

INQUIRY INTO 2022 REVIEW OF THE WORKERS COMPENSATION SCHEME

Organisation: Australian Education Union - NSW Teachers Federation Branch

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New South Wales Teachers Federation

a branch of the Australian Education Union
AEU NSW Teachers Federation Branch ABN 86 600 150 697



22 July 2022

In reply please quote: 428/2022/AC/ja

The Director
2022 Review of the Workers Compensation Scheme
Parliament House
Macquarie Street
SYDNEY NSW 2000

Email: law@parliament.nsw.gov.au

Dear Sir/Madam

Re: Submission - 2022 Review of the Workers Compensation Scheme

Please find attached a submission from the AEU NSW Teachers Federation regarding the 2022 Review of the Workers Compensation Scheme.

The officers with responsibility for this submission are Sam Clay, Deputy Secretary (Research/Industrial and Professional Support), Greg Butler, Industrial Officer and Angela Catallo, Professional Support Officer. They can be contacted on 9217 2100 or mail@nswtf.org.au

Yours sincerely

Maxine Sharkey
General Secretary



**AUSTRALIAN EDUCATION UNION
NEW SOUTH WALES TEACHERS FEDERATION BRANCH**

SUBMISSION TO

NSW Legislative Council Standing Committee on Law and Justice

ON

2022 Review of the Workers Compensation Scheme

Authorised by

**Maxine Sharkey
General Secretary
AEU NSW Teachers Federation**

22 July 2022

Introduction

The Australian Education Union NSW Teachers Federation Branch (Federation) represents school teachers in New South Wales public pre-schools, infants, primary and secondary schools, Schools for Specific Purposes and teachers working in consultant/advisory positions. Teachers in TAFE are also represented by Federation. The current financial membership totals over 66,000 practicing teachers and student teacher members.

Federation is encouraged by the decision of the Committee to focus on the issues of claims for psychological injuries which are prevalent among workers compensation claims within the teaching profession. An analysis of the SIRA claims data for the 2021-2022 financial year shows that of the 3119 claims made under TMF/education and training, 672 were caused by 'mental stress'.¹ When Return to Work rates are considered, the outcome at 26 weeks for all injuries is at 88%, a figure which represents 95% of claims for 'slips, trips and falls' while for 'mental stress' claims it falls to 69%.²

To be fit for purpose the Workers Compensation Scheme must provide not just monetary and medical support, but also consist of processes which provide a psychologically safe experience for the injured worker to heal and to re-engage with the world of work.

The present scheme is ineffective.

The concept that the present Workers Compensation Scheme does not provide for the needs of injured workers is detailed in the candidly titled report from the McKell Institute, *It's Broken*.³ Concerns canvassed within this report which Federation members commonly experience include the high level of administrative complexities faced by injured workers (page 27) and the frequency of changes in case managers (page 33). The personal insights of the injured workers as presented in Part 3 of the report illustrate how the scheme fails to provide for the medical or financial needs of injured workers in NSW.

It's Broken reports on the results of an NSW Injured Workers Support Group survey of 106 individual workers' compensation recipients in NSW which go to the psychological impact of the scheme. Over three quarters of respondents strongly disagreed that their experience with the workers compensation system had helped them recover from their workplace injury. As evidence of the psychological effects of claims management, almost eighty percent of respondents strongly agreed that their experience with the workers' compensation system had negatively affected their mental health and wellbeing with seventy three percent of respondents reporting experiencing suicidal ideations as a result of their claim.

It's Broken contains an appendix which lists the amendments to workers compensation legislation which have occurred since 2012. This appendix is evidence of continued lobbying by unions and other workers advocates which have led to improvements to the scheme, however further reform is needed if the scheme is ever to achieve best outcomes for those individuals who are injured at work.

¹ <https://www.sira.nsw.gov.au/open-data/system-overview/claimsdata>

² <https://www.sira.nsw.gov.au/open-data/system-overview/rtdwdata>

³ https://mckellinstitute.org.au/wp-content/uploads/2022/07/McKell_Workers-Comp_final.pdf

Federation draws the Committee's attention to the findings made in *It's Broken*, specifically Finding 1, and Finding 4.

