

**Submission
No 295**

INQUIRY INTO NSW WORKERS COMPENSATION SCHEME

Organisation: The University of Sydney

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THE UNIVERSITY OF
SYDNEY

Dr Michael Spence
Vice-Chancellor and Principal

25 May 2012

Joint Select Committee on the NSW Workers Compensation Scheme
Parliament House
Macquarie Street
Sydney NSW 2000
via email: workerscompinquiry@parliament.nsw.gov.au

Dear Mr Borsak

NSW Workers Compensation Scheme Inquiry

The University of Sydney is pleased to provide the attached submission in response to the Committee's request for input to its review of the NSW Workers Compensation Scheme.

As a major employer we take our workers' compensation and safety duty of care obligations very seriously. The University is a member of the Retro-Paid Loss Scheme (RPLS), a group of some 43 select employers identified by WorkCover as having particular expertise in workers compensation and injury management. By being part of the RPLS, and as an employer of some 10,000 staff with a pay-roll in excess of \$800 million annually we continue to contribute to the Workers Compensation Scheme in a positive sense, while also benefitting from our strong claims management and return to work practices. The University's risk profile is extremely wide and comparable to any large and diverse private company.

Operating in a highly competitive and increasingly global environment for talent, the University strives to be an employer of choice through a range of strategies. Ensuring that we offer a safe and healthy work and study environment for our staff and students is a key element of our overall strategy and philosophy. To this end, we have specialised Occupational Health & Safety and Injury Management & Workers Compensation units.

The University agrees that the current Workers Compensation Scheme deficit of \$4 billion is threatening its sustainability, but that it is not a viable option to simply increase employer premiums to cover this shortfall. Additionally we agree that it is neither viable nor ethical to simply seek ways of cutting the entitlements of those workers who do sustain an injury in the course of their employment. We therefore urge the Committee to think of the types of integrated structural reforms needed to ensure that NSW retains a sustainable, strong and fair system of workers' compensation.

If the Committee requires any further information from the University in relation to matters raised in our submission, please direct inquiries to Ms Julia Cohen, Manager, Injury Management & Workers Compensation Group, Human Resources, julia.cohen@sydney.edu.au,

Yours sincerely

Professor Stephen Garton
Acting Vice-Chancellor



THE UNIVERSITY OF SYDNEY, SUBMISSION TO NSW PARLIAMENT'S JOINT SELECT COMMITTEE INQUIRY INTO THE NSW WORKERS' COMPENSATION SCHEME, MAY 2012

Executive summary

The University of Sydney welcomes the opportunity to make a submission to the Committee's Inquiry into the matters raised in the recent Parliamentary NSW Workers Compensation Scheme Issues Paper ('**Issues Paper**').¹ The University supports the purpose of the Issues Paper – to deliver a Workers Compensation system in NSW that provides appropriate support for workers who sustain significant injuries in the course of their employment, whilst keeping the cost of the scheme affordable for employers.

The University believes that any reforms to the current scheme should seek to create a system that more efficiently and effectively supports injured workers to obtain treatment and return to the workplace. We also believe that any changes to Workers Compensation legislation and liability for when injuries occur should be better aligned with an organisation's Work Health & Safety (WHS) legislative responsibilities.

We agree that there is a resounding need for reforms to the NSW Workers Compensation Scheme which would deliver:

- early intervention for injuries;
- less paperwork and less complex processes - especially at either end of a claim;
- transparency of information amongst parties involved in a workers compensation claim;
- affordable premium rates for employers of all sizes;
- effective injury management for workers;
- less waste of money and time spent on services and treatments that do little to assist workers to recover and return to work;
- positive incentives to encourage injured workers to recover and return to work as soon as possible; and
- Reductions in the number and intensity of disputes.

