

**REVIEW OF THE EXERCISE OF THE FUNCTIONS OF THE  
WORKCOVER AUTHORITY**

**Organisation:** Public Service Association of NSW

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## **Submission to the Legislative Council Standing Committee on Law and Justice**

### **Review of the Exercise of the Functions of the WorkCover Authority**

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Level 7, 160 Clarence Street Sydney NSW 2000  
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## Introduction

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The Public Service Association of New South Wales (PSA) supports the Unions NSW submission to this Inquiry and welcomes the opportunity to make a submission on behalf of its members, public sector workers in NSW.

We hope that the information provided to the Committee will enable Parliament to make recommendations that result in greater safety provisions and protections for NSW workers and greater support for injured workers in NSW.

It is envisaged this submission will highlight areas for improvement, to work towards achieving a proactive, efficient and compliance focused WorkCover Authority, compliant in both the work health and safety and workers' compensation streams.

Reference is made to the terms of reference for this Inquiry, to supervise the exercise of the functions of WorkCover Authority under the Workplace Injury Management and Workers Compensation Act 1998.

## To monitor and review the exercise by the authorities of their functions

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### **Issue: What benefits are there to the WorkCover authority having multiple functions?**

The WorkCover Authority currently regulates workplace health and safety through the OHS Division and Workers Compensation when health and safety fails the worker or others in the workplace through the Workers Compensation Division. These areas encompass a wide variety of activities from provision of health and safety information to compliance, through to on the spot penalties or prosecutions. Workers compensation also includes the provision of information, compliance with workers compensation legislation, managing worker's compensation insurance, the TMF, insurer agents and self-insurers.

PSA considers that the multiple functions are carried out by the one body does not of itself contribute to the cultural problems uncovered through the Parliamentary Inquiry into Alleged Bullying in WorkCover. We are of the view that it is critical for WHS and workers compensation to remain under the same authority with closer and more rigorous interactions. There are good synergies to be realised by having the functions located in the one organisation.

For example, WorkCover inspectors can visit a workplace and simultaneously address compliance issues in relation to workplace safety and in relation to workers compensation.

### **Recommendations:**

1. WHS and workers compensation to remain under the same authority.
2. Develop closer and more rigorous interactions between the two areas to eradicate the silo effect that can occur with separate divisions.

3. Any workers compensation systems savings are invested in health and safety campaigns and provision of benefits for workers rather than giving them to employers as reduced workers compensation premiums.

**Issue: Is WorkCover bias in its investigations of other government agencies?**

WorkCover is the regulatory authority under the WHS, Workers Compensation and Injury Management legislation, and covers the Crown and private industry. It is crucial that the relationship between WorkCover (as a government body) and other government agencies is perceived as being free of bias in regard to outcomes for the Crown as opposed to industry outcomes.

There is currently a perception of bias where WorkCover has failed to apply the same rigor in WHS investigations and compliance when other government agencies are involved. Examples of these instances are illustrated when relevant public sector unions have used their union right to prosecute against those agencies when WorkCover failed to take actions. PSA has conducted seven successful prosecutions. For example, the PSA specifically asked WorkCover to investigate the death of Wayne Smith from Department of Corrective Services (DCS), when WorkCover failed to take action PSA successfully prosecuted DCS, which pleaded guilty.

Another critical area is the right of WorkCover employees to be able to access the same level of protection in their workplace afforded to all other workers in NSW under WorkCover regulatory functions. WorkCover employees currently have their health and safety rights protected through their union, the PSA, being able to utilise powers under the *Work Health and Safety Act 2011*.

**Recommendations:**

4. That transparent protocols are developed to ensure consistency in investigation, compliance and prosecution, applicable across public and private sectors.
5. That WorkCover staff have access to an independent body with regard to work health and safety issues in their workplace.
6. That this body reviews the existing organisational culture and is responsible for ongoing monitoring of the organisation.
7. That unions maintain their current rights and role in ensuring health and safety for their members.

