CharityCare forced her to rely upon weekly workers compensation benefits at the expense of the insurer and the wider workers compensation scheme. Had it not been for the intervention of the Association and the willingness of Monica to contest the matter, her reliance on weekly payments would have continued until she obtained alternative employment.

Case Study 3 – Katie's Experience

Position: Assistant in Nursing

Employer: NotForProfit Care

Katie was a part time Assistant in Nursing employed by NotForProfit Care 32 hours per week. She suffered a back injury on 1 April 2006 when attempting to reposition an elderly resident. She was off work for around 3 weeks before returning to pre-injury duties on 20 April 2006. On 4 July 2006 she suffered a re-injury and was then totally unfit until 4 September 2006.

Katie returned to work on suitable duties on 5 September 2006. Between 5 September 2006 and 6 November 2007 she gradually improved and steadily increased her hours and scope of duties. By 10 September 2007, Katie was working her contracted hours (32 per week) with medical restrictions requiring her to avoid heavy lifting, repeated bending and resistive residents.

On 7 November 2007, Katie attended a functional assessment at the direction of NotForProfit Care. During this assessment she suffered a re-injury. As a result, her hours of work had to be reduced to 20 per week. At around this time NotForProfit Care began directing Katie to perform work which she considered demeaning, such as the partial washing of windows to waist height. Generally, NotForProfit Care began to only direct Katie to perform nursing related duties when there were no other staff members to duty to do so.

In January 2008, Katie was directed to work in the hostel of the facility with residents who only required low care. From 4 February 2008, she was able to increase her hours to 32 per week, although she continued to have medical restrictions on the type of work she could perform.

Hence, from this time no workers compensation weekly benefit was payable because Katie was working her contracted hours.

On 22 May 2008, Katie approached her employer to explore ways to replace the demeaning work she was being required to perform with more nursing related duties. As a result, on 8 June 2008 the rehabilitation provider created a new return to work plan which involved both manual and non-manual work.

On 8 July 2008, Katie attended a meeting with NotForProfit Care whereupon she was told she was suspended from all work until she could return to pre-injury duties. This is entirely inconsistent with the obligation upon employers within workers compensation legislation to provide suitable work.

Subsequently Katie obtained a medical clearance from her doctor to return to pre-injury duties in the hostel between 4 August 2008 and 5 September 2008.

NotForProfit Care did not however, provide her with any work within this time.

Rather, on 20 August 2008, NotForProfit Care met with Katie and informed her;

"Katie your employment with NotForProfit Care is terminated because you cannot perform your pre-injury duties at the nursing home. We are unable to offer you

duties at the hostel as they are not your pre-injury duties and you are contracted to roster at the nursing home."

....

"NotForProfit Care does not employ people on modified duties and will not set a precedent. It is simply not possible."

...

"You have to be able to perform your pre-injury duties at the nursing home and if that is not possible, we do not have a position available for you."

The NSW Nurses' Association (the Association) thereafter commenced litigation against NotForProfit Care. After a period of negotiation, NotForProfit Care agreed to reinstate Katie and, as far as we are aware, she continues to work 32 hours per week with this employer.

By refusing to provide Katie with suitable work and subsequently terminating her, NotForProfit Care forced her to rely upon weekly workers compensation benefits at the expense of the insurer and the wider workers compensation scheme. Had it not been for the intervention of the Association and the willingness of Katie to contest the matter, her reliance on weekly payments would have continued until she obtained alternative employment.

Case Study 4 – Ingrid's Experience

Position: Endorsed Enrolled Nurse

Employer: XYZ Area Health Service

On 10 June 2007, Ingrid suffered an injury to her right shoulder whilst showering a patient.

In the lead up to September 2009, Ingrid was performing suitable duties. On 22 September 2009, Ingrid received a letter from the XYZ Area Health Service (XYZAHS) stating;

"Whilst suitable duties and alternative employment options have been considered by the Area Health Service, it has been difficult to identify a permanent funded position that will accommodate your work restrictions..."

In light of this information it is now proposed to terminate your employment based on medical grounds. The proposed termination of your employment is based on your continuing unfitness for pre-injury duties and the unavailability of a suitably funded position within the Health Service."

At this time Ingrid was fit for light to moderate duties, 8 hours per day, 9 days per fortnight, with limited use of her right arm. Her treating doctor certified her fit for a large range of work in wards, day surgery and accident and emergency. She was also certified fit for a range of other duties.

On 29 September 2009, the NSW Nurses' Association (the Association) wrote to XYZAHS pointing out that in July 2009 Ingrid had applied for the position of Clinical Support Officer. However, XYZAHS had failed to comply with clause 3.2 of Policy Directive 2011_032 *Recruitment and Selection of Staff of NSW Health Service* which requires injured workers to be given priority for available positions. Instead, XYZAHS advertised the position and appointed a candidate based on competitive recruitment.

On 9 October 2009, the Association commenced disputes proceedings regarding this matter. A number of conciliations and conferences were then held.

Ingrid continued to perform suitable work at this time in accordance with her medical restrictions. On 19 November 2009, Ingrid's return to work plan was altered by the XYZAHS. XYZAHS deleted a number of duties from the return to work plan which Ingrid was fit for, had been performing and which were required to be performed by the XYZAHS. These duties involved the allocation of a patient load, the completion of documentation and the communication of patient care to staff in charge. On 19 November 2009, the XYZAHS emailed Ingrid indicating that this alteration occurred because they did not agree that she should be undertaking a patient load, despite the fact that her doctor had certified her fit for such work.

In November 2009, Ingrid applied for another vacant position within the XYZAHS; that of Patient Liaison Officer. The XYZAHS had again failed to afford her priority for this position in accordance with NSW Health policy. Ingrid was later given 4 hours notice of an interview for this position, and was later told she was unsuccessful because it would take 6 weeks to train her and the position was only short term. This position was later filled on 16 December 2009 and the successful candidate was still employed in the position as at 29 February 2010.

After further conciliations and conferences, the Chief Executive of XYZAHS sent Ingrid a letter dated 15 December 2009 terminating her employment. At the time of termination Ingrid's doctor had certified her fit for a long list of duties she had been performing encompassing ward work, day surgery duties, accident and emergency duties and other duties.

The Association found it extraordinary that in a health service which employed 5222 staff in a range of clinical and non-clinical roles, no work could be found for Ingrid.

Accordingly, the Association commenced legal action her behalf. After a period of negotiation, the XYZAHS agreed to reinstate Ingrid to a part time clerical position (0.6 full time equivalent).

By refusing to provide Ingrid with suitable work and subsequently terminating her, XYZAHS forced her to rely upon weekly workers compensation benefits at the expense of the insurer and the wider workers compensation scheme. Had it not been for the intervention of the Association and the willingness of Ingrid to contest the matter and her willingness to travel to a new workplace, Ingrid's reliance on weekly payments would have continued until she obtained alternative employment.

Case Study 5 – Noni's Experience

Position: Assistant in Nursing

Employer: ForProfit Group

Noni was an Assistant in Nursing employed by ForProfit Group. Prior to her injury she had worked for ForProfit Group for 10 years.

