

**INQUIRY INTO WORKERS COMPENSATION
AMENDMENT BILL 2021**

Organisation: NSW Nurses and Midwives' Association

Date Received: 16 December 2021

Submission to: Legislative Review Committee – Workers Compensation Amendment Bill 2021

DECEMBER 2021

Foreword

The New South Wales Nurses and Midwives' Association (NSWNMA) is the registered union for all nurses and midwives in New South Wales. The membership of the NSWNMA comprises all those who perform nursing and midwifery work. This includes: registered nurses; enrolled nurses and midwives at all levels including management and education, and assistants in nursing and midwifery.

The NSWNMA has approximately 72,000 members and is affiliated to Unions NSW and the Australian Council of Trade Unions (ACTU). Eligible members of the NSWNMA are also deemed to be members of the New South Wales Branch of the Australian Nursing and Midwifery Federation.

NSWNMA strives to be innovative in our advocacy to promote a world class, well-funded, integrated health system by being a professional advocate for the health system and our members. We are committed to improving standards of patient care and the quality of services of all health and aged care services whilst protecting and advancing the interests of nurses and midwives and their professions.

We welcome the opportunity to provide a submission to this Consultation.

This response is authorised by the elected officers of the New South Wales Nurses and Midwives' Association

CONTACT DETAILS

NSW Nurses and Midwives' Association

50 O'Dea Avenue
Waterloo, NSW 2017

(02) 8595 1234 (METRO)
1300 367 962 (RURAL)
gensec@nswnma.asn.au

Introduction

The NSW Nurses and Midwives Association (the Association) strongly opposes the introduction of the Workers Compensation Amendment Bill 2021 which would remove existing presumptions under the Workers Compensation Act which entitle a worker in a prescribed employment who contracts COVID-19 to access workers compensation.

Given the ongoing workplace exposures to COVID-19 it would be premature and potentially negligent for the NSW Government to vary section 19B at this stage, particularly considering the emergence of the new Omicron strain which experts agree is a variant of concern and is as yet an unknown quantity. Further, there is every possibility that other more virulent COVID19 mutations may develop in the near future.

The Association believes that where there is a reasonable risk of contracting COVID-19 at work, workers should not have to deal with dual problems of infection and complicated legal procedures to access benefits for occupational diseases. Therefore, it is entirely appropriate that NSW maintains laws with presumptive language—language that automatically protects workers in environments with an elevated risk of exposure to COVID-19. This should include nurses and midwives, residential care workers, other frontline workers and those required to continue to work outside their homes.

Whilst the focus of our submission will be on nurses and midwives (working in all settings, including but not limited to hospitals, residential care, community and corrections), it is important to note that the Association believes that excluding other frontline workers from access to 19B will have a negative impact on our members and the health system as a whole as it will lead to increased community transmission of the virus as a result of decreased testing and isolating by those unable to access leave.

Impacts of Covid-19 on Nurses & Midwives

Healthcare workers are a high-risk group when it comes to exposure to COVID-19. *NSW Health is currently responding to a number of COVID-19 outbreaks across NSW. Healthcare workers are at high risk of exposure to COVID-19.*¹

Nurses and Midwives play an essential role at the front line providing direct care for patients. In the context of caring for patients with COVID-19 and during provision of routine health services, they may be at risk of exposures to COVID-19 in their workplace. Furthermore, once infected, they may spread COVID-19 to patients, co-workers, and others in the community.

¹ NSW Health website, accessed 7/12/21 at [COVID-19 advice for health professionals - COVID-19 \(Coronavirus\) \(nsw.gov.au\)](https://www.nsw.gov.au/health/coronavirus)

*The COVID-19 pandemic is placing health workers in exceptionally demanding situations. In addition to a heavy workload, they are coping with the fear of contracting the disease and of spreading it to their family and friends. Furthermore, the overall atmosphere of anxiety among the general population is impacting health workers and their mental health.*² The last thing that the NSW Government should be doing at this time is increasing the psychological stress burden on healthcare workers by removing their right to access workers compensation should they contract COVID-19.

*Undoubtedly, the health and care sector is one of the most severely hit by the pandemic as those employed or contracted in it face multiple hazards that affect their physical, mental and social well-being. HCWs have been documented to have a higher risk of infection with SARS-CoV-2 than the general population*³. The World Health Organisation reports at least 115,000 healthcare workers have died from COVID-19 in the period Jan 2020 - May 2021⁴.

November 2021 saw the tragic death of Victorian nurse Gillian Dempsey. Jill was fully vaccinated and wearing appropriate PPE when she contracted COVID-19 as an emergency department nurse. Many other nurses are suffering the effects of long COVID. If healthcare workers contract COVID-19 they could be without income for many months and in the event of further fatalities, their families left without financial support.