## To monitor and review the exercise by any advisory committees, established under section 10 of the Safety, Return to Work and Support Board Act 2012, of their functions

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Unlike the Dust Diseases Authority, WorkCover has no dedicated Board. It is currently overseen by the Safety, Return to Work and Support Board.

Tripartite consultation with WorkCover initiated forums (Industry Reference Groups) of unions and employers have recently been disbanded. These IRGs had been very productive in developing industry specific programs with union and employer support. For example, an OHS pocket guide on “Working at External Locations” for the Health and Community Services sector, developed by the WorkCover NSW Health and Community Services IRG.

Prior to the current CEO there were regular meetings with the WorkCover CEO, the heads of the OHS and Workers Compensation divisions and representatives from Unions NSW and affiliates which enabled the unions to raise health and safety issues affecting workers under their coverage where WorkCover was not dealing effectively with these issues. As a result, these issues could be addressed in a timely manner without need of disputation, to the benefit of all workplaces.

### **Recommendations:**

8. Development of a WorkCover Board with proper tripartite representation.
9. Re-instatement of tripartite consultative forums on industry profiles.
10. Re-instatement of regular meetings between WorkCover CEO, the heads of the OHS & Workers Compensation divisions and Union representatives.

To report to the House, with such comments as it thinks fit, on any matter appertaining to the authorities, and the advisory committees, or connected with the exercise of their functions to which, in the opinion of the committee, the attention of the House should be directed

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### **Issue: How can WorkCover Inspectors be more effectively utilised and what are the barriers?**

WorkCover Inspectors have wide-ranging responsibilities, including provision of health and safety information, workplace inspections and compliance. With recent changes in legislation, inspectors have been allocated additional responsibilities including dealing with Return to Work plan disputes, WHS dispute resolution, oversight of Health and Safety Representatives, Provisional Improvement Notices (PINs) and Right of Entry disputes.

As no additional inspectors have been appointed, the current inspectors are experiencing work overload with competing priorities and are struggling to fulfil the full range of duties assigned to them.

PSA has been raising this particular issue for some time about utilising the inspectors more effectively in the area of workers compensation compliance.

The barrier to simultaneously addressing compliance issues in relation to workplace safety and in relation to workers compensation may be related to the tight time frames provided to inspectors before they must close a case and unpreparedness for senior management in the two Divisions to work together. Inspectors are also not encouraged to do any work outside of the safety realm or the initial purpose of the workplace visit.

The current focus appears to be less on compliance measures and more on provision of information.

There may be benefit in increasing the individual powers of inspectors; however it is reasonable for the judgement of any one officer to be able to be questioned. The biggest concerns arise when the inspector recommends taking the matter further and this decision is overruled by someone who has not been to the worksite to see the issues first hand; although there is an acknowledgement that with limited resources there may be the need to focus efforts strategically rather than pursuing each individual matter.

PSA has raised issue on numerous occasions about managers directing inspectors to withdraw notices, or removing the inspector to replace with another when a complaint is made by a Person Conducting a Business or Undertaking (PCBU). There are issues about managers having interactions with PCBUs and then instructing the inspector to close the case. The interactions of managers do not appear to be recorded in the same transparent fashion that the inspectors' actions are recorded.

**Recommendations:**

11. Engage additional WorkCover Inspectors to ensure a higher rate of compliance with WHS and workers compensation.
12. Ensure that numbers of inspectors are maintained and that vacancies are advertised and filled promptly.
13. Strengthen the powers of the inspectors particularly in regards to workers compensation compliance.
14. Improve the WorkCover structure to ensure better liaison between the Divisions to enable more efficient workplace inspections and interventions.
15. That the powers of the inspector in WHS compliance and workers compensation are fully and efficiently utilised during workplace visits removing the need for duplicated visits.
16. Involve inspectors in decision-making subsequent to making their recommendations regarding workplace involvement with accurate record-keeping to ensure transparency of decision-making processes.
17. Separate the areas of responsibility for information provision and compliance and allocate inspectors to each area on a rotational basis.