Finding 1: *Ten years on, the key objectives pursued in the workers' compensation reforms of 2012 have not been met.*

These objectives which were included in the NSW Government's Workers Compensation Issues Paper of 2012 include:

- 3. *promote recovery and the health benefits of returning to work, and*
- 5. *support less seriously injured workers to recover and regain their financial independence*⁴.

and

Finding 4: *Return to Work rates had improved steadily since 2008-09, but began to decline again from 2014, just two years after the 2012 reforms.*

The objective of promoting a timely return to work for workers with psychological injuries is reliant upon the provision of suitable duties. In the case of physical injuries, there are a range of readily facilitated reasonable adjustments to the environment or workload, while for a psychological injury they are less obvious and more difficult to facilitate. It is often viewed by insurers that it is easier to provide a room change, provide already available technology or a short term timetable change away from practical classes to accommodate a physical injury than it is to run a successful mediation, reduce the workload or shield a member from abusive behaviour. However, such measures are critical to a timely and sustainable return to work for the injured worker. Federation is available to provide further evidence to the committee in relation to the ineffectiveness of the scheme if required.

Recommendation 1: The committee recognise that the present Workers Compensation Scheme is ineffective in that it fails to provide timely and sustainable return to work outcomes for too high a percentage of workers who have suffered psychological injuries at work and that the operation of the scheme itself is detrimental to the mental health of injured workers with both physical and psychological claims.

The Code of Practice: Managing Psychosocial Hazards at Work must be implemented.

The psychosocial health of members has long been a concern for Federation. In November 2020, Federation made a comprehensive submission to SafeWork NSW in relation to the draft Code of Practice which encompasses the myriad of psychosocial hazards to its members, a copy of which attached as an appendix to this submission.

After many years of lobbying, Federation welcomed the publication by SafeWork NSW in 2021 of the *Code of Practice: Managing Psychosocial Hazards at Work (The Code)*.⁵ As explained in the Foreword

⁴ https://www.sydney.edu.au/documents/about/higher_education/2012/20120501%20workers-compensation-issues-paper.pdf

⁵ https://www.safework.nsw.gov.au/_data/assets/pdf_file/0004/983353/Code-of-Practice_Managing-psychosocial-hazards.pdf

An approved code of practice provides practical guidance on how to achieve compliance with the work health and safety standards required under the WHS Act and the Work Health and Safety Regulation (WHS Regulation), including effective ways to identify and manage risks.(page 4)

Effective identification and management of risks in the workplace is an obligation of the Department of Education and TAFE NSW as the Person Conducting the Business or Undertaking (PCBU) under the *Work Health and Safety Act 2011* (NSW) (*WHS Act*) and the *Work Health and Safety Regulation 2017* (NSW) (*WHS Regulation*). Therefore, effective implementation of The Code should have resulted in a reduction in psychological injuries in the workplace.

Examples of how The Code can be effectively implemented in different industries are included in the appendix. The school example (page 29) provides a scenario which is common to the experiences of Federation members when they are required to implement a new Departmental policy, a situation which is also experienced by Federation members working in TAFE. The risks and hazards include the increase to their already interminable workload and the lack of prior warning or effective consultation resulting in low job control resulting in low morale.

The Code also outlines best practice by listing control measures including the responsibility of the PCBU to provide sufficient time, central support and teacher hours to effectively implement the policy as well as effective consultation and communication and ongoing monitoring of the WHS impacts on the affected workers throughout the process.

Disappointingly, this best practice scenario has not been implemented by the Department of Education or TAFE NSW. It has been disappointing to see that a Code of Practice which provided such promise for the reduction of injuries and developed by one NSW government agency then failed to be meaningfully implemented by another.

The employer's shortfalls in implementing The Code have not only resulted in elevating the incidence of psychological injuries which are then subject to the workers compensation scheme, but also impact on return to work processes. It is clear from the experience of Federation Officers that reinjury in the context of return to work arrangements for its members who have sustained psychological injuries is far from a rare occurrence and occurs more frequently than with physical injuries.