Data on the total numbers of nurses and midwives who have been infected with COVID-19 in NSW since the start of the pandemic is not readily accessible, however we do know that in the most recent wave during the period 16 June 2021 and 20 November 2021 that there were 1045 healthcare workers in NSW infected with COVID-19. In many instances the source of infection was able to be identified as either work or community, however 426 (approximately 41%) have not been linked. This is a very large proportion of the health workforce who have contracted COVID-19 who would be denied access to workers compensation if this bill is passed. A further 325 aged care workers were infected during this period⁵.

Healthcare and residential care staff testing positive to COVID-19 are unable to continue working until fully recovered. The recovery period is at least 14 days and could be significantly longer. Given that their work is direct patient facing, these employees do not have the option to continue to work from home if they are asymptomatic or have only mild symptoms.

² ILO Sectoral Brief – Covid-19 and the Health Sector, May 2020, accessed 7/12/2021 at https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/briefingnote/wcms_741655.pdf

³ World Health Organisation, The Impact of Covid-19 on Health and Care workers, 2021, accessed 8/12/2021 at <https://apps.who.int/iris/bitstream/handle/10665/345300/WHO-HWF-WorkingPaper-2021.1-eng.pdf?sequence=1&isAllowed=y>

⁴ <https://www.who.int/news/item/20-10-2021-health-and-care-worker-deaths-during-covid-19>

⁵ [covid-19-surveillance-report-20211120.pdf \(nsw.gov.au\)](https://www.nsw.gov.au/covid-19-surveillance-report-20211120.pdf)

Unlike other businesses, in healthcare there is no requirement for patients to be vaccinated. Admissions to health facilities are generally not tested for COVID19 until after they have presented for treatment, thereby placing the staff at greater risk of exposure.

Additionally, a significant number of health care workers work in clinical settings where patients and/or visitors exhibit extreme behavioural problems often creating volatile and unpredictable situations that place the staff in an escalated risk of exposure.

Cost

The key rationale offered for the repeal of 19B is concern about potential increased cost to small business should workers compensation premiums increase because of a large increase in the number of claims. This has so far not been borne out. Additionally, this is an unreasonable justification as it shifts the financial burden associated with the pandemic onto individual workers.

Healthcare workers are at higher risk than others of contracting COVID-19 at work due to the nature of their work, so are the mostly likely to require access to workers compensation. Most healthcare workers do not work for small business, in fact the majority work for the NSW government, so discussions about the impact of potential increases to workers compensation premiums for small business are not relevant.

Healthcare workers have done an extraordinary job in looking after the community throughout the pandemic despite the direct risk to themselves and their families. They have done this under difficult circumstances, with many working extremely long hours, missing breaks, understaffed and without access to critical safety equipment. It is entirely reasonable for these workers to expect that they will be able to access paid leave by way of workers compensation, rather than to expect them to also carry the financial burden should they become infected and/or sick from COVID-19.

Vaccination

The legislation review committee report states that part of the rationale for the introduction of section 19B in 2020 as being that this was a time when little was known about the effects of vaccination and it appears to suggest that 19B is no longer required given the high rates of vaccination in NSW. High rates of vaccination may assist in reducing the numbers of workers compensation claims, (and therefore assist in addressing the government's concerns about increasing premiums and the effects on small business), however this is not a good reason to remove s19B. The following points must be considered:

1. The majority of healthcare workers who caught Covid-19 in the most recent outbreak were vaccinated. Even though there is a mandatory requirement for health care workers to be vaccinated they are still at risk of becoming infected with

the virus. Vaccination reduces the chances of catching the disease and reduces the severity of disease for those who become infected, however it does not entirely prevent infection, serious disease or death, (as seen in the case of Jill Dempsey).

2. There is significant uncertainty around the effects of waning vaccine effectiveness over time and the effectiveness of current vaccines in providing protection against Omicron and other emerging variants.
3. There is no mandatory requirement for the patients/clients they care for or their visitors to be vaccinated, and even if there was, vaccinated people can still be infected and expose healthcare workers.

Rationale for Deemed diseases

Establishing whether a worker contracted COVID19 in connection with their employment can be a complex and prolonged process. Compared to work-related injuries, it is more difficult to prove that a disease has been contracted in, or caused by, particular employment. In recognition of this, most jurisdictions in Australia have enacted provisions in their workers' compensation legislation which deem specified occupational diseases as being caused by specified work related activities. The criteria for inclusion as a deemed disease has been where there is a strong causal link between the disease and the occupation; there are clear diagnostic criteria and work-related exposures appear responsible for the majority of cases.