### **Issue: How can management assist in improving WorkCover?**

With the current Parliamentary Inquiry into Allegations of Bullying in WorkCover NSW, the emerging picture is that the culture in WorkCover is punitive, with a tendency to discipline after the event rather than foster a positive culture that focuses on prevention. To change this requires a cultural shift by the leadership and WorkCover management.

The WorkCover leadership must take steps to develop a culture that values good people management and makes a commitment to manager development. This will be vital in contributing to a respectful and productive workforce.

#### **Recommendations:**

18. Enhance management skills through education and training in building a positive workplace culture.
19. Manage complaints of bullying under the WHS Act, that is, respond to reports of bullying with a health and safety investigation with appropriate provisions contained within the WHS Act 2011, rather than necessitating a disciplinary investigation into alleged misconduct.

**To examine trends and changes in compensation governed by the authorities, and report to the House any changes that the committee thinks desirable to the functions and procedures of the authorities, or advisory committees**

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### **Issues: How have the changes in Workers' Compensation laws affected workers?**

PSA assists members with a large range of issues around workers' compensation, injury management and return to work plans.

The retrospective changes to workers' compensation legislation in 2012 have had a profoundly negative impact on injured workers in NSW.

#### **(i) Provisional Liability**

PSA has been acting on behalf of members who have not received provisional liability payments whilst their claim was being assessed, without reasonable excuse. In these cases WorkCover has been notified by claimants that the insurer has not responded to their claim within the timeframe set by the *Workplace Injury Management and Workers Compensation Act 1998* (WIMWC). Section 267 outlines the insurer's responsibility to commence within seven days after notification unless reasonable excuse is declared as the reason for not commencing weekly payments.

When this has been reported to Workcover, the insurer's reaction has been to immediately send out a section 74 decline notice.

The period in which provisional liability payments should have commenced was not reimbursed, leaving the injured workers claiming sick leave or in financial difficulties, as they then commence the process of review or seek legal assistance through the WIRO.

WorkCover has not been able to follow through with this and there appears to be no application of the penalty (maximum 50 penalty units) for this offence as described in the *WIMWC Act*.

**Recommendations:**

20. That WorkCover holds the insurers and insurer's agents accountable for failure to comply with the legislative requirements for processing provisional liability.
21. That injured workers are reimbursed for provisional liability payments delayed due to failures in legislative compliance and WorkCover inaction.

**(ii) 30% Impairment**

Under the 2012 retrospective changes a seriously injured worker is defined as having 30% or more impairment. A seriously injured worker is exempt from:

- 5 year limit on weekly benefits
- 52 week limit on medical and related expenses
- 2 yearly Work Capacity Assessments – unless the worker requests it

A number of seriously injured workers who previously had access to ongoing medical and related expenses have now been re-assessed as under the 30% impairment and as a consequence have lost their medical and weekly benefits entitlements.

For example, in a recent high profile case a seriously injured worker was re-assessed as under 30% impairment and as a result, lost entitlements for provision of a prosthetic arm and leg. The widespread publicity resulted in reinstatement of the previous entitlements.

This appalling treatment of injured workers can result in secondary injury, namely psychological injury, due to the emotional stress and financial burdens resulting from dealing with the flawed system.

**Recommendations:**

22. That clear guidelines are developed on the criteria for assessing the 30% impairment.
23. Assessments are conducted in a timely manner to avoid exacerbation or secondary injury.

### **(iii) Approval of Medical Treatment and Expenses**

Under the 2012 changes all medical treatment and expenses now require pre-approval from the insurer, with the exception of the first 48 hours after injury.

The systematic effect of delaying treatment can result in a slower recovery (or result in more permanent damages), an extension of the rehabilitation time and a lengthening of the time off work, all adding additional stress to the injured worker.