Noni suffered an injury to her neck, shoulder and arm as a result of a car accident on her way to work on 2 August 2009. After being totally unfit for a period, she returned to work on suitable duties 3 days per week performing a combination of

Recreational Activity Officer duties, administrative duties and limited nursing duties such as feeding residents.

On 10 June 2010, Noni received a letter from ForProfit Group directing her to attend a meeting and indicating that the termination of her employment was a possibility as it had been more than 6 months since her injury. At a meeting the following day, ForProfit Group again indicated that the termination of her employment was possible given the elapse of 6 months since her injury. Noni requested that ForProfit Group 'hold' her position, but they indicated this was not possible.

In the lead up to this time, Noni had been working 8am to 3pm, 5 days per week. Her only restriction now related to a Carpel Tunnel problem in her left hand. She still suffered some residual pain in her neck and shoulder but this had been improving and she had recently begun driving again. Noni was optimistic at this time that she would make a full recovery in her neck and shoulder.

On 15 June 2010, ForProfit Group sent Noni a letter terminating her employment. That letter stated;

"1. You have been unable to perform your full, pre-injury duties since 2 August 2009, a period of time over 26 weeks.

2. At our meeting, we advised you that we are unable to offer you ongoing suitable alternative duties in the facility and we are unable to accommodate any suitable retraining for an alternative position.

As a consequence of the above, we have made the decision to terminate your employment as from the date of this letter."

Thereafter, the NSW Nurses' Association (the Association) foreshadowed legal action against ForProfit Group on behalf of Noni on the basis that they had clearly failed to provide ongoing suitable work and had mistakenly believed it was lawful to dismiss Noni 6 months after her injury.

On 9 August 2010, the Aged Care Association wrote to the Association on behalf of ForProfit Group agreeing to reinstate Noni and provide suitable work when available. However, it was claimed that no such work existed at that time despite a number of new employees commencing at the facility.

After further negotiations Noni was allowed to return to suitable work at the facility on 14 September 2010. It is the Association's understanding that Noni continues to work there.

By refusing to provide Noni with suitable work and subsequently terminating her, ForProfit Group forced her to rely upon weekly workers compensation benefits at the expense of the insurer and the wider workers compensation scheme. Had it not been for the intervention of the Association and the willingness of Noni to contest the matter, Noni's reliance on weekly payments would have continued until she obtained alternative employment.

Case Study 6 – Gina's Experience

Position: Registered Nurse

Employer: ABC Area Health Service

Gina commenced training as a Registered Nurse in July 1969 and graduated in July 1972. She began working within the ABC Area Health Service (ABCAHS) in September 1997.

On 17 August 2004, Gina was a Scrub/Instrument nurse for a Laproscopic Gallbladder Procedure. During the procedure she was required to hold an instrument in a certain position for an extended period of time and not move. As a result of this she sustained an injury to her lower back.

Gina was unfit for work as a result of the injury for a number of very short periods. These were;

- between 17 August 2004 and 25 August 2004
- between 8 October 2004 and 22 October 2004
- between 5 February 2006 and 7 February 2006
- between around 25 July 2006 and 26 July 2006 when she suffered a re-injury whilst pushing a bed
- between 14 December 2007 and 4 January 2008

Save for the above periods and a short time between 22 October 2004 and November 2004 (when she worked some reduced hours), Gina worked her pre-injury hours between 25 August 2004 and 30 September 2009 in Anaesthetics. Hence, no weekly workers compensation benefit was payable for these times as she was working her contracted hours.

Generally, Gina's medical restrictions prevented her from;

- lifting more than 10 kg
- sitting for more than 2 hours without moving
- standing for more than 30min without moving
- travelling for more than 1 hour at a time

The practical reality of these restrictions was that Gina could do almost all of her job. For example, the restriction on lifting over 10kg meant practically that when lifting a patient, which is done by a number of nurses, she had to lift the legs rather than the torso.

Gina suffered no aggravation of her injury in the 12 months leading up to August 2009. Without warning however, on 3 August 2009 the Chief Executive of the ABCAHS sent Gina a letter (received 6 August 2009) terminating her employment from 7 August 2009 on the following grounds;

"This decision is made on evidence that your medial prognosis indicates that you will remain incapable of returning to your pre-injury duties as a Registered Nurse and efforts to provide you with suitable alternative employment within your medical restrictions have proven to be unsuccessful."

Since your injury in 2004, the [ABCAHS] has exhausted all avenues available to rehabilitate you to the workforce..."

Thereafter the NSW Nurses' Association (the Association) commenced disputes proceedings and Gina requested reinstatement. The ABCAHS rejected Gina's request. This rejection was remarkable given that, at the time, the ABCAHS employed around 6500 full time equivalent staff. Furthermore, the hospital at which she worked had 4 Operating Theatres which engaged approximately 40-50 Registered Nurses. Moreover, a nearby hospital also had 4 Operating Theatres.

Following negotiations between the parties, on 15 March 2010 the ABCAHS agreed to reinstate Gina in the anaesthetics, scout and recovery areas. Consent orders were made to this effect. As far as the Association is aware, Gina continues to work at this location.

By suddenly terminating Gina's employment, the ABCAHS forced her to rely upon weekly workers compensation benefits at the expense of the insurer and the wider workers compensation scheme. Had it not been for the intervention of the Association and the willingness of Gina to contest the matter, her reliance on weekly payments would have continued until she obtained alternative employment.

Case Study 7 – Diane's Experience

Position: Assistant in Nursing

Employer: 4Profit Group

Diane had been employed as an Assistant in Nursing by 4Profit Group for over 20 years.

On 14 February 2006, Diane injured her back whilst repositioning a resident.

From 16 April 2006, Diane performed suitable work which involved, among other duties, the education of other nursing staff, reception duties, cleaning, filing, menus for residents, medications, feeding residents, dressings, bed making and distributing morning teas.

Leading up to February 2009, Diane had been performing suitable work around 5 hours per day, 4 days per week. Her restrictions were mainly;

- no lifting greater than 5 kg, and
- she is required to alternate her posture from sitting to standing periodically.

On 18 February 2009, Diane was directed to attend a meeting with 4Profit Group to discuss her employment. During the subsequent meeting on 19 February 2009, 4Profit Group summarily terminated Diane effective at 12.05pm on the basis that it

had been over 3 years since her workplace injury and she was unable to return to pre-injury duties. The letter of termination stated;

"we believe that it is in your best interest to be assisted by the insurer (Allianz Australian Worker's Compensation (NSW) Ltd) to seek assistance with vocational job placement or further training with the view of job placement."

The NSW Nurses' Association (the Association) commenced legal action on Diane's behalf against 4Profit Group.

On 1 April 2009, the Chief Executive Officer of 4Profit Group wrote to Diane expressing disappointment at the inappropriate manner in which an employee of 20 years service had been terminated.

Following negotiations between the parties, 4Profit Group agreed to consent orders reinstating Diane to work as an Assistant in Nursing as per her medical restrictions. Diane commenced work again in the facility on 31 August 2009 and as far as the Association is aware continues to work there.