In our submission we have proposed a variety of reforms, which we believe, if adopted, would contribute to addressing many of the significant challenges that the NSW Workers Compensation Scheme is facing. Key proposals include:

- Accreditation of technically skilled employers to enable them to take a greater role in the administration of workers compensation within their workplaces;
- Consideration of a "co-pay" system to motivate injured workers and doctors to ensure that treatment and return to work outcomes are reached within evidence based recovery timeframes;
- Review of liability for injuries incurred during the journey to and from the workplace; and
- Medical costs containment.

In addition to these key recommendations, we have provided our views about the following issues:

- Review of timing of step downs
- Review of step downs
- GP accreditation to act as Nominated Treating Doctor (NTD).

While in the time available we have not been able to provide data or other evidence to support many of our arguments and recommendations, we would be happy to assist the Committee by providing further information as required.

¹ WorkCover Authority, NSW Workers Compensation Scheme Issues Paper, <http://www.workcover.nsw.gov.au/aboutus/newsroom/Pages/WorkersCompensationIssuesPaper.aspx>



The University employs many academic and professional staff with significant expertise relevant to the Inquiry's terms of reference. We would be keen to seek to mobilise and coordinate this expertise to provide deeper analysis of issues of interest to the Committee.

1. Journey claims

When our employees travel to and from work, they are exposed to risks that cannot be controlled by the University.

Under the current scheme, however, if an employee is injured during the journey to or from work, he or she is able to make a claim for workers compensation under the current scheme. Whilst such claims do not impact premium, they do impact the cost of the scheme. Here we note that no other states or territories cover such claims under their workers' compensation schemes. We believe that consideration should be given to bringing the treatment of such claims into alignment with the arrangements in place in other jurisdictions. Since 1999, 15 per cent of all claims for workplace injury at the University have been journey or recess claims. The University recognises that treatment and compensation costs for these injuries would be at least in part transferred to other sources of insurance or cover, for example Private Health Insurers, Public Liability insurances, CTP and Medicare. Nevertheless, we believe that there would be merit in the Committee considering whether journey costs should continue to be covered by the Workers' Compensation Scheme.

2. Medical liabilities

The University recognises that medical liabilities have increased to levels not seen before. Outstanding liabilities of >\$3b for medical costs alone are alarming. Looking at the outstanding liabilities on claims to Dec 31 2011, medical liabilities amounted to 56 per cent of outstanding wages liabilities.

Like many other large employers in NSW and others who are in regular contact with the NSW Workers Compensation Scheme, the University has long recognised that it suffers from significant costs leakage arising from the high and ever growing medical costs associated with claims. Areas of leakage include:

- Frequent weekly visits to doctors with little evidence that upgrades in work capacity are achieved, or that treatment goals are being reviewed or changed.
- Frequent unnecessary referrals to specialists for seemingly insignificant injuries, often in order to obtain reports which only confirm current circumstances and add no value to the return to work outcome.
- Referrals for scans, MRIs in particular are frequent and costly, often revealing additional physical problems that are unrelated to the workplace injury, but which nonetheless become part of the claim.
- Claims for ongoing treatments that often go well beyond the point of returning the worker to their pre-injury capacity. In some cases the Nominated Treating Doctor (NTD) often certifies that the injured worker is fit for suitable duties with high restrictions for long periods, even though the restricted duties lie functionally within the pre-injury duties.

The University believes that there are multiple factors that have contributed to the increases in medical costs that the scheme has experienced over the last decade or more. We support the concept of work capacity testing, however we have grave concerns about how work capacity testing will be dealt with effectively through insurers, and in collaboration with NTDs.

The University is concerned that legislated work capacity testing will increase the administrative burden for workers, agents and employers. Unless the work capacity testing framework has the legislative strength to influence NTD certification practices, we fear it will be ineffectual.

We therefore recommend that:

2.1 GPs who wish to be an NTD be required to attain WorkCover accreditation



- Any GPs who wish to work within the workers compensation scheme should be required to obtain accreditation from WorkCover, and then to participate in ongoing education about the workers' compensation system, their responsibilities as an NTD (as opposed to family physician), and the impact of workers' compensation claims on the workplace and their patient's ongoing employment circumstances.
- Any certificate issued by a non-accredited NTD would ultimately be considered as invalid.
- There is a precedent in Australia for this (e.g.: Tasmania).

