

11 March 2020

Secretary to the Committee

Legislation Scrutiny Committee

Legislative Assembly of the Northern Territory

Dear Secretariat

Re: Return to Work Legislation Amendment Bill 2020

Please below submissions to the inquiry into the Return to Work Legislation Amendment Bill 2020 for the Legislation Scrutiny Committee.

United Workers Union Submissions

We welcome the opportunity to make this submission to the Legislation Scrutiny Committee of the Northern Territory Parliament on the *Return to Work Legislation Amendment Bill 2020 (NT)* ('Bill').

The United Worker's Union ("UWU") submissions in relation to the Bill are as follows.

1. We are generally supportive of the proposed Bill as a greater balancing of rights between employees and employers, including reversing a number of the 2015 amendments, under the NT Worker's Compensation Scheme and the *Return to Work Act NT* ("RTWA") is much needed.
2. We will address a selection of the proposed amendments and submissions for additional reforms in some detail below.
3. The remaining amendments proposed as part of this Bill are not addressed in this submission in detail because either they are supported entirely or are administrative in nature and/or not directly applicable to workers.

Clause 5- Section 3B Inserted

4. We are generally supportive of this proposed amendment however UWU submits a return to the broad based, results-based definition which was contained in the legislation prior to the 2015 amendments as this would be fairer and more encompassing than the PAYG focused definition.

CDP Workers Included

5. UWU submits that the Act should be amended to make clear that people engaged as part of Community Development Program (“CDP”) are “workers” for the purposes of the RTWA.
6. Currently CDP participants are considered to receive income support payments and are not employees. The effect is that indigenous people for indigenous organisations across the Territory are undertaking meaningful employment. Some are partially paid by the earlier CDEP program and partially by CDP. If they are injured while working of CDEP, they are covered by the legislation. If they are injured while on CDP, they are not.
7. UWU submits this is grossly unfair. Indigenous Territorians are already some of the most marginalised and disadvantaged in our community. They are further disadvantaged in the event they are injured at work and find that through complex funding arrangements they are only considered an employee for part of their day but not an employee at other times.
8. CDP participants are “workers”. It is submitted that they should be able to avail themselves of the benefits of the RTWA.

Clause 9- Section 65 Amended

9. UWU supports the proposed amendments to section 65, and further wishes to re-iterate support for the amendment pertaining to the ‘removal of the cap on normal weekly earnings for payments made after 26 weeks of incapacity’ referred to on the 1st page of the Bill’s “Explanatory Statement”. We note the draft Bill does not specifically address this amendment under section 64 of the RTWA and seek clarification on this point.
10. This 26 week cap should be removed as this was an unfair amendment bought in as part of the 2015 changes. A worker who remains incapacitated should continue to receive compensation equivalent to their normal weekly earning as long as they need it and should not be disadvantaged simply because they are incapacitated for a longer period of time.

Clause 24- Regulations amended re PTSD for First Responders

11. UWU recognises the significance of including Post-Traumatic Stress Disorder (“PTSD”) as a deemed disease under the presumptive legislation and strongly supports this as it is the right thing to do and will help to bring about cultural change in the NT’s emergency services as emergency workers with PTSD will be supported rather than doubted and dragged through stressful legal proceedings.
12. Whilst in support of the addition proposed in the Bill, UWU submits the definition of ‘first responder’ in relation to ambulance services should include patient transport, emergency dispatchers and remote Aboriginal health practitioners.
13. With ambulance service patient transport workers are exposed to traumatic, major, time-critical and potentially life-threatening incidents and should be covered under the presumptive legislation.

14. Ambulance service Emergency dispatchers also should be covered as they have specialised skill set and training, more than police and fire service dispatchers, where they have to stay connected the emergency call and provide medical information this can lead to exposure to prolonged traumatic events that are both time-critical and potentially life-threatening.
15. Remote Aboriginal Health Practitioners are employed in the various categories of employment listed have an additional linkage of culture. Aboriginal Health Practitioners, particularly, are culturally stigmatised because of duties involving cleaning bodies of deceased people. The stigmatisation is only increased if the deceased was known to or related to the Aboriginal Health Practitioner. The work performed in this role is amongst the most challenging work available in our community and thus for PTSD to be provided presumptive recognition would greatly assist those affected by it.

Correctional Officers

16. UWU also submits that the presumptive legislation for PTSD should cover correctional officers because they are in a confined prison environment and are exposed to time-critical and potentially life threatening situations and must act as first-responders in those situations until other emergency services attended the scene.
17. In Tasmania nation-leading changes have applied a presumptive provision that a PTSD diagnosis is work-related to all state government employees which, in addition to emergency workers, includes correctional officers. We submit that the NT should also be a leader in this area and build on the proposed amendments to also include coverage to at least correctional officers to ensure those faced with some of the most challenging jobs in our community are properly recognised and supported.

Clause 29- Regulation 5B amended (Prescribed diseases and qualifying periods: firefighters)

18. UWU has long advocated for and welcomes the inclusion of the four prescribed diseases added to the presumptive legislation for firefighters.
19. However, we do question how the qualifying periods of 15 years for each of the four diseases was determined as through our research we were unable to locate a similar qualifying period applying for these types of diseases in any jurisdiction around the world.
20. We advocate that the qualifying periods should be reduced to 5 years, this is particularly the case for 'primary site skin cancer' considering the extreme and persistent exposure to the sun and challenging conditions NT firefighters face.

Submissions re Further Amendments not Included

21. UWU understands that there are other amendments to the RTWA to be considered in the future by the Return to Work Act Working Group and Parliament. We strongly support and will advocate for further reforms throughout these processes however wish to raise further issues now that require urgent attention.