By terminating Diane, 4Profit Group forced her to rely upon weekly workers compensation benefits at the expense of the insurer and the wider workers compensation scheme. Had it not been for the intervention of the Association and the willingness of Diane to contest the matter, her reliance on weekly payments would have continued until she obtained alternative employment.

Case Study 8 – Yolande's Experience

Position: Assistant in Nursing

Employer: Large4Profit Group

Yolande started employment with Large4Profit Group in January 2002 working 65 hours per fortnight. The facility at which she worked was a very large nursing home.

On 11 March 2005, Yolande suffered an injury in the course of her employment.

Leading up to her termination Yolande was performing suitable work 65 hours per fortnight. As she was working her contracted number of hours there was no additional top up weekly workers compensation payment required. Her medical restrictions were as follows;

- unable to lift above 10kg
- avoid toileting or showering patients

She was fit however to perform a very long list of duties including;

- feeding residents
- cleaning lockers
- paperwork
- nail cutting

- restocking of linen
- making of beds with a partner
- labelling
- walking ambulatory residents

On 8 October 2008, Large4Profit Group withdrew suitable work from Yolande. However, the duties which Yolande had performed continued to be required by Large4Profit Group's business. Thereafter, Yolande ceased to be paid by Large4Profit Group and consequently had to rely upon weekly workers compensation benefits. By way of letter dated 8 October 2008 Large4Profit Group stated;

"I am writing to advise you of [the facility's] inability to continue to provide you suitable duties.

As per Workers Compensation Legislation, an employer is required to provide a short term period of suitable duties in order to assist injured employees rehabilitate into the workforce after sustaining a workplace injury. The current duties being performed are no longer feasible from an operational perspective, in which we regret it is no longer reasonably practicable to continue to offer suitable duties at this time.

We will advise you if appropriate suitable duties become available at [the facility]. Furthermore, should at any stage you recover from your injury and are able to perform your pre-injury duties, please notify the undersigned to discuss return to work options.

Allianz Insurance will take over ongoing workers compensation entitlements, and can be contacted on [telephone number]. Please ensure that you quote your claim number (above) when contacting Allianz. We recommend that you contact Allianz Insurance as soon as possible after receiving this letter to discuss your obligations and requirements in relation to your weekly benefits."

At around this time Large4Profit Group was advertising in local newspapers for Assistants in Nursing to perform work of the kind Yolande had been performing.

In short, by withdrawing suitable work Large4Profit Group shifted the cost burden associated with Yolande's injury from itself to the insurer and hence the workers compensation scheme.

The NSW Nurses' Association (the Association) commenced legal proceedings against Large4Profit Group on behalf of Yolande. It was the Association's view that Large4Profit Group was one of the largest aged care providers in the state and the work which Yolande was performing continued to be required at Large4Profit Group's business. The decision in these proceedings concluded that there was "*not an abundance of evidence*" regarding why Large4Profit Group decided it no longer was able to continue to employ Yolande on suitable duties. Furthermore, it was held;

- Yolande had been integrated into the workforce for three and a half years on selected duties following her work-related injury
- Large4Profit Group's reasons for the peremptory withdrawal of suitable duties was not particularly well-developed
- There was no evidence of any significantly-changed operational exigencies necessitating the decision to withdraw suitable duties.
- There was no evidence why it was considered time-critical to withdraw suitable duties on 8 October 2008, given that Yolande had been undertaking selected duties for a number of years following the injury.
- Financial considerations did not provide a reason for Large4Profit Group's actions

- One way or the other, through the processes of administrative decision-making, Large4Profit Group, through its human resources and senior nursing staff, determined to withdraw suitable duties.
- The available evidence would not lead to a conclusion it was not reasonably practicable for Large4Profit Group to continue to provide employment for Yolande in accordance with s49 of the Workplace Injury Management and Workers' Compensation Act.

It was then found that by refusing to provide work and refusing to pay Yolande, Large4Profit Group had, in effect, terminated her employment. Thereafter the Association sought Yolande's reinstatement to suitable duties.

After negotiations Large4Profit Group agreed to reinstate Yolande and she continues to work at the facility.

By refusing to provide Yolande with suitable work and subsequently terminating her, Large4Profit Group forced her to rely upon weekly workers compensation benefits at the expense of the insurer and the wider workers compensation scheme. Had it not been for the intervention of the Association and the willingness of Yolande to contest the matter, her reliance on weekly payments would have continued until she obtained alternative employment.

Case Study 9 – Charlotte's Experience

Position: Enrolled Nurse

Employer: Charity Health Care

Charlotte Quinn started employment with Charity Health Care on 4 July 1987. She was employed as an Endorsed Enrolled Nurse.

Charlotte sustained an initial lower back injury in the course of her employment with Charity Health Care on 6 June 1997. After a period of recovery, she was able to return to pre-injury duties and with a regular and committed exercise programme was able to sustain her duties for nearly a decade.

Charlotte sustained an aggravation of the injury in September 2006 during a period of double shifts and heavy workloads. After a period of time off work she commenced full duties. Subsequently the injury flared up again and she commenced suitable duties.

During 2007, Charlotte performed suitable duties. For 10 months of that year she performed suitable work on the medical-surgical ward as this work was within her limitations and was found not to aggravate her injury.

Subsequently, Charity Health Care removed Charlotte from nursing duties on the medical-surgery ward with the explanation that it was "*for legal reasons*".

Thereafter, she was transferred to the Sleep Studies Unit on a "*trial*" basis. It was

understood at the time that a casual employee in that unit had indicated that she was going to resign.

The Sleep Studies Unit requires a level of computer competency which the applicant was not trained for. Charlotte did not receive any formal computer training from Charity Health Care and was instead given some on the job training by a younger casual Assistant in Nursing. This Assistant in Nursing was not familiar with adult education techniques and therefore Charlotte did not acquire the necessary computer skills. The NSW Nurses' Association (the Association) asked Charity Health Care for formal computer training to be provided but this did not occur.

On Tuesday 12 March 2008, a meeting occurred between Charity Health Care and Charlotte during which she was told there were no positions available for her. Charity Health Care indicated that a "*computer technician*" would probably be employed in the position in the Sleep Studies Unit. However, on 24 March 2008 and 14 April 2008 two Assistants in Nursing (ie not computer technicians) were employed in the positions in the Sleep Studies Unit on a casual basis.

On 26 March 2008, during a teleconference between the Association, Charity Health Care and Charlotte, Charity Health Care indicated;

- a. Charlotte cannot continue in the medical-surgical ward (despite having worked there for 10 months), and
- b. employment in the preadmission clinic was inappropriate because Charlotte could not push a wheelchair (despite Charlotte being able to do other work and the presence of a wardman to provide wheelchair assistance).

The Association attempted to convince Charity Health Care to engage Charlotte within the Sleep Studies Unit. After conducting a review, Charity Health Care continued to claim Charlotte's computer skills were unacceptable. They refused however to provide any of the reports or reasons for this conclusion. No attempt was made to train Charlotte externally.