2.2 Consideration be given to incorporating a 'co-pay' system to motivate injured workers back into the workplace

- As in the health insurance system, where the insurance company pays only part of the cost of a treatment and the patient pays a "gap", we see value in consideration being given to establishing a similar system for workers' compensation in NSW.
- We recognise that there is a basic right under the Workers Compensation Scheme for an injured worker to receive treatment and return to work assistance, without incurring financial disadvantage. We believe that employers have similar rights in that they should not to be financially disadvantaged by the extended and unreasonable periods of absence due to workers' compensation claims. We define unreasonable as "being significantly outside of normal recovery timeframes". For example – a worker who sustains a knee injury, undergoes arthroscopic repair and at 12 months post date of injury is still only working at 50 per cent of previous capacity in a pre-injury role that is 100 per cent desk-based, would be, in our view, unreasonable. Under normal recovery timeframes such a worker should have been fit for full pre-injury duties at the desk again within 6-12 weeks.
- Provide incentive through the introduction of a co-pay system so that workers who return to the workplace within specified 'reasonable' timeframes for an injury of their type (e.g.: in accordance with statistically and medically determined recovery timeframes) have their out-of-pocket expenses reimbursed in full.
- We suggest that reasonable recovery timeframes can be established by WorkCover actuarial studies of recovery times for all injury types.
- Provide a sliding scale incentive so that for example: at 26 weeks the reimbursement of out-of-pocket expenses is 50 per cent etc.
- We also suggest that any co-pay system would need to be adjusted in the case of serious injury. Where there is a catastrophic injury, multiple injuries, or an injury that is likely to result in long absences from work then there would need to be an allowance for the co-pay rule to be removed in that case.
- Clearly, the detail of how such assessments would be made would need to be worked through, but we do believe that a treating specialist in that injury or an Independent Medical Consultant (IMC) should be involved.

3. The WorkCover Medical Certificate (WCMC)

We believe that the existing WCMC is ineffective and should be changed from its current form. For example, we have seen instances where the doctor signs a certificate and then hands it to the injured worker and asks the patient to complete the rest of the form including the sections dealing with work restrictions and work hours. In our view this is entirely inappropriate. –

Our recommendations for the WCMC are:

- Replace legislated current WCMCs, which are effectively "incapacity" certificates with "fitness certificates" – i.e.: certificates designed to outline clearly and functionally what an injured workers is capable of doing in the workplace at that point in time.
- Remove "unfit" from the certificate altogether.
- Require the NTD to write functional restrictions on the certificate.
- Require the NTD to provide specific functional reasoning if the certificate states that the injured worker can perform 0 duties for 0 days per week.



- Require the NTD to predict the date that the worker will be able to return to the workplace on their full duties.

4. Work Capacity Assessments

We agree with the concept of requiring workers to undergo work capacity testing. We believe that this should occur at week 13 of incapacity (incapacity being defined as any incapacity – partial or total).

We make a further recommendation that NTDs be **compelled** by legislation to certify the worker's fitness exactly in line with the work capacity assessment. It should not be acceptable for an NTD to certify a worker otherwise.

Unless these basic principles are enforced, then work capacity assessments will simply add to the compliance burden, and add more costs to each claim with no clear purpose or outcome.

In the current workers' compensation environment, all too often we see that NTDs are provided with advice from other medical practitioners, some of whom understand the workplace better than the treating doctor. That advice is not always reflected on the certificate, and the worker is signed off as unfit for duties despite the existence of evidence that that he or she is functionally fit to return to work. This situation causes disharmony in the workplace and can be an indication of a workplace relationship that is breaking down.

We recommend that the work capacity recommendations that come from any work capacity assessments must have legislative power to become the capacity for work as recorded on the WCMC. Or in other words, an NTD is to be compelled to complete the WCMC in agreement with the work capacity assessment.