SafeWork Australia has recently commissioned a review of the Australian deemed diseases list by Dr Tim Driscoll. Dr Driscoll's report and a peer review report by Dr Andrew Lingwood, Director of OccPhyz Consulting and a Consultant Physician in Occupational and Environmental Medicine were discussed at a SafeWork Australia meeting on the 8 December 2021. It is noted that Dr Driscoll recommends that COVID-19 should be considered a "deemed disease" for workers in frontline healthcare occupations with direct patient contact.

COVID-19 in healthcare workers appears to satisfy the three criteria required for inclusion – there is a strong causal link between COVID-19 and work as a frontline healthcare worker; there are clear diagnostic criteria (the polymerase chain reaction or PCR test); and work-related exposures appear to be responsible for a majority of the cases of COVID-19 in frontline healthcare workers. Therefore, COVID-19 in healthcare workers is recommended to be included on the Revised Safe Work List.⁶

⁶ Driscoll, Tim, SWA Deemed Diseases List Recommendations for amendments to 2015 List Final report, 2021

Dr Lingwood's peer review report was highly complimentary of the Driscoll draft report, finding it to be comprehensive, well-reasoned and clearly written. The reviewer also notes that in his view the criteria for designation as a deemed disease are sound and defensible.

There is no indication that section 19B has been subject to abuse. The presumption that a worker may have caught COVID19 in the workplace if they are in a prescribed occupation under section 19B is not without some rigour.

The employer (insurer) may rebut a presumption (and dispute liability) if they can establish that the worker did not contract COVID-19 in the course of their employment. Specific medical tests and results are required to confirm that a worker has COVID-19 for the purpose of the legislation. These are prescribed at clause 5B and Schedule 2, Part 2 to the 2016 Regulation.

Applying the presumption:

A new Standard of practice [S32 Managing claims during the COVID-19 pandemic](#) commenced from 26 June 2020.

For each claim notified for COVID-19, the insurer is to ascertain whether the worker is in 'prescribed employment' and determine whether the presumption applies. The insurer is to also confirm with the worker what is required to establish they have contracted COVID-19.

If further information is required to determine whether the presumption applies, or where the presumption doesn't apply but where there is high risk of exposure, the insurer is to explain to the worker and employer what further information is required to determine liability, and provisionally accept liability and commence provisional payments without delay.

Note: If the insurer has a reasonable excuse for not commencing provisional weekly payments in accordance with [Part 2.1](#) of the Workers Compensation Guidelines, this is to be clearly documented on the claim file.

Given the difficulty proving that COVID-19 was caught at work, repealing the amendment at this stage would allow the employer/insurer to freely invoke the "*reasonable excuse*" clause in the legislation thereby forcing an unfair financial impost onto the worker.

Impacts of proposed change on nurses and midwives

The removal of s19B will shift the financial burden of COVID-19 infection onto healthcare workers working on the frontline of the pandemic. It will cause financial hardship, particularly for those in precarious employment who do not have access to other leave. While workers could still apply for workers compensation, it can be extremely difficult to prove if the virus

was contracted at work or on the bus. While it will not entirely prevent access to workers compensation, this change will make it far more difficult to access and will mean that healthcare workers will need to deal with time consuming legal matters while ill.

The loss of income during sickness increases poverty risks for workers and their families. The impact on the health, income and well-being of households affected by the disease is immediate and may also have a lasting impact.

Healthcare workers have felt unsupported and expendable throughout the COVID-19 pandemic, with insufficient and poorly fitting PPE and inadequate staffing. Research on the voices of Australian healthcare workers throughout the pandemic describes widespread moral injury - psychological distress arising from being treated as expendable rather than essential to the response.

Deficiencies in work health and safety, respiratory protection, personal protective equipment and workplace culture have resulted in a loss of psychological and physical safety at work associated with an occupational moral injury. The challenge for healthcare leaders is to repair trust by addressing HCW concerns and fast track solutions in collaboration with them.⁷

Expecting healthcare workers to not only put the safety of themselves and their loved ones on the line every time they go to work, but to expect them to wear the financial burden should they become infected with COVID-19 is unconscionable and will further exacerbate moral injury to nurses and midwives.

Despite the continued mutating of the COVID19 virus governments are committed to easing or removing restrictions such as international travel, mask wearing, social distancing and, as in NSW allowing unvaccinated (or partially vaccinated) people the same freedoms as the vaccinated. It is maintained that this will not only result in an increase in exposure for health care workers but more importantly, increased difficulty in identifying whether that exposure occurred in the workplace.

Impacts of proposed change on the broader community

Removing access to workers compensation for frontline workers who become infected with COVID-19 removes workers incomes. The effects are most profound for those most vulnerable who may have very limited or no access to sick leave.