On 5 August 2008 Charity Health Care wrote to Charlotte terminating her employment effective 25 August 2008. Charity Health Care indicated in the letter that:

"The currently available positions available at Charity Health Care Health Care are:

*Theatre staff- EN and Rn able to scrub and scout;
Registered midwives- numerous positions available
Wardsman - one position available
Medical Coder- part time casual position*

As we are unable to identify any permanent alternative positions that is within your restrictions we are now forced to terminate your employment"

The Association wrote to Charity Health Care on 27 August 2008 identifying available suitable work which Charlotte was able to perform including work on the medical surgical ward, admissions, discharges, medication, doctor's rounds, answering buzzers and patient education etc. This letter went unanswered. A subsequent phone call also went unanswered.

The Association commenced legal proceedings and after a period of negotiation Charity Health Care reinstated Charlotte to non-nursing work which were within her medical restrictions.

By refusing to provide Charlotte with suitable work and subsequently terminating her, Charity Health Care forced her to rely upon weekly workers compensation benefits at the expense of the insurer and the wider workers compensation scheme. Had it not been for the intervention of the Association and the willingness of Charlotte to contest the matter, her reliance on weekly payments would have continued until she obtained alternative employment.

Case Study 10 – Rosalind's Experience

Position: Endorsed Enrolled Nurse

Employer: Charitable Aged Care

Rosalind is a 54 year old Endorsed Enrolled Nurse who first commenced worked for Charitable Aged Care in 1999. Between 1999 and 2007 she was employed as an Assistant in Nursing. She resigned in approximately January 2007 to commence full time nursing studies before returning to the facility on 14 May 2008 working 60 hours per fortnight.

The facility at which Rosalind worked was a large aged care facility that had 123 residential aged care places, 43 high care beds, 80 low care beds including 4 respite beds and 20 dementia specific beds.

On 10 January 2011, Rosalind sustained an injury to her right thumb whilst assisting a resident with toileting. She had around two days off as a result of this injury. In the first half of 2011, Rosalind re-injured her thumb three times which resulted in short periods off work followed by suitable duties.

On around 29 September 2011 whilst on annual leave, Rosalind was called to attend a meeting at work. She met with a number of representatives of Charitable Aged Care, including the Workers Compensation Manager. During this meeting the Workers Compensation Manager said words to the following effect:

"Well Charitable Aged Care does not have permanent suitable duties, we just don't do them. Never will."

Rosalind was understandably concerned after this meeting that if she could not return to pre-injury duties, Charitable Aged Care would terminate her.

On 25 October 2011, Rosalind was certified fit for work 8 hours per day, 5 days per week, which was more than her actual contracted hours. Her doctor still however, imposed some medical restrictions.

At around this time, Rosalind noticed a job vacancy for the position of Team Leader at the facility and wrote to Charitable Aged Care indicating an interest in the position. Such a position would not have been a promotion for an Endorsed Enrolled Nurse, but would have been a position which placed less stress on her injured thumb.

On behalf of Rosalind, on 26 October 2011, the NSW Nurses' Association (the Association) wrote to Charitable Aged Care requesting that she be appointed to the Team Leader position on the basis that it involved work which she was able to

perform. Attached to this letter was a certificate from Rosalind's doctor certifying her fit for the role.

On 14 November 2011, Rosalind also formally applied for the position.

Charitable Aged Care subsequently refused to appoint Rosalind. As a result the Association commenced disputes proceedings. Following negotiations between the parties Charitable Aged Care agreed to Consent Orders to the following effect;

- Charitable Aged Care agreed to provide preference to Rosalind to perform a range of endorsed enrolled nurse work approved by her treating doctor.
- Charitable Aged Care agreed that these duties will be in accordance with Rosalind's medical restrictions.

Rosalind then returned to work.

On 9 January 2012, Rosalind experienced an increase in pain in her right hand and her new doctor indicated that she was unfit for duty between 11 and 26 January 2012. This period off work was unusual for Rosalind.

On 27 January 2012, upon returning to work Rosalind was given a letter by Charitable Aged Care terminating her employment.

The Association has commenced legal action against Charitable Aged Care on behalf of Rosalind. That matter has been listed for hearing.

By refusing to provide Rosalind with suitable work and subsequently terminating her, Charitable Aged Care forced her to rely upon weekly workers compensation benefits at the expense of the insurer and the wider workers compensation scheme. Rosalind is a sole income earner. Whilst she is very

keen to return to work, if she is unable to return to work because her employer and the Commission refuse to reinstate her she will have to rely on weekly compensation benefits provided by the scheme. Any reduction to the weekly compensation would have a very serious financial impact on Rosalind.

Recommendations

The Association does not believe that the obstacle preventing workers from returning to work is their own laziness or fraud. Nor do we believe that a curtailment of benefits will cause more workers to return to work sooner. In fact, the opposite is likely to occur as workers would increasingly force themselves to return to work too early and suffer re-injuries as a result. Rather, injured workers are being denied the opportunity to return to work by the profit motive or self interest of employers who would rather offload such workers than accommodate them. Accordingly, the Association makes the following recommendations;

1. We recommend that there be a financial incentive for employers to provide suitable work to injured workers. This could come in the form of a reduced premium.
2. We recommend that severe penalties be imposed on employers and individuals who refuse to provide work to injured workers where such work is available. A financial disincentive could also be imposed by way of an increased premium.

3. We recommend that insurers be given the capacity, and then be obliged, to rigorously examine whether their clients are able to provide suitable work to an injured worker prior to termination or suitable work being withdrawn and prior to requiring that worker to seek work elsewhere.
4. We recommend that in any legal proceedings dealing with the question of whether suitable work is available, the onus be on the employer to establish that no suitable work exists.
5. We recommend the implementation of some form of independent review which must be undertaken prior to an employer being able to withdraw suitable work or terminate injured workers and thereby cost shift to the workers compensation scheme. This review could be conducted by the Workers Compensation Commission and should involve input from the employer, insurer and the injured worker. The aim of the review should be to assess the capacity of the employer to provide work to the injured worker. Employers should then be obliged to offer any duties which are found to exist through this review. Indeed, if the Committee is to recommend Work Capacity Testing as foreshadowed on page 25 of the Issues Paper, such an assessment could be undertaken in tandem with that process. Whilst the Association is opposed to the Work Capacity Testing of workers as proposed by the Issues Paper, we believe that there is clear justification for the work capacity testing of employers. This would require only minimal legislative amendment as the Workers Compensation Commission already has the power to recommend the provision of suitable work. We propose the

strengthening of this power to ensure such recommendations are a prerequisite and are binding.

6. We recommend that it be an offence for an employer to require a prospective employee to declare whether they had previously suffered a workers compensation injury unless that injury would prevent him or her from performing the inherent requirements of the role. An offence of this kind could be inserted into anti-discrimination legislation.
7. We recommend that it be an offence for an employer to inform another prospective employer that a former employee has suffered a workers compensation injury. An offence of this kind could be inserted into anti-discrimination legislation.

The Association believes that measures such as these would go a long way toward addressing the alleged deficit within the workers compensation scheme.