Having this consistency between work capacity test results and WCMC's will assist employers to create meaningful 'Suitable Duties Plans for injured workers, enabling them to return safely to their workplace

4.1 **Operational instruction 1.6**

Notwithstanding current operational guidelines (ref: Op Instruction 1.6), insurers invariably refuse to share medical information with employers on privacy grounds. We believe that it is essential that any work capacity test reports are made exempt from any of the privacy issues which frustrate employers who try to access work-based medical information in accordance with Operational Instruction 1.6. Current insurer practice is to limit employer's access to medical reports, with the result they cannot be used for their intended purpose – assisting with the process of returning injured employees to work.

We sometimes hear from NTDs that they are afraid to provide certification for workers to return to work too early; as they fear that they may be sued or become liable for an aggravation. A work capacity assessment which legislatively aligns with the WCMC would protect doctors dealing with such situations.

We recommend the following reforms to Work Capacity Assessments:

4.2 **Compel NTD to attend the workplace**

Once a NTD has certified that an injured worker is unfit to work full duties (i.e.: has any restrictions,) more than 10 times or for more than 13 weeks, then the NTD should be compelled to visit the workplace and view the duties. Where it is not reasonable for an NTD to attend the workplace, he or she should be required to view video footage of someone in the workplace performing the duties proposed for the injured worker. Advances in communications technology mean that it should be easy for NTDs to view such footage remotely.

We often find that NTDs have little understanding of the real work requirements in the workplace, and therefore they are fully reliant on the worker's descriptions of their duties. This can sometimes be a problem in instances where injured workers overstate the physical demands of their duties when attending the NTD for certification, especially after the 13 and 26 week points of



a claim. By this time workers have often grown accustomed to being 'sick' and existing within the workers compensation 'system'.

The University frequently see WCMCs that set unrealistic restrictions to be applied in the workplace, and believe that the relevance of these certificates would be enhanced significantly through NTDs having a better appreciation of the work requirements relevant to their patients.

We find that NTDs who have viewed workers performing their duties invariably produce more meaningful certificates, which in turn allow for better Suitable Duties Plans to be developed and implemented.

4.3 Progress Pre-Injury Duty PID certification

It has become common practice for NTDs to certify injured workers as "fit for pre-injury duties – progress" (i.e.: not final). They tell us that they do this because they believe that their patients will be denied **any** further medical treatment from the date of a final pre-injury duties (PID) certificate. This is not the case.

Progress PID certification can at times extend to 52 weeks and beyond. In our view, this results in significant over servicing for injuries that have either been resolved or, more importantly for the workers' compensation system, no longer prevent the worker from performing their normal duties. Therefore, only one Progress PID should be allowed.

PID certification should not exclude an injured worker from being able to finalise treatment within a reasonable timeframe. This certification should be capable of ensuring that the employee's return to work is durable and that safety is ensured in the workplace for the return to work.

5. Outcome based payment option for GPs - motivate GPs

We recognise that the primary concern of NTDs must always be ensuring the wellbeing of their patients. Financial incentives are, however, used routinely throughout the health and social security systems to encourage certain behaviours and achieve broader policy objectives. Consistent with the co-pay suggestion for injured workers outlined above, we believe that the introduction of an outcomes based incentive payments system for NTDs, has the potential to motivate them further to focus their efforts on returning the injured worker to the workplace within reasonable timeframes for each injury type. Therefore we suggest that an outcome based payment option be available to NTDs who work within the Workers' Compensation system. This would mean that for every injured worker returned within the recovery timeframes (based on MDA statistical data) the NTD would receive a "Return to Work" bonus payment.

6. Capped access to medical treatment and wages

The Issues Paper indicates that some jurisdictions now limit medical treatment access and workers' compensation entitlements in accordance with the level of assessed whole person impairment.

We agree that this approach should be considered further.

