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The Hon. Dominic Perrottet, MP
Minister for Finance & Services
GPO Box 5341
SYDNEY NSW 2001

Dear Minister,

Thank you for the opportunity to provide the below submission regarding the impact of the current Workers Compensation Legislation on Corrective Services staff in particular Custodial Officers.

As you will be aware the Association, along with the broader union movement, objected strongly to the *Workers Compensation Legislation Amendment Act* when it was introduced in 2012. It was and remains our view that the Act creates a system which penalises injured workers.

The exemptions to the amendments for police officers, paramedics and fire fighters have created a two tiered system in which our members are afforded inferior compensation. We object to this not only in principal but on the grounds upon which the amendments are based.

Within the Association's membership there are numerous occupations that involve similar functions and risks to those excluded groups. *The Crimes Act 1900 (NSW)* lists all roles considered "law enforcement officers" in the state of NSW. The list includes not only police officers but also correctional officers, parole officers, special constables, officers of the Department of Juvenile justice and sheriff's officers.

It is unjust that one cohort of "law enforcement officers" are granted superior compensation terms compared to another. In many instances the officers noted above perform their duties in tandem with police officers and deal with the same dangerous individuals within the criminal justice system.

Outside of the list of "law enforcement officers", the Association also represents other occupational groups who on occasion perform their duties in joint operations with police; this includes Fair Trading officers, child protection workers, environmental compliance officers and WorkCover inspectors.

It is our view that these unfair amendments are best fixed, not by carving out additional groups from a fundamentally unfair system, but by making the system fair for all workers in NSW.

We do not intend to canvass each element of the Act here. Instead we address what we see as some of the most manifestly unfair components which may be able to be fixed through relatively simple changes.

With respect to the broader systemic inequities of the system, the Association supports and directs your attention to the recent report produced by the Centre for Workforce Futures at Macquarie University – *The Impact on Injured Workers of Changes to NSW Workers Compensation: July 2012 – November 2014, Report No. 2 for Unions NSW*.

We recognise and support Unions NSW in their advocacy on this matter on behalf of the broader union movement.

For the purpose of immediate legislative change we draw your attention to the following matters:

The calculation of the Pre-Injury Average Weekly Earnings (PIAWE) cap

Notwithstanding the Association's objection to the rationale behind this part of the Act, we draw your attention to the perverse effect of the current method of calculation. An employee, who is injured at work but is able to return to duties inside of one week (or part thereof any subsequent week), has no incentive to do so when either:

- The time lost from injury in a given week is less than 5% (or 20% after 13 weeks) of their weekly hours; or
- The projected income from their scheduled weekly hours is greater than the PIAWE cap.

In both of these instances, the cap incentivises workers not to return to work when they are able to do so. Workers who do return to work in either of these scenarios are financially disadvantaged.

The Association has dealt with a number of cases in which a member has been requested to pay back a portion of their weekly pay once it was found that their income from hours worked was above that permitted by the cap.

Recommendation: As noted in our letter to yourself and Minister Hazard on 26 February 2015, a more coherent approach would be to apply the cap only to the actual time a worker is absent from the workplace due to an injury.

A further improvement to this method would be to exempt any time required to seek medical care (both upon initial injury and on a reoccurring basis) from such a cap. Under the current system, workers who are absent from work in order to receive treatment for a short period are punished by having their weekly salary limited.

Long Term Medical Expenses

The limitation on medical expenses to 12 months from the date of injury (or last payment) is profoundly unfair, contrary to the intention of returning injured workers to employment and is somewhat at odds with sound medical treatment practice.

The workers compensation system should be underpinned by the goal of restoring a worker's health to its pre-injury state, or as close to it as medically possible. There should be no arbitrary time limit placed on compensation for the expenses incurred to this end.

The current 12 month time limit means that workers who are unable to afford on-going medical expenses have a reduced capacity to reach or maintain a level of health that allows them to work.

As pointed out by the Centre for International Economics in their review of the 2012 amendments, the presence of the time limit creates an incentive for treating doctors to bring forward treatment to ensure that it is performed whilst compensated under the scheme, despite it being contrary to their preferred timeframe.

On the basis of actuarial figures contained in the Parliamentary Inquiry: *Review of the Exercise of the Functions of the WorkCover Authority*, the complete removal of the medical

expenses cap, even at the estimated upper limit, would be affordable given the schemes current and projected surpluses.

Recommendation: The Association urges the removal of limitation on compensation for on-going medical expenses.

Definition of seriously injured worker

The current definition of a seriously injured worker as one with a permanent impairment of more than 30% is far too high, and in our view, set without any sound medical or policy grounds.

It leaves workers who are by any understanding *seriously injured*, but who fall under this threshold, without access to compensation for on-going medical expenses and exposed to the requirements of work capacity assessments for the purposes of determining their weekly payments.

The range of injures a worker can sustain and fall under 30% includes substantial loss of the use of a hand or a leg, the loss of sight in one eye or serious damage to an eye requiring medication for a indefinite period of time. The later of these examples pertains directly to an Association member who was assaulted whilst on duty as a Prison Officer.

The threshold is also problematic in its application to disease injuries. For communicable diseases such as HIV and Hepatitis – to which our members working within the prison system have high exposure, it is likely that the level of assessed impairment will not reach 30%, leaving workers who have contracted a disease on the job without on-going compensation for their medical treatment.