Problems with the Issues Paper and the Direction of the NSW Government

The Government's only answer is to reduce the benefits of injured workers

The Association does not necessarily accept the assertion in the Issues Paper that the workers compensation scheme is in deficit and that massive changes are urgently needed.

However, even accepting these assertions at face value, the Association is concerned that the only real solution offered by the Issues Paper is to strip away benefits for workers. The Issues Paper repeatedly suggests that reducing or taking away workers compensation benefits will encourage workers to return to work.² This completely ignores the fact that many workers genuinely cannot return to work due to their injury.

The underlying assumption within the Issues Paper is that injured workers are either lazy or are fraudulently claiming higher workers compensation benefits either through inflated lump sum or medical claims or by willingly working less than they are able to. The Association utterly rejects this line of reasoning. In our view, cogent evidence should be presented before a government acts on such an assumption. Indeed, with the advent of sophisticated imaging technology such as MRIs and the creation of the independent medical examiner within the workers compensation system, we understand that the instances of fraud have been reduced to miniscule levels.

In our experience, the vast majority of injured workers desperately want to return to work. As stated above, the Association's view is that the predominant obstacle preventing injured workers returning to work is not their own laziness or fraud. The main obstacle is the unwillingness of employers to provide them with work.

² *NSW Workers Compensation Scheme Issues Paper*, pp.4-6.

We urge the Committee to consider this along with the fact that half of the alleged deficit within the scheme is attributable to global financial factors³. In such circumstances, we believe it is wrong to ask injured workers to bear the brunt of any changes.

The Association is concerned that the Issues Paper does not propose a single reform which attempts to impose some additional responsibility on insurers or employers. Nor does the Issues Paper propose a single reform designed to seriously improve occupational health and safety in New South Wales, despite this being described as desirable⁴. In our view, the responsibility for the viability of our workers compensation scheme is a joint responsibility to be shared by workers, employers and insurers. It is manifestly unjust for workers to be the group that must suffer in order to address any alleged deficit.

The Government views compensation as a disincentive to work

The Issues Paper's proposals to cut workers compensation benefits are justified on the ground that such action will encourage a return to work.⁵ In this regard, the Issues Paper has misrepresented the very notion of 'compensation'. Compensation is about placing a person in the position they would have been had the wrong or loss not occurred. The caps and limitations on workers compensation benefits already mean that workers are never compensated for the entirety of their loss, and historically they never have been. The proposals set out in the Issues Paper would

³ NSW Workers Compensation Scheme Issues Paper, Appendix 1 - WorkCover NSW Executive Summary: Actuarial valuation of outstanding claims liability for the NSW Workers Compensation Nominal Insurer as at 31 December 2011, p.2.

⁴ NSW Workers Compensation Scheme Issues Paper, p.5.

⁵ NSW Workers Compensation Scheme Issues Paper, pp.4-6.

clearly exacerbate this. We urge the Committee to remember that the original intent of the 1926 workers compensation legislation was, according to the first reading speech, *"for industry to bear the consequences of its own casualties"*.

The Issues Paper details a number of factors which together make the *"best"* workers compensation system.⁶ Notably absent from this list is a recognition that the optimal workers compensation scheme should provide adequate compensation to injured workers and sufficient incentive for employers to minimise injuries. In our view, the suggestion that compensation needs to be reduced in order to *"encourage"* a return to work betrays the fundamental purposes of the workers compensation system.

The Government is avoiding any real analysis of premiums

The Issues Paper makes it clear that the Government is not willing to consider any increase in workers compensation premiums.⁷ The assertion is made that premiums paid by employers in New South Wales are estimated to be between 20 and 60 per cent higher than equivalent employers.⁸ However, the Issues Paper does not provide adequate data to support this claim. Whilst a short comparison of premiums is set out on page 14 of the Issues Paper, this is entirely inadequate.

As the Issues Paper makes clear, premiums in New South Wales have declined by 33% since 2005.⁹ In these circumstances, the Association believes it is

⁶ *NSW Workers Compensation Scheme Issues Paper*, p.5.

⁷ *NSW Workers Compensation Scheme Issues Paper*, pp.2 and 6.

⁸ *NSW Workers Compensation Scheme Issues Paper*, pp.2, 4, 13 and 14.

⁹ *NSW Workers Compensation Scheme Issues Paper*, p.13.

disingenuous for the Government to claim that urgent changes are needed within the workers compensation system. If indeed premiums are still higher in New South Wales than in other jurisdictions, there may be a range of factors causing such a situation. For example, the Association would expect that the dollar amount of premiums would be higher in New South Wales simply because of the higher wages and cost of living in this state.

Furthermore, in our view it is misleading for the Issues Paper to cherry pick premiums from other jurisdictions as a justification for change, without examining in total the legislation in each jurisdiction and its affect on premiums. Each jurisdiction has found its own balance between its fault and no fault workers compensation schemes. For example, whilst no fault workers compensation benefits in Queensland and Victoria are comparatively low, there is greater access to fault based claims. We believe it is a mistake to wilfully avoid any real analysis of these issues.

We urge the Committee to release adequate data so that premiums across different jurisdictions can be comprehensively examined. Further, we urge the Committee to consider the possibility of increasing premiums (particularly for employers who fail to provide suitable work or who have poor safety records) even on a short term basis to address any alleged deficit in the workers compensation scheme.

The Government is ignoring the social affect of reducing workers compensation benefits

The Issues Paper does not consider the social affect of reducing workers compensation benefits. Stripping away benefits from injured workers carries with it the very real risk of thrusting them into a life of poverty or welfare dependency. The social effects of such consequences are obvious; increased crime rates, increased incidence of social dislocation, increased incidence of family breakdown, etc.

Injured workers are one of the most vulnerable groups in society and, in our view, cutting their workers compensation benefits will have dire consequences for many families and communities. It will also result in many injured workers being forced to attempt to rely upon the Commonwealth welfare system through benefits such as disability payments. We understand that the eligibility requirements for such benefits are, in themselves, quite restrictive. Similarly, curtailing medical benefits will increase the burden on Medicare. In short, the changes proposed will result in cost shifting from New South Wales employers and insurers to the Commonwealth taxpayer.

Nurses, midwives and nursing assistants will be disproportionately disadvantaged in this regard. Often our members are the sole income earner within their family units and generally have a number of dependants as well as financial commitments such as a mortgage.

The Association's Response to the Options for Change

As stated above, the Government's only options for change appear to be to reduce the benefits of injured workers. The Association rejects the idea that New South Wales should adopt the meanest aspects of each of the other workers compensation systems around the country. Together this will result in New South Wales having the meanest workers compensation system in Australia. We see no reason however, why New South Wales should not strive to have the most compassionate and fair workers compensation system.

Generally, the Issues Paper proposes the harmonisation of the New South Wales scheme with the meanest aspects of similar schemes around the country. This occurs even when provisions denying or reducing benefits to workers are found in only a minority of other jurisdictions. Disappointingly, the Issues Paper does not recommend the harmonisation of our system with any of the more generous aspects of similar schemes.