One relevant example is where there is the provision and then withdrawal of 'suitable duties'. Where a psychological injury is related to interpersonal conflict, commonly medical advice is that the teacher has capacity return to a teaching position at another workplace. Such a placement in 'suitable duties' is offered on a short term basis while the long term return to work goal remains fixed to return to the substantive workplace. This process allows time for mediation between the parties and/or changes in workplace practices which may assist with return to work in their previous role.

However, it is not uncommon for ongoing medical advice to be that a return to the substantive workplace is not feasible and in practice a permanent movement to another school in such circumstances remains the exception rather than the rule, particularly in psychological workers compensation claims. The sudden withdrawal of suitable duties routinely leaves members with the choice of returning to the place of injury or being at home on weekly payments. Neither of which has positive health outcomes and can lead to reinjury.

Recommendation 2: That in order to reduce the incidence of psychological injuries, and to provide best practice examples for all PCBU's, NSW Government Departments effectively implement the *Code of Practice: Managing Psychosocial Hazards at Work*.

The place of the *Code of Practice: Managing Psychosocial Hazards at Work* in claims management.

The Code of Practice provides clear guidance on the causes and effects of psychosocial hazards and how these can lead to psychological injuries. This information should be considered when claims decisions are being made. At present the *SIRA Claims Guide*⁶ references psychosocial hazards only insofar that 'information on managing the risks to psychological health and can assist an employer to ensure the workplace is psychologically safe for the worker to return to work'. There is no expectation of, or guidance provided to, claims managers to make use of The Code to assist in their decisions about claims.

At present Allianz often demonstrates best practice in following Section 2.2 of the *SIRA Workers Compensation Guidelines*⁷ by providing provisional liability within the 7 day timeframe.

After further investigation has been completed, claims may then be declined within the 12 week period.

Claims can be declined under section 11a of the *Workers Compensation Act 1987* (NSW), on the basis of reasonable action of the employer, when there is a clear time link between the date of injury and an employer action. Examples may include a management decision by the Principal, management of a complaint or allegation, or the implementation of a performance management process. Such school leadership decisions rarely occur in isolation; however the current practice is to decline claims without full consideration of how previous events, issues or hazards have affected the psychosocial health of the injured teacher.

Claims can also be declined based on a single Independent Medical Examination. It is not unusual for the specialist opinion to be that the teacher has sustained a psychological injury, but within a single appointment it is difficult for the background circumstances to be fully considered, so the outcome commonly is to support the actions of the employer and deny the claim.

Injured workers who have their claims declined have the right to access legal funding via the Independent Review Officer (IRO) to dispute the decision. The injured teacher is provided an opportunity to fully explain the entirety of their experience and other Department or TAFE processes, including Complaints Policies and Procedures, and Health and Safety Incidents Reports can be taken into consideration. Once a solicitor is

⁶ <https://www.sira.nsw.gov.au/workers-compensation-claims-guide/insurer-guidance/eligibility-compensable-injuries/managing-claims-for-workers-with-a-psychological-injury>

⁷ https://www.sira.nsw.gov.au/data/assets/pdf_file/0011/438338/Workers-Compensation-Guidelines-March-2021.pdf

engaged in such matters, the outcome often results in a reversal of the decision to decline liability with a reinstatement of weekly payments and medical expenses.

State Government funded legal costs could be saved if the insurer was obliged to take greater heed of events and circumstances which have occurred leading up to the date of injury and to do so through the lens of The Code.

The denial of claims not only ceases weekly payments but also prohibits access to a qualified rehabilitation consultant to facilitate a timely and sustainable return to the workplace. The removal of this support and reduced access to mental health professionals can lead to exacerbation of injury and longer periods of poor mental health. The denial and later reinstitution of weekly payments also increases administrative costs to the employer due to the time taken to reconcile sick leave and workers compensation payments.

After the expense of an IRO funded legal appeal, such claims are routinely reopened for both weekly payments and reimbursement of medical expenses.

The insurer rarely considers the health and safety implications of any managerial decisions. There is no human factor or recognition that increases in tasks or that the informal support of itself is a workload increase may be a trigger to an injury.

Recommendation 3: The SIRA advice to claims managers needs to be updated to include reference to the *Code of Practice: Managing Psychosocial Hazards at Work* needing to be taken into account when claims decisions are made for psychological injuries.