Removing paid leave creates a disincentive for those who may be a contact of someone with COVID-19 but who are asymptomatic, or those with mild symptoms from getting tested, and increases the risk of them unwittingly passing the disease on to others. This is a particular concern in healthcare and residential care where workers are working with people who are highly vulnerable to the effects of the disease.

⁷ Ananda-Jajah, M et al, Hearing the voices of Australian healthcare workers during the COVID-19 pandemic, BMJ Leader, accessed 8/12/2021 at <https://bmjleader.bmj.com/content/5/1/31>

A lack of coverage encourages people to report to work sick or when they should self-quarantine, increasing the risk of spreading the disease. This adverse effect has already been documented for its impact on prevention in previous public health crises and its impact on occupational safety and health.⁸

International approach

Internationally there is significant recognition of the need to ensure that healthcare workers are properly protected from COVID-19, and supported should they contract COVID-19. The International Labour Organisation has highlighted relevant international labor standards with regard to the particular need to protect nurses from Covid-19 as follows:

*Health workers are at particular risk of occupational exposure to transmissible diseases such as COVID-19. The Nursing Personnel Convention, 1977 (No. 149) calls for Governments to, if necessary, endeavour to **improve existing laws and regulations** on occupational health and safety by adapting them to the special nature of nursing work and of the environment in which it is carried out.*

*The Nursing Personnel Recommendation, 1977 (No. 157) addresses occupational health protection in the nursing sector and calls for all possible steps to be taken to ensure that nursing personnel are not exposed to special risks. Where such risks are unavoidable, the Recommendation calls for measures to be taken to minimise these risks, including the provision and use of protective clothing, shorter hours, more frequent rest breaks, temporary removal from the risk and **financial compensation in the event of exposure**.⁹*

The ILO Sectoral report on the effects of COVID-19 on the health sector reports: *The COVID-19 crisis is revealing significant coverage gaps, not only in access to health care but also in terms of sickness benefit, leaving health workers and carers who are in non-standard forms of employment, or are self-employed, unprotected. The lack of income security when ill or caring for sick family members creates an incentive to go to work while unwell and increases risks of contagion. It also increases the risk of impoverishment for those affected by the disease and their families. Health workers should also be provided with access to health care and financial compensation in the event of becoming infected with COVID-19 during employment, either under specific employment injury insurance or, where no such insurance schemes exist, through direct compensation from employers, in line with the ILO Employment Injury Benefits Convention, 1964 (No.121).¹⁰*

⁸ ILO brief, Sickness benefits during sick leave and quarantine: Country responses and policy considerations in the context of COVID-19, accessed 8/12/2021 at https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---soc_sec/documents/publication/wcms_744510.pdf

⁹ ILO Standards and COVID-19 (coronavirus) FAQ Key provisions of international labour standards relevant to the evolving COVID19 outbreak

¹⁰ ILO Sectoral Brief – Covid 19 and the Health Sector, accessed 8/12/2021 at https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/-sector/documents/briefingnote/wcms_741655.pdf

It is significantly out of step with the international community for the NSW Government to be considering removing laws designed to support healthcare workers in the event of COVID-19 exposure.

Many countries around the world have recognised COVID-19 as an occupational disease. While some consider eligibility on a case by case basis as would be the case should 19B be revoked, there are a great many that have a presumption for healthcare workers. This includes countries such as Argentina, Austria, Belgium, Canada, China, Columbia, Dominican Republic, France, Germany, Italy, Latvia, Lithuania, Malaysia, Mexico, Peru, Phillipines, Portugal, Korea, Spain, Switzerland, Ukraine, the US, and Uruguay¹¹.

Conclusion

The Association urges the NSW Government to withdraw the Workers Compensation Amendment Bill 2021, and to retain the existing presumption that workers who contract COVID-19 and are in prescribed occupations have caught COVID-19 in the workplace.

¹¹ ILO, State Practice to Address Covid-19 Infection as a Work Related Injury, 2021, accessed 8/12/2021 at https://www.ilo.org/global/topics/geip/publications/WCMS_741360/lang--en/index.htm



Submission to Legislative Review Committee – Workers Compensation Amendment Bill 2021

DECEMBER 2021



NSW NURSES AND MIDWIVES' ASSOCIATION

AUSTRALIAN NURSING AND MIDWIFERY FEDERATION NSW BRANCH

www.nswnma.asn.au

50 O'Dea Avenue
Waterloo NSW 2017

T 8595 1234 (METRO) • 1300 367 962 (NON-METRO)

F 9662 1414

E gensec@nswnma.asn.au