7. Weekly benefits

The University does not agree that NSW Workers' Compensation system is any more complex than the schemes in place in other states. We do agree that calculation of wages in all jurisdictions is complex. Payroll functions within HR are notoriously complex and sensitive. Any change that would simplify and streamline calculation of wages in the Workers Compensation system would be welcome.

One of the greatest weaknesses in the NSW Workers' Compensation system is the lack of appropriate legislative tools to ensure that injured workers are exited from the scheme once their claim becomes 'long term', or a tail claim.

A system such as that in place Tasmania, where wage support payments are capped to match that of assessed WPI, appears to be most sensible.

A system similar to that in WA is supported where pre-injury earnings are taken directly from payroll records and then drop downs are in two simple stages.



However we issue caution in consideration of these issues, as there is significant potential for dispute over the level of assessed WPI and the potential for “doctor shopping” from legal representatives and “insurance doctors” to increase. This in turn would be likely to create a culture of dispute, disharmony and resentment in the workplace, where one injured worker will have seemingly different entitlements to another. Employers would require significant levels of education to administer this type of system.

7.1 Total Incapacity

The University agree that in line with research which shows that once an injured worker has been away from the workplace for 12 weeks or more the chances of returning them to the workplace have diminished to less than 50 per cent, a step down at 26 weeks should be changed to 13 weeks. This would bring NSW in line with all other states in Australia.

The step down however should be less harsh than the current drop to the statutory rate, which at the current time is wage equivalent to less than the acceptable minimum wage, forcing some individuals to survive below the poverty line.

It would seem sensible and fair to drop to 95 per cent as in WA or 80 per cent in line with Victorian legislation.

7.2 Partial Incapacity

We further recommend that consideration be given to introducing a system similar to that in place in Tasmania, where the level of wage support reflects the amount of suitable duties being performed.

Again, employers will require significant levels of education to administer this type of system.

In NSW at present, after 26 weeks, the top up amount is limited by the statutory rate. The University consider that this works quite well as an incentive for injured workers to continue upgrading to limit the wage reduction once on suitable duties. We recommend that the Section 40 top up amount have some cap applied so that a worker can only achieve his or her pre-injury rate of pay by working additional hours. .

The University notes that this part of the system does have the potential to discriminate against more severely injured workers. We therefore suggest that at the threshold of 30 per cent WPI the capped make up pay should not apply. Generally, a 20-30 per cent WPI indicates a severe disability resulting in high barriers to return to work. Such barriers may be beyond the control of injured workers who should not be dealt with unfairly as a result.

We believe that there is an argument that the statutory rate should still exist. The two conditions where it could still apply are:

- As part of Section 40 as per comment above.
- At the 130 week point and for workers who remain on benefits but have a less than 15 per cent WPI.

8. Claims for psychological injury and treatment – Section 11A

One of the most difficult claims areas under legislation is Section 11A: claims that are not compensable on the basis of reasonable action by employer.

The University believes that this is an area which requires review. Since the time of legislating S11A, claims for psychological injury have climbed in both frequency and cost. University data indicates that the high cost of claims for psychological injury is far out of proportion with their low frequency. WorkCover data would indicate that this pattern is scheme wide. It is now extremely difficult to conduct a truly independent investigation of a claim for psychological injury. With provisional liability, treatment itself can often solidify a claim for psychological injury, when in fact the claim was a response to reasonable action by the employer, (i.e.: performance management).

Clarity in the legislation is required regarding the interaction between S9 and S11A. For example, if a claim is made on the basis of bullying and harassment because a performance management process has been instigated, but in the process of investigation it is found that the worker has a pre-existing (undeclared) depression, then the basis of acceptance/denial of the claim becomes blurred immediately. A claim for psychological injury based on claimed harassment where



performance management has been taking place should not be confused due to the unearthing of a pre-existing condition. Such cases are too often the cause of confusion and mishandling, but once such a diagnosis is detected, then invariably the claim for psychological injury gets accepted under S9 when S11a should still have been applicable.

