

REPORT ON IN-CAMERA PROCEEDINGS BEFORE

STANDING COMMITTEE ON LAW AND JUSTICE

FIRST REVIEW OF THE WORKERS COMPENSATION SCHEME

CORRECTED PROOF

At Jubilee Room, Parliament House, Sydney on Sunday, 7 November 2016

The Committee met at 10:10 am

PRESENT

The Hon. S. Mallard (Chair)

The Hon. T. Khan

The Hon. D. Clarke

The Hon. L. Voltz

The Hon. D. Mookhey

Mr D. Shoebridge

The CHAIR: Welcome to the Inquiry. I think you have been here during the last evidence. We have agreed to hear evidence in camera because of your commercial sensibilities and so that you can speak frankly.

WITNESS A, Allied health provider, affirmed and examined. **WITNESS B**, Allied health provider, affirmed and examined.

The CHAIR: Would you like to make a brief opening statement?

WITNESS A: Yes. We recognise the positive effects of the 2012 amendments to the New South Wales scheme, however we acknowledge that more needs to be done to ensure that the amendments meet the objectives of reform

Our intent is to highlight where issues do not promote the objectives of the scheme to deliver better return-to-work and social outcomes for the people of New South Wales following work-related injury.

The CHAIR: I invite the Deputy Chair to ask some questions.

The Hon. LYNDIA VOLTZ: From the start, you said that you were highlighting the positive aspects of the scheme changes and you note in your submission, "The scheme reforms highlighted principles of independence, social inclusion and participation in the community" as key objectives. How do we measure what the actual return-to-work figures are? How many people have actually been returned to work in full-time employment, how many are working part-time, or how many people have simply been cut off benefits?

WITNESS B: It is a good question. The reality is that there is probably no one consistent measure of return to work in the scheme and certainly not nationally either. It is a challenge for us ; it is a challenge I think for accurately determining the success of the scheme when a true definition of return-to-work and actual data measures to capture that information cannot be accurately determined or accurately framed. So the answer is, we do not know.

The Hon. LYNDIA VOLTZ: So, given your opening statement, the positive aspects, how are we measuring it?

WITNESS A: How are we measuring the current return-to-work rate?

The Hon. LYNDIA VOLTZ: No, how are we measuring the positive aspects that you say have come out of it, given what you said are the key objectives and principles?

WITNESS A: We are certainly seeing better engagement. The new benefits regime does encourage the health benefits of good work and does encourage return to recovery as a better outcome for people. We are seeing the positive effect of that.

The Hon. LYNDIA VOLTZ:

On Friday we had business chambers coming in and industry association groups, all saying the same thing: that there is no contact; claim managers are turning over; and getting return-to-work, even if you are an employer, is hugely difficult, because you cannot even get someone to call you back. So how are we measuring those, given your initial statements?

WITNESS A: We would support that there is a high level of turnover of case managers in the scheme agents and we certainly see the impact of that. A lot of what we have said is that the use of rehabilitation and return-to-work has been limited by the agents and is selectively used to help support work-capacity decisions, rather than to build the capacity in a worker to help that person return to work.

The Hon. LYNDIA VOLTZ: I am trying to get to what are the positive aspects that you are talking about, given that we know we have people who have difficulties in returning to work; we know that industry is not happy; we know that workers are not happy; and we know that people are actually finding it more difficult, rather than simpler.

WITNESS B: There are certainly signs of improved earlier referral and engagement with rehabilitation, which enables a select number of workers with an injury to access services. There are far too many who are not being referred. There has been some movement in that respect. That would certainly be a positive change since the 2012 reforms. I think the financial viability of the scheme means that there is

opportunity for more workers to be supported on an ongoing basis and I think certainly that opportunity, and from a scheme design perspective, is a positive one for sustainability purposes. There have been some improvements in the way that agent contracts have been developed but we do not think they have gone far enough to support the scheme objectives. And, as I think you are alluding to, there are no measures for the social outcomes that the scheme has set out to achieve. So all we are being measured on at the moment is some hard data around, was this person returned to pre-injury duties, partial duties or not returned at all? And, even in instances where a work-capacity decision has been applied, there is no way of defining whether that person was actually at work or not at work at the time the decision was made.

The Hon. LYNDIA VOLTZ: Well, what have been the improvements in the agent contract?

WITNESS B: Without being privy to the detail of the contracts, I think there has been more incentive for agents to engage workers on their journey of recovery. Those contracts are confidential but there is certainly a move—and I think the way that agent behaviour has shifted a little bit, there is a definite move—towards trying to engage workers more actively.

The Hon. LYNDIA VOLTZ: So you have not seen the contract; we have evidence that there is high turnover; and there is a lack. So, how do you know that is an improvement?

WITNESS B: I have been in the industry and the shift in agent behaviour has been marked since the 2012 reforms. We are certainly in a better place in terms of the way agents are engaging with workers. I think, if you reflected back perhaps prior to 2012 and looked at the scheme at that time, you would see similar issues, without doubt, presenting themselves as they are today.