The changes proposed will disproportionately and unfairly disadvantage workers who work in more dangerous environments. Nursing generally involves a significant degree of manual work such as moving/lifting patients etc. Furthermore, many nurses, midwives and nursing assistants work in environments where there is an increased risk of injury such as;

- emergency departments where all manner of persons in various states of wellbeing present
- correctional centres or elsewhere within the criminal justice system

- disability services caring for persons who may suffer mental or physical disabilities
- forensic hospitals which are high secure mental health facilities for mentally ill patients who have been in contact with the criminal justice system and high risk civil patients
- mental health units including psychiatric intensive care units which care for patients requiring acute intervention (indeed, in January 2011 a mental health nurse named Bob Fenwick was tragically killed in a work-related incident at Bloomfield Hospital, Orange NSW after stepping in to save a colleague in a stabbing attack)
- aged care where many residents suffer from dementia
- community care where nurses are required to attend patients' homes alone

The Association's response to each of the options for change are as follows;

1. Severely injured workers

The Association is not opposed to increasing benefits for severely injured workers. However, limiting such reforms to workers with a 30% whole of body impairment will mean that only a small minority of injured workers will benefit. We note the Issues Paper does not identify the proportion of injured workers who would satisfy the 30% threshold. We believe it would be miniscule.

2. Removal of coverage for journey claims

The Association is opposed to this proposal. We reject the claim that employers have limited control over the circumstances involved in journey claims. Employers generally direct when and where an employee is to perform work. Employers also decide how long an employee is required to stay at work before returning home. The Association is aware of a nurse who suffered an injury on her way home after being required to work a 16 hour shift. Toward the conclusion of her journey she literally collapsed from exhaustion and suffered an injury. Nurses, midwives and nursing assistants work at all hours of the day, often on rotating shifts. Excessive workloads are a major problem for such workers and this can result in sheer exhaustion at the completion of shifts. In addition, working night duty often means nurses will have to wander a deserted car park or catch public transport at night when travelling to or from work. Many also work in rural locations which necessitates travel on highways which can involve high speeds, heavy carriage and are frequently poorly lit or maintained. Rural roads are also generally more dangerous during inclement weather. The removal of journey claims will disproportionately disadvantage these workers.

The Issues Paper also ignores the fact that the point at which a person's work life begins is the time when they commence their commute to work. It is at this time that their family life and leisure time ceases. Furthermore, with the advent of modern technology in the form of smart phones, laptops and tablets, the line between work and leisure time is becoming increasingly blurred. Many workers perform unpaid work at home or whilst commuting to or from work. Abolishing journey claims would be unfairly inconsistent with this trend.

The Issues Paper claims that the removal of journey claims would make the New South Wales scheme consistent with Victoria, Queensland and Tasmania.

However, this ignores the fact that, as the Association understands, Victoria has a comprehensive statutory travel compensation scheme. It would also mean that New South Wales would be part of the minority of jurisdictions that do not provide for compensation for journey claims. We understand that journey claims in one form or another can be made in Queensland, the Australian Capital Territory, South Australia, the Northern Territory, the Commonwealth and Victoria (under its travel compensation scheme).

3. Prevention of nervous shock claims from relatives or dependants of deceased or injured workers

The Association is opposed to this proposal. In our view, limiting the ability of family members to be compensated for nervous shock at such a harrowing time is wrong. We disagree with the suggestion that such claims do not fall within the objects of the legislation and are largely outside the control of employers. In fact, such claims can only be made where the death is occasioned by some negligence on the part of the employer. We note that this proposed change would mean that New South Wales is the only state where such claims could not be made.¹⁰

No reasonable person could deny that the sudden death of a loved partner or parent would not have a devastating and debilitating impact. The recent death of

¹⁰ *NSW Workers Compensation Scheme Issues Paper*, Appendix 3 - Comparison with Other Australian Jurisdictions, p.1.

Bob Fenwick at Bloomfield Hospital and the rape, murder and decapitation of nurse Sandra Hoare at Walgett are examples of such trauma.

The Association understands that the number of nervous shock claims is miniscule and thus, prohibiting them is unlikely to have a significant affect on the alleged deficit.

4. Simplification of the definition of pre-injury earnings and adjustments of pre-injury earnings

The Association is not opposed to the calculation of pre-injury earnings being based upon a worker's entire remuneration including base wages, overtime and penalty rates. However, we only support such a move if the worker in question has not been paid below any applicable industrial instruments.

Whilst on page 24 the Issues Paper appears to propose that weekly payments should be aligned to actual pre-injury earnings, on page 16 it also cites with approval the Victorian scheme which calculates average earnings on the basis of ordinary working hours only. If the Government intends to adopt the Victorian model, this would be vigorously opposed by the Association. Nurses, midwives and nursing assistants work around the clock and it would unfairly disadvantage these workers if weekly compensation levels did not take account of penalty rates and overtime payments.

5. *Incapacity payments-total capacity*

The Association is opposed to the imposition of an earlier 'step down' for the following reasons;

- We disagree with the suggestion that reducing benefits in this way will encourage workers to return to work earlier, increase their hours or increase their scope of duty.
- In this regard the Issues Paper presumes that the obstacle to a return to work is a worker's own laziness or fraud, rather than the injury itself or the recalcitrance of employers.
- With regards to this matter the Government is proposing to harmonise the New South Wales system with a minority of other jurisdictions (ie Victoria, South Australia and Western Australia). The majority of other jurisdictions however, do not have such restrictions (ie Queensland, Tasmania, the Northern Territory, the Australian Capital Territory and the Commonwealth).
- Such a change would risk forcing injured workers to return to work too soon. The likely result would then be an increase in re-injuries and further strain on the workers compensation scheme.

The Association believes the Government should instead adopt measures designed to compel employers to provide suitable work to injured workers as outlined earlier in this submission.

6. *Incapacity payments-partial capacity*

The Association is opposed to the imposition of financial disincentives of the kind outlined in the Issues Paper for the following reasons;

- We disagree with the suggestion that reducing benefits in this way will encourage workers to return to work earlier, increase their hours or increase their scope of duty.
- In this regard the Issues Paper presumes that the obstacle to a return to work is a worker's own laziness or fraud, rather than the injury itself or the recalcitrance of employers.
- With regards to this matter the Government is proposing to harmonise the New South Wales system with a minority of other jurisdictions (ie Victoria and South Australia). The majority of other jurisdictions however, do not have such restrictions.
- Such a change would risk forcing injured workers to return to work too soon. The likely result would then be an increase in re-injuries and further strain on the workers compensation scheme.

The Association believes the Government should instead adopt measures designed to compel employers to provide suitable work to injured workers as outlined earlier in this submission.

7. Work Capacity Testing

This Association is opposed to this proposal. The current scheme already obliges workers to undergo a large number of medical examinations. We oppose the imposition of further such burdens on workers when employers continue to be taken at their word as to their ability to offer suitable work. Furthermore, we are concerned that work capacity testing will be seen and used as an opportunity by insurers to find an excuse to cease payments.