Legislative changes to minimise this confusion could include:

- Improved definition of 'reasonable action' by employer.
- Altered reporting requirements for psychological injury as opposed to physical injury. For example, require that the claimant states at the outset whether they believe that they have been psychologically harmed as a result of their normal duties, or as part of a performance management process.
- Greater legislative power given to reasonable excuse in the case of psychological injury when performance management has been carried out.

9. Employer Accreditation Scheme

Under current legislation, all employers are considered and treated as equal. However this is far from reality. Some employers have little or no skills in the workers' compensation system, some have highly developed technical expertise in workers compensation and injury management. Some employers are very large. Some are very small. Many are somewhere in between these extremes.

The University believes that consideration should be given to establishing an employer accreditation system as a core part of a reformed scheme.

The type of accreditation that we refer to is well beyond that of the Return To Work (RTW) Coordinator.

An accredited employer would be allowed to:

- Access all medical information relevant to a case.
- Access all relevant medico-legal information.
- Access all legal advice.
- Access all investigative reports and recommendations.
- Be a party required to sign off on liability decisions made with insurer.
- Determine conditions of an Injury Management Plan.
- Issue / Receive full copies of declinature (Section 74) letters.

For an employer to be able to access this type of accreditation they would need to be able to demonstrate substantial expertise about workers compensation matters, as well as an overall ethical approach to the management of these matters, including privacy issues. Employers within the NSW Retro Paid Loss RPL system for example would be typical of the type of employer who may elect to take up accreditation.

Accreditation would need to be, for example, within the AQF framework and be delivered by WorkCover or an RTO (or a current equivalent).

Accreditation in this type of system would not mean that the employer becomes an effective "self-insurer". Rather it would mean that an accredited employer would be permitted to take a greater responsibility and role in the management of the insurance side of their claims, as well as retaining all current injury management and WH&S responsibilities. This type of employer would still be required to have an insurer (agent) and the normal rules of subrogation should still apply. The intention would be to achieve a more seamless ability for the insurer (agent) to share information, work together and achieve return to work or claim closure outcomes. Consideration could also be given to a public recognition scheme to acknowledge those employers who demonstrate outstanding management of their workers compensations cases.

Providing the possibility of accreditation for certain employers may also assist in keeping well performing employers from exiting the scheme into self-insurance.



10. Whole Person Impairment

There is currently a one per cent threshold for a WPI payment. Sometimes the cost of assessing the one per cent WPI is greater than the payment itself.

WPI payments (or the idea that one is available) can work as a perverse incentive to return to work. Workers mistakenly believe that by staying away from the workplace, their assessed WPI will be escalated. In all except psychological injury claims this should not be the case.

Additionally, the issue of maximum medical improvement (MMI) is undefined and untested.

The University believes that an injured worker should only be able to access WPI payments under the following circumstances:

- Assessed WPI reaches threshold of 5 per cent (or greater).
- Injured worker has returned to the workplace in either pre-injury capacity or a permanently modified role.
- Injured worker has been redeployed to an alternative employer
- There are no ongoing wages.
- There is an agreement for finality to treatment (e.g.: worker is discharged from physiotherapy).
- Where there is a WPI of >25 per cent and a full return to work is not achievable then WPI assessment and payment should proceed.

Maximum Medical Improvement requires further definition under legislation as per some of the conditions for WPI payment above.

Access to “top up” WPI payments is an area of concern for employers, particularly when the injured worker has either moved to another place of employment or has retired from the workforce altogether. Under each of those scenarios, the original employer has had nil opportunity to control the safety risk to the injured worker, and as such should not be considered liable for deterioration in the workers medical (WPI) status.

There are some exceptions to this which could be dealt with under the legislation. For example:

- Loss of hearing claims –deterioration does occur even without further noise exposure and therefore should be excluded.
- Any other injuries which will deteriorate without further exposure.
- When the injured worker has continued working at the original employer and modifications to the original role have not been made thus resulting in deterioration of an injury. We note however that recurrence claims should be used to deal with such situations.