The Hon. DANIEL MOOKHEY: One thing I picked up from your submission is that you say that there is an average delay to referral to rehabilitation specialists of 25.77 weeks, which works out to be almost six months.

Is the reason for the delay to do with scheme agents or scheme agent management of claims?

WITNESS A: Yes.

WITNESS B: Yes.

The Hon. TREVOR KHAN: I thought you put an alternative there?

Mr DAVID SHOEBRIDGE: Scheme agents or scheme agent managers.

The Hon. DANIEL MOOKHEY: In your view, is that reflective of the theme which is that there are conflicts of interest in the roles of scheme agents here, between managing a person's care and managing the financial performance of the scheme?

WITNESS B: There is a tendency, I think, for scheme agents to, in some ways, over-complicate the situation and there are, I think, just in pure percentage terms, a number of workers who will go back to work soon after an injury without anyone necessarily being involved with them whatsoever. There is a relatively large proportion of those people. There are also a proportion of workers with an injury who need support. There are some simple ways to identify those workers, but there is a reluctance of the agents to hand on or provide a referral to a rehabilitation provider or other support.

The Hon. DANIEL MOOKHEY: Is that because a culture has set in amongst agents who are using rehabilitation providers for the dominant purpose of work capacity assessment as opposed to return to health?

WITNESS A: I would say there are two reasons: One is that they do not want to engage in spend when a worker may naturally return to work without assistance. In other words, spend money unnecessarily. The other is included in our submission, that rehabilitation is becoming used for targeted assistance to move towards work capacity decisions rather than to rehabilitate that person to work and life.

The Hon. DANIEL MOOKHEY: You make a point in your submission that the cost of this deferral, in addition to all of the other factors you allude to, that causes people to be assessed much later in the injury life cycle has a tremendous financial cost to the scheme, is that correct?

WITNESS B: Absolutely.

WITNESS A: Yes.

The Hon. DANIEL MOOKHEY: It is a matter of false economy?

WITNESS A: Yes.

WITNESS B: Yes. There is a recent study in the life insurance industry with a similar purpose that shows every dollar spent on rehabilitation saves between \$27 and \$34 in actual claims cost.

The Hon. DANIEL MOOKHEY: On notice can you provide the Committee with that study?

WITNESS B: Absolutely. Swiss Reinsurance did the study.

The Hon. DANIEL MOOKHEY: The other theme we are hearing from many injured workers in submissions and evidence is that should a rehabilitation provider provide advice that is not well received by the agent, that rehabilitation provider is changed or subject to adverse action by a scheme agent. In your view is that legitimate and correct?

WITNESS A: There is a failure within the structure of the scheme that does allow an agent to be coercive.

The Hon. DANIEL MOOKHEY: What type of pressure are you talking about?

WITNESS A: The most common would be in the area of labour market testing where a workplace rehab provider seeks evidence around the labour market and the agent says, "We need more information on the labour market".

Mr DAVID SHOEBRIDGE:
the way it has these adverse pressures?

Is workers comp notable for

WITNESS A: Yes.

Mr DAVID SHOEBRIDGE: Of all those schemes how does New South Wales workers comp stack up?

WITNESS B: It is unique. It is difficult. It depends how you are measuring it, to be honest.

Mr DAVID SHOEBRIDGE: Unique as in it is a diamond or is it negative?

WITNESS A: They are all different in different ways.

WITNESS B: The legislation surrounding each scheme is different, and in life insurance and income protection it is different again. The objectives of all the schemes are a return to work and a return to health, acknowledging the health benefits of good work. They are all designed to achieve the same thing but the mechanisms and levers in place are different. The ones in New South Wales are less prescriptive in some ways than other states. In the area of work capacity decision making it is a difficult one and does compromise the objectives.

Mr DAVID SHOEBRIDGE:

there is a conflict between the commercial interests and the health interests in New South Wales?

WITNESS B: Yes.

WITNESS A: In part.

Mr DAVID SHOEBRIDGE: How would you fix it?

WITNESS A: If I could come back to that. It is in part the conflict, because returning somebody to their work and life is good for the person's health. That has a combined financial benefit for the scheme. The two definitely align there, there is no doubt about that.

The definition of suitable employment requires that agent to consider any workplace occupational rehabilitation services but the perverse issue is that the agent can choose not to have any at all because it might contradict the work capacity decision they seek to make. The agent could use a selective amount of rehabilitation and you have seen that in some of the evidence provided by the workers. The rehabilitation has been targeted only to assist in a work capacity decision, rather than more broadly to fully rehabilitate the person.

Mr DAVID SHOEBRIDGE: Can you give an example of a case where that conflict arises?

WITNESS B: There is an case example in the submission. In more general terms, often we will assess and work with the worker in the early stages of their recovery, put a plan together, negotiate that plan with the doctor and the treatment provider, and get support from the agent for that plan. The agent will simultaneously be seeking information to support a work capacity decision, despite the fact that the worker is on a signed-off work recovery plan. The worker is progressing, things are moving along nicely and we are moving towards an achievable sustainable goal and in the course of that pathway the agent uses information that they have collated and gathered to apply a work capacity decision and cut them off.