However, if work capacity testing is adopted, the Association believes it must be accompanied by the testing of the relevant employer's (if the worker remains employed) capacity to provide suitable work. Employers should then be compelled to offer any suitable work to the injured worker. In this regard we rely upon the submissions and recommendations set out earlier in this submission. Furthermore, if Work Capacity Testing is adopted, we would recommend that such testing be conducted by a properly qualified and independent person. Further, we believe such testing should involve a functional assessment in the workplace with the active involvement of the injured worker. It is the Association's experience that functional assessments in the workplace are the most reliable way to determine whether a worker is able to perform certain tasks. Assessments done outside of the workplace are often unreliable because the assessor can only rely upon a description of the work in question.

The Association is opposed to weekly benefits ceasing after a certain period for workers with a work capacity for the following reasons;

- We disagree with the suggestion that reducing benefits in this way will encourage workers to return to work earlier, increase their hours or increase their scope of duty.
- In this regard the Issues Paper presumes that the obstacle to a return to work is a worker's own laziness or fraud, rather than the injury itself or the recalcitrance of employers.
- Such a proposal effectively imposes a penalty on injured workers with a work capacity if they are not suitably employed. There is no recognition however, of the fact that it is extremely difficult for an injured worker to either convince their existing employer to provide suitable work, or to find work with a new employer. In short, the proposal forces workers to pay the price for a market failure.
- The proposal will disadvantage the most severely injured and vulnerable workers. It will effectively mean that these workers are forced to rely upon welfare payments (if applicable) as a result of their weekly benefits ceasing.
- Such a change would risk forcing injured workers to return to work too soon. The likely result would then be an increase in re-injuries and further strain on the workers compensation scheme.

8. *Cap weekly payment duration*

The Association is opposed to this proposal for the following reasons;

- We disagree with the suggestion that reducing benefits in this way will encourage workers to return to work earlier, increase their hours or increase their scope of duty.
- In this regard the Issues Paper presumes that the obstacle to a return to work is a worker's own laziness or fraud, rather than the injury itself or the recalcitrance of employers.
- Such a proposal effectively imposes a penalty on injured workers with a work capacity if they are not suitably employed. There is no recognition however, of the fact that it is extremely difficult for an injured worker to either convince their existing employer to provide suitable work, or to find work with a new employer. In short, the proposal forces workers to pay the price for a market failure.
- The proposal will disadvantage the most severely injured and vulnerable workers. It will effectively mean that these workers are forced to rely upon welfare payments (if applicable) as a result of their weekly benefits ceasing.
- Such a change would risk forcing injured workers to return to work too soon. The likely result would then be an increase in re-injuries and further strain on the workers compensation scheme.

9. *Remove "pain and suffering" as separate category of compensation*

The Association is opposed to this proposal. The proposal would mean that there is no subjective or individualised component to the determination of lump sum compensation. The same kind of workplace injury can have different affects on different individuals. For example, an office worker who severs a finger is unlikely

to incur the same levels of pain and suffering than a professional pianist. Indeed, nurses, midwives and nursing assistants generally consider their occupation to be a calling, rather than a job. Consequently, an injury which prevents them from pursuing that calling can have a devastating impact for which they should be appropriately compensated. Adopting a 'one size fits all' approach to the concept of pain and suffering will mean that compensation is not tailored to the suffering and loss of the individual worker.

10. Only one claim can be made for whole person impairment

The Association is opposed to this proposal. The Issues Paper completely ignores the reality that injuries and illnesses are often fluid and unpredictable. The presumption is made that there is a single and predictable point in time at which an injury will not get any worse. Many injuries however, lead to a degenerative process, the consequences of which cannot be foreseen. In other words, even the most highly skilled medical practitioner does not have a crystal ball.

The proposal would force injured workers to languish for long periods before obtaining lump sum compensation. In addition, the proposal would mean that where an unexpected deterioration occurs, the worker would be denied compensation. We note that this change would mean New South Wales is one of only two jurisdictions which severely limit the number of claims in this way.¹¹

¹¹ *NSW Workers Compensation Scheme Issues Paper*, Appendix 3 - Comparison with Other Australian Jurisdictions, p.4.

The Association rejects the claim that workers are making fraudulent or exaggerated claims to meet thresholds. The Issues Paper has not produced any evidence to support such a serious claim.

Finally, the Association questions the financial advantage of this proposal given that the liability attributable to lump sum claims as set out in the Issues Paper is comparatively minimal.¹²

11. One assessment of impairment for statutory lump sum, commutations and work injury damages

The Association is unclear as to the nature of this proposal. Our understanding is that the Approved Medical Specialist system within the workers compensation scheme already provides a single assessment of the kind proposed.

If the intention is to limit an injured worker's access to medical examinations where they have suffered injuries to more than one body system, the Association would be opposed to this proposal as it presumes that medical practitioners do not make mistakes. In our view, the focus of the workers compensation system should be on obtaining an accurate assessment of a worker's condition. Such a change would disadvantage the most seriously injured workers. For example, a worker who suffers a severe back injury and who also suffers bowel and bladder dysfunction as a result, would be required to choose between an orthopaedic or a neurological assessment to determine impairment.

¹² NSW Workers Compensation Scheme Issues Paper, p.8.

We note that this change would mean New South Wales joins Victoria as the only jurisdictions which impose such a restriction.¹³ Also, the Association questions the financial advantage of this proposal given that the liability attributable to lump sum claims as set out in the Issues Paper is comparatively minimal.¹⁴

12. Strengthen work injury damages

The Association is opposed to extending the application of the *Civil Liability Act 2002* (NSW) to work injury damages. In our view, the *Civil Liability Act 2002* (NSW) came about as a result of a concerted campaign by the insurance lobby to hinder the ability of injured people to receive proper and fair compensation. This legislation turned the common law of negligence on its head in a manner specifically designed to benefit insurers and defendants (see for example, the restrictions on the ability of injured persons to claim damages under Parts 2 and 3 of the legislation).

Extending the application of this legislation to work injury damages will severely disadvantage injured workers. We note that if this change is adopted, New South Wales will be the only jurisdiction which would have extended the application of such legislation to work injury damages.¹⁵

One of the original aims of the *Civil Liability Act 2002* (NSW) was to supposedly promote individual responsibility to avoid injury. However, the notion of individual

¹³ *NSW Workers Compensation Scheme Issues Paper*, Appendix 3 - Comparison with Other Australian Jurisdictions, p.4.

¹⁴ *NSW Workers Compensation Scheme Issues Paper*, p.8.

¹⁵ *NSW Workers Compensation Scheme Issues Paper*, Appendix 3 - Comparison with Other Australian Jurisdictions, p.5.

responsibility does not sit easily within an employment context. At its heart the workplace is characterised by master-servant relationships, wherein the employer has control over the premises, the nature of the work to be performed, how the work is to be performed, when the work is to be performed, etc. In short, the *Civil Liability Act 2002* (NSW) was not designed for the employment context and if it is now extended to apply to work injury damages, we believe there will be a host of unintended and undesirable consequences.