Recommendation: That the definition of seriously injured be no greater than 15%.

The definition of disease injury

The 2012 Amendments created a higher bar for workers to receive compensation with respect to disease injuries compared to all other forms of personal injury – requiring that employment be the *main* contributing factor.

This inequitable treatment is based on the inherently objectionable implication that it is acceptable for employment to contribute to a worker acquiring disease and/or making a disease worse.

The requirement is also based upon the presumption that contributing factors to disease, including mental disorders, can be neatly disentangled and arranged into a hierarchy of causes. This ignores the reality of disease acquisition often involving cyclical, mutual contributing work-place and non-work factors.

In addition, the exclusion of compensation when employment cannot be identified as the main contributing factor, represent a shifting of costs from the workers compensation system on to the individual and the wider health care system.

In this respect, the actions, or systems established, by an employer may contribute to the acquisition or worsening of disease, in the same manner in which they did prior to the Amendments, however under the current arrangement, they incur no cost towards the workers compensation or treatment.

Recommendation: Access to compensation with respect to disease injury is on the basis of the injury being acquired in the course of employment.

Injured workers close to "retiring age"

The 2012 amendments cut off weekly payments to an injured worker receiving compensation once they reach retiring age - currently defined as 65. Should a worker be injured following their 65 birthday however, they are eligible for payments of up to 12 months. Medical expenses were paid until not needed post retirement previously.

It is our view that both the anomalous cut off for workers injured before their 65 birthday and the 12 month limitation on weekly payments for those injured beyond 65, are disadvantageous to older workers.

Within the NSW Public Sector, which forms major component of the Association's area of membership coverage, 3.4% of the workforce (13,414 employees) are older than 65. A career which extends beyond this age is fast becoming the norm in many areas. The denial of workers compensation to an injured worker who intended to work beyond 65 is likely to result in a significant loss in expected earnings and retirement savings.

There is a widespread economic consensus that increasing workforce participation amongst older Australians is an area with fruitful returns to national productivity. It is therefore inconsistent with encouraging older workers to remain in, or re-enter, the workforce to provide a lower standard of workers compensation.

Cutting this cohort off from full access to payments under the workers compensation system also represent a significant shifting of costs from the employer, in whose service the worker was injured, to the tax payer through reliance on social security and Medicare.

Recommendation: All age dependent thresholds should be removed from the legislation.

Return to work and protection from dismissal

Under the current legislation any worker who is not assessed has having 30% total impairment is required to undertake a work capacity assessment.

The Association has dealt with numerous members who are assessed as having some capacity to work but then experience protracted disputes with their employer regarding their ability to perform the inherent requirements of their pre-injury job and the obligations upon the employer to find suitable alternate employment.

In many instances these circumstances have led to the injured worker being medically retired.

To emphasise the contradictory and unjust nature of this outcome, a worker in this situation is effectively told:

- They are not seriously injured;
- They have some capacity to work;
- They cannot however work in their pre-injury role;
- They cannot be placed in an alternative position by their employer;
- They are medically retired on the grounds that their injuries are of a permanent nature; however
- They will not receive compensation for on-going medical expenses because they are not seriously injured.

It would appear that this is an unintended result of the legislation that creates unfair and a potentially financially crippling situation for an injured worker.

An immediate step that can be taken to ensure that greater onus is placed on employers to legitimately attempt to find alternative and reasonable work for an injured worker: is to remove the reasonable excuse from Section 49 and extend the six month limit on the statutory protection from dismissal for injured workers.

Recommendation: Remove the reasonable excuse from Section 49 and extend the six month limit on the statutory protection from dismissal for injured workers (Section 248) to as long as there are reasonable prospects of the worker undertaking meaningful work with reasonable adjustment.

Journey claims

Section 3A of clause 10 of the amended legislation has created significant confusion in relation to the payment of journey claims. In our experience, the insertion of the amendment has led to insurers refusing to accept liability for claims under section 3(a) on a systematic basis.

This matter is of particular concern for Association given a significant portion our members work in regional areas and are exposed to lengthy commutes, another significant portion of our members perform shift work on a 24 Hour rotating shift basis – both of which contribute to driver fatigue. Prison Officers as sworn Officers can be recalled to duty at any time creating a further risk.

A joint publication by WorkCover NSW and WorkSafe Victoria cites evidence that being awake for 17 hours impairs diver performance to the same level as having a blood alcohol content of 0.05, while being awake for 20 hours has the same impairment as an 0.1 blood alcohol content.

According to statistics produced by the Centre for Road Safety, within Transport for NSW, fatigue was a factor in twice as many road accidents than alcohol in NSW in 2013.

It is unjust that a person's work arrangements would expose them to these known heightened risks, yet the workers compensation system would deny them coverage when accidents inevitably occur.

Recommendation: Remove section 3A of clause 10 of the legislation.

We are of the view that broader problems remain with the system in relation to fair access to legal remedies and assistance, the power of insurers and the role and functions of the regulator.

However, as a first step, amendments made to legislation consistent with the recommendations set out above would assist in removing some of the obvious inequities of the current system.

We look forward to a further meeting with you on this matter and to contributing to any changes proposed to the legislation.

Yours faithfully,

Anne Gardiner
General Secretary