Mr DAVID SHOEBRIDGE: Midway through what is a good path it all gets killed by a work capacity decision?

WITNESS B: Yes.

Mr DAVID SHOEBRIDGE: Is that unusual?

WITNESS B: It is not unusual.

WITNESS A: Not unusual.

Mr DAVID SHOEBRIDGE: How do we fix it? Do we say once you have a return to work plan and it is signed-off and agreed you need something substantial to knock you off the path?

WITNESS A: We put that in the submission. A work capacity decision should not contradict the logical return to work pathway that is in place.

Mr DAVID SHOEBRIDGE: That is a legislative fix to force the case managers to stick by the return to work?

WITNESS B: It could be a guideline issue. The application of the work capacity decision is inconsistent amongst agents and it is too frequently poorly considered, which creates adversarial fallout from workers, employers and it is not good thing for the scheme.

Mr DAVID SHOEBRIDGE: "What work can this worker do?" Would that be a classic question?

WITNESS B: Yes, or "What jobs are there for this worker to do, given their limitations?"

Mr DAVID SHOEBRIDGE: Because of the definition of "suitable employment" under the Act, that can be used as a reason for a work capacity decision or it could cut them off benefits.

WITNESS B: That is correct.

WITNESS A:

We put in a submission, but it seems to be more about theoretically measuring work capacity rather than trying to build that capacity. Rehabilitation services could be far better used to achieve better health, wellbeing and social outcomes for workers, but they have been too narrowly targeted towards work capacity decisions.

The CHAIR: you recommend a better, stronger triage system. That is on arrival; it is early intervention.

WITNESS B:

Three simple questions have been proven to identify whether someone might be in need of additional support. They are: How soon do you think you will go back to work? Is your employer supportive of your return to work? Is your doctor supporting your return to work? If the worker answers no to any of those, it is indicative of the fact that they are likely to have psychosocial factors that are going to prevent them from returning to work, even if they are not directly related to the mechanism of the injury. We know

that it is rarely the physical or psychological recovery from an injury that is pertinent to someone's likelihood of returning to work. It is quite often the psychosocial factors that influence the return to work more significantly.

The CHAIR: What percentage of people off work on workers compensation does your industry engage with?

WITNESS A: It is less than 10 per cent. It is a very small group of workers.

Mr DAVID SHOEBRIDGE: If the answer to one of those questions is no, does that indicate that rehabilitation is appropriate to get out of that mindset?

WITNESS A: It indicates that that person is far more likely to have prolonged work absence. That is often irrespective of their injury.

The CHAIR: How does that get picked up later?

WITNESS A: That is the thing; It has not been. We are suggesting that, if that was applied, you would very quickly target those people more likely to have trouble and those people who should be engaged with early.

The CHAIR: Thank you.

Mr DAVID SHOEBRIDGE: So it is not connected to the nature of the injury? Could you not have a schedule of injuries

WITNESS A: No.

Mr DAVID SHOEBRIDGE: It is the workers' response to the injury.

WITNESS A: WorkSafe in Victoria looked at that. It found that the injury or the person's age or ethnic background has less impact on predicting whether the person is going to have trouble, compared to those three questions.

The Hon. DAVID CLARKE: If you had to summarise the core message that you want to get across today that so concerned you, what would it be?

WITNESS A: Can we both answer this one? It is that too much effort has been spent measuring work capacity rather than building work capacity and that workplace rehabilitation providers are being selectively used to make work capacity decisions rather than to implement the true intent of rehabilitation, which is to fully rehabilitate a person and allow them to return to work. Work capacity decisions are being made prior to 13

weeks and do not follow the natural return to work pathway. That directly impacts on the performance and remuneration of the agent. Something that has not really been covered is that have promoted mobile case management. Somebody from goes out and undertakes workplace rehabilitation activities, influencing return to work and directly writing return to work and rehabilitation plans. That represents a direct conflict of interest because the agent then uses that information to make a work capacity decision.

WITNESS B:

the fact that some insurers and agents are looking to bring that mobile case management model in-house directly, without meeting any of the national approval standards that are in place for an allied provider health framework, is an even stronger breach of that.

Mr DAVID SHOEBRIDGE: "I am from the insurer and I am here to help."

The CHAIR: Thank you, , for your evidence today. It has been very helpful. I understand that you are happy for some of the transcript not to be confidential. The secretariat will consult you about that.

The Hon. TREVOR KHAN: It is a consultation with Committee members, to be quite clear about it.

The CHAIR: I know, but members will not contact the witnesses directly.

The CHAIR: You have taken questions on notice. The Committee has resolved that witnesses have 21 days to provide answers to questions taken on notice. The secretariat will be in touch with you regarding that.

WITNESS A: And the research.

Mr DAVID SHOEBRIDGE: Would you also provide that Victorian WorkSafe study that you referenced, WITNESS A?

WITNESS A: It was presented to us by WorkSafe. I will see what I can do to find it.

WITNESS B: There is other evidence supporting that.

The CHAIR: Thank you very much, .

WITNESS A: Thank you.

WITNESS B: Thanks for the opportunity.

(The witnesses withdrew)

(Short adjournment)