In some cases the delays to medical expense approvals are being extended until the worker is outside the time limit for the provision of medical expenses, so the worker is left to fund their own medical expenses, which can include substantial operations such as shoulder or knee reconstructions.

#### **Recommendation:**

24. That the injury management plan, drawn up by health experts and medical professionals should be sufficient authority for continued and uninterrupted treatment.
25. That all requests for medical treatment and expenses are dealt with within seven days.
26. Where a decision cannot be made within that timeframe that the injured worker has continued access to medical expenses.

### **(iv) Complications with Workers' Compensation Weekly Payments Systems**

Under the 2012 changes to weekly benefit calculations for an injured worker, a complex formula is used for the first 13 weeks which then changes for weeks 14 to 130 weeks.

A number of public sector pay offices are having difficulty understanding and administering the formulas for calculating the weekly compensation payment. When this is combined with an inflexible computerised pay system that has not been adapted to calculate and administer the changes, the results are another source of distress for the injured worker. The failure to make the necessary pay adjustments and the delays in dealing with the flawed system results in overpayment to the employee. The employers are then asking employees to pay back what can amount to a substantial overpayment, resulting in additional financial and psychological stress for the injured worker.

Part of the problem is what employers are using as the average weekly earnings (AWE) or pre-injury AWE in these complex calculations. WorkCover information has introduced a new term Pre-Injury Average Weekly Earnings (PIAWE) to replace the definition outlined in the legislation which has added confusion.

The complex formula results in a financial disadvantage and therefore disincentive for injured workers if they are only able to return to work for two days rather than a full week after week 13. Financially they are better off not returning to work unless it is for more than 15 hours so this is not a way to reduce the length of a workers' compensation case.

For example, a worker with an pre-injury average weekly earnings of \$1000 a week

	<b>Weeks 1- 13</b>	<b>Weeks 14-130</b>
<b>If no work capacity</b>	95% AWE = \$950	80% AWE = <b>\$800</b>
<b>If less than 15 hrs RTW (eg 2 days)</b>	95% AWE – E (\$950-\$400) Pay = \$550 + \$400 = \$950	80% AWE – E (\$800-\$400) Pay = \$400 + \$400 = <b>\$800</b>
<b>If more than 15 hrs RTW (eg. 3 days)</b>	95% AWE – E (\$950-\$600) Pay = \$350 + \$600 = \$950	95% AWE – E (\$950 -\$600) Pay = \$3500+ \$600 = <b>\$950</b>

**Recommendation:**

27. That any overpayments generated by poor administration and/or inflexible computerised pay system should be absorbed by the department at fault and not the injured worker.
28. That the formula be altered to ensure the injured worker who has work capacity less than 15 hours receives more income than if no work capacity.

**(v) Return to Work**

The development of a good Return to Work Plan (RTW) will not only benefit the worker by enabling a safe and durable return to the workplace but will also reduce the period of compensation payments.

This process can be delayed by factors previously mentioned such as need for pre-approval of medical treatments and expenses.

PSA has found in a number of cases the development of sound RTW plans has been hindered by the employers' unwillingness to provide suitable employment by facilitating a RTW in an alternative position.

WorkCover inspectors have been given the responsibility for dealing with RTW disputes though this seems to be poorly acknowledged in the general community.

**Recommendations:**

29. That WorkCover actively intervenes when notified of a dispute over a RTW plan.

## Summary of Recommendations

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### Recommendations:

1. WHS and workers compensation to remain under the same authority.
2. Develop closer and more rigorous interactions between the two areas to eradicate the silo effect that can occur with separate divisions.
3. Any workers compensation systems savings are invested in health and safety campaigns and provision of benefits for workers rather than giving them to employers as reduced workers compensation premiums.
4. That transparent protocols are developed to ensure consistency in investigation, compliance and prosecution, applicable across public and private sectors.
5. That WorkCover staff have access to an independent body with regard to work health and safety issues in their workplace.
6. That this body reviews the existing organisational culture and is responsible for ongoing monitoring of the organisation.
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