In particular, we are concerned about the following;

- Section 5G of the Act restricts the ability of injured persons to make claims where an activity involved an "*obvious risk*". Section 5H states that a person does not owe a duty to warn of an obvious risk. Together with section 5S of the Act, this can mean that compensation can be reduced to nil where such a risk is accepted. Further, section 5I states that a person is not liable in negligence for harm suffered by another person as a result of the materialisation of an "*inherent risk*". Nurses, midwives and nursing assistants often work in situations where there is an inherent or obvious risk.

For instance, there are obvious or inherent risks in working in;

- emergency departments where all manner of persons in various states of wellbeing present
- correctional centres or elsewhere within the criminal justice system
- disability services caring for persons who may suffer mental or physical disabilities
- forensic hospitals which are high secure mental health facilities for mentally ill patients who have been in contact with the criminal justice system and high risk civil patients

- mental health units including psychiatric intensive care units which care for patients requiring acute intervention (indeed, in January 2011 a mental health nurse named Bob Fenwick was tragically killed in a work-related incident at Bloomfield Hospital, Orange NSW after stepping in to save a colleague in a stabbing attack)
- aged care where many residents suffer from dementia
- community care where nurses are required to attend patients' homes alone

Coupled with this is the fact that nurses and midwives have professional obligations to provide care and can be held accountable where they fail to do so. The Association is deeply concerned that extending the *Civil Liability Act 2002* (NSW) to work injury damages will mean that nurses, midwives and nursing assistants in such areas will be denied compensation by virtue of the fact that there is an inherent or obvious risk in the nature of the work they perform. We are also concerned that extending the applicability of this legislation will mean that employers are not obliged to warn employees of "obvious risks".

- Part 5 of the Act creates special rules restricting the ability of injured people to make claims against public authorities. In particular, section 42 effectively provides that public authorities are to be given special consideration when determining whether they have breached a duty of care. Sections 43 and 43A provide that where a claim is based on the breach of a statutory duty by a public authority, an act or omission does not constitute such a breach unless it was so unreasonable that no authority could consider it otherwise. Section 44 provides that a public authority may not be liable for any failure to exercise various functions such as the issuance of a license, permit or other

authority. Section 46 provides that the fact that a public authority exercises a function does not of itself indicate that the authority had a duty to do so.

Section 41 defines a public authority to include a public health organisation.

Hence, nurses, midwives and nursing assistants employed in the public health system will have inferior rights to claim damages by virtue only of the fact that their employer is a public authority.

By virtue of these provisions, extending the applicability of the *Civil Liability Act 2002* (NSW) will mean that nurses, midwives and nursing assistants have less of a right to claim for workplace injuries than other workers.

13. Cap medical coverage duration

The Association is opposed to this proposal. It is nonsensical for a workers compensation scheme which is designed in part to assist workers to return to work or maintain a level of function, to impose limitations on the compensation for medical treatment which may help workers become fit or maintain function. Such a change would increase the burden on Medicare and shift the cost of workplace injuries to the Commonwealth taxpayer. Furthermore, if this proposal were adopted the Government would effectively harmonise the New South Wales system with a minority of other jurisdictions (ie Victoria, Tasmania and Queensland). All other jurisdictions however, do not have such restrictions.

14. Strengthen regulatory framework for health providers

The Association is opposed to this proposal. In our view, medical benefits should encompass both medical and therapeutic treatments designed to both assist recovery and to minimise pain for workers who, through no fault of their own, do not recover. As well, many injured workers need pain management to both return to work and remain in work. We do not believe that medical benefits should be denied for workers who are either unable to return to work, or who need treatment to alleviate pain and remain in work. Furthermore, we are concerned by the use of the term “*dependency*” in the Issues Paper. In our view, such terminology is indicative of a presumption that the obstacle to a return to work is a worker’s own laziness or fraud, rather than the injury itself or the recalcitrance of employers.

15. Targeted Commutation

The Association supports this proposal if the commutations result in fair compensation for workers. In our experience, the overwhelming majority of injured workers wish get out of the workers compensation system and take control of their lives. We believe that such commutations would massively reduce the alleged deficit within the workers compensation scheme. Indeed, we urge the Committee to adopt this recommendation along with the Association's recommendations designed to force employers to provide suitable work (see earlier in this submission), as the only changes to the current system. Together, these changes alone would save the scheme a significant amount.

If targeted commutations are adopted however, we would urge the Government to separately examine and publicly release the savings associated with this change.

16. Exclusion of strokes/heart attack unless work a significant contributor

The Association understands that under the current scheme strokes and heart attacks are only compensable if work is a substantial contributing factor. The Association is opposed to any further restriction on such benefits. Work related stress is a major problem for the modern workforce and can be a major contributor to the incidence of strokes and heart attacks. The Issues Paper has cited no evidence for the assertion that the causation of strokes and heart attacks are not normally associated with workplace injuries. Before depriving New South Wales workers of access to compensation for such events, we believe that cogent evidence should be provided.

In addition, the Association understands that the number of such claims is miniscule and the change is unlikely to have a significant affect upon the alleged deficit.

Finally, nurses, midwives and nursing assistants work in extremely stressful environments and often have erratic rosters which can affect sleep patterns and stress levels. Indeed, there is significant scientific evidence with links night duty with cardiac and cerebral vascular disease. Accordingly, this proposal would disproportionately disadvantage such workers.

Conclusion

The Association opposes any attempt to restrict or limit workers compensation benefits in this state. We reject the implicit assumption of the Government that the alleged deficit within the scheme is attributable to the laziness or fraud of injured workers. Rather, we say the main problem with the current workers compensation scheme is the recalcitrance of employers and the inability of insurers to ensure injured workers are provided with suitable work. We believe that strong reforms designed to compel employers to provide suitable work would significantly address any alleged deficit within the scheme.

The Association also believes that any attempts to deprive injured workers of benefits should not be examined in isolation. Rather, such reforms should be considered in the context of other attacks by this Government on the rights of working people. In particular, we draw the Committee's attention to;

- i. the codification of the NSW Government's Wages Policy within industrial legislation meaning that the Industrial Relations Commission of NSW is unable to award pay rises for public sector employees which are not consistent with Government policy, and
- ii. the Government's consideration of a proposal within the NSW Commission of Audit Interim Report on Public Sector Management to remove staffing arrangements clauses such as nurse to patient ratios from industrial awards.

With regards to paragraph (i), in our view it is hypocritical for a Government to claim that cuts to workers compensation benefits will encourage injured workers to return

to work, whilst simultaneously implementing policies designed to prevent or restrict wage rises. If the New South Wales Government genuinely wishes to encourage injured workers to return to work, it would be advocating and facilitating fair wage rises for New South Wales workers generally.

With regards to paragraph (ii), in our view the New South Wales Government should carefully consider the fact that the removal of nurse to patient ratios from the *Public Health System Nurses' and Midwives' (State) Award* will cause the workloads of nurses, midwives and nursing assistants to increase dramatically. This will then inevitably result in more workplace injuries and greater stress on the workers compensation system.

We thank the Committee for the opportunity to make this submission.

—
Brett Holmes

General Secretary