Common Law/Limiting Compensation to 260 weeks- Section 61A

22. UWU strongly supports removing entirely from the RTWA the 260 week (5 year) duration cap for a worker's entitlement to compensation and removing the time limit that applies to medical expenses entirely. The UWU understands this can be achieved by essentially repealing the 2015 amendments made in relation to payment of weekly benefits and medical expenses.
23. Currently in the NT workers are capped out at 260 weeks in addition to having no access to a common law scheme. Currently by adopting a no-fault scheme in addition to having an entitlement cap in place, the NT scheme is contrary to every jurisdiction in Australia. Where schemes either have access to short term benefits and common law (short-tail scheme) or no access to common law but a statutory scheme of benefits for all injured workers providing support through to pension age (long-tail scheme).
24. UWU's recommendation is that one of these two schemes must be applicable in the NT as otherwise it is deeply unfair to workers who would otherwise remain entitled to compensation under the scheme to have no recourse to compensation after they are 'capped out' and if they do not reach 15% whole person impairment, which is the vast majority of cases.
25. UWU's strong preference is the 260 weeks cap and time limit on medical expenses be removed from the RTWA and there is a return to a truly no-fault, long-tail scheme providing cover to all workers as long as they need and are eligible for it.

Leave and Superannuation Entitlements to Accumulate while in receipt of Workers Compensation

26. UWU submits that the RTWA ought to be amended to make clear that a worker is entitled to accumulate leave and superannuation entitlements while in receipt of weekly payments pursuant to sections 64 and/or 65 of the RTWA.
27. In relation to accruing leave, a provision allowing this under the RTWA would remain consistent with Section 130 of the *Fair Work Act* whilst *Anglican Care v NSW Nurses and Midwives' Association* (the Anglican Care Decision), a full bench decision of the Federal Court is authority for the proposition that state/territory workers compensation legislation permits accrual of leave unless it specifically prevents or prohibits the accrual of leave.
28. The RTWA does not specifically prevent or prohibit the accrual of leave while a worker is not working and in receipt of compensation. Despite this, employers interpret the RTWA as not permitting accrual of leave.
29. This is a significant issue as the terms of any lump sum settlements of our members' entitlements pursuant to Section 78A of the RTWA overwhelmingly, if not always, require resignation from employment with the employer. Further, our members who are on benefits long-term regularly have their employment terminated once outside the legislated 6 month protection period.

30. The legislative provisions in Queensland, Australian Capital Territory and South Australia already confirm workers in receipt of workers' compensation payments accrue annual leave.
31. Similar to the New South Wales legislation Victoria, Western Australia and NT legislation is silent on the issue. The Anglican Care Decision will be followed if a challenge is brought before the Federal Court again.
32. UWU submits that legislative amendment recognising leave and superannuation entitlements under the NT scheme is appropriate, so the matter does not have to be bought before the Courts.

Insurer's Conduct

33. UWU submits that there should be a penalty provision within the RTWA that applies to insurers in circumstances where:
 - a claim is dismissed out of hand without any meaningful investigation by the insurer;
 - where an insurer decides to not accept a claim or to end a claim on the basis of one medical report notwithstanding the balance of medical evidence in its possession is supportive of the claim, and;
 - in situations where the insurer ignores all medical evidence in its possession and rejects a claim anyway.
34. Where such a decision is made UWU submits that a penalty provision in such circumstances outlined above would minimise these ill-considered decisions or decisions not supported by available evidence and prevent the emergence of a cavalier attitude toward claims.
35. A person who believes they have suffered injury arising 'out of or in the course of employment' makes a claim, often on the advice of their treating medical practitioner(s). The claim form includes an irrevocable authority enabling the employer's workers' compensation insurer to access medical and other records relevant to the claim.
36. UWU submits that a claimant has the right to expect an insurer will meaningfully investigate their claim and make a decision based on information obtained. Regretfully, it is apparent that this does not always occur.
37. While it is acknowledged claimants have rights of appeal ultimately via the court system, the financial and emotional costs of doing so, even if successful, are a serious disincentive to many would be claimants.
38. The ability for NT WorkSafe to remove an insurer from the list of approved insurers is an extremely serious sanction. It is unlikely such a power would be used in the situations outlined. However, the effects on individual claimants are extremely serious.

39. UWU submits that the provision for NT WorkSafe to fine an insurer where there has clearly not been a proper consideration of evidence prior to a decision adversely affecting a claimant's access to entitlements would provide added protection against perfunctory decision making.

Insurer Investigations

40. Further we have seen many instances where insurance companies, whilst assessing a claim, are hiring investigators to conduct interviews with claimants. The issues with these interviews is they are often conducted without legal representation, the claimant is unaware or not encouraged to seek legal representation before participating in an interview and claimants are not informed by the insurance companies that its is not compulsory to attend. It is of course not compulsory and may not be in a claimant's best interests to participate however they are made to feel either it is compulsory or if they do not agree to participate are threatened that it will negatively affect the assessment of their claim and they will have their entitlements ceased.
41. UWU believes this is an area that requires regulation, it should form part of the Insurer's Best Practice Guidelines to inform claimants that an investigator has been hired and the person has a right to elect not to speak to them if they wish and also make it mandatory that an Insurer must recommend to a claimant that they should seek legal advice before participating in an interview. This could even form part of legislative reform to the RTWA.

We once again thank the Committee for the opportunity to make this submission. In the event you have any further queries, please do not hesitate to contact the writers.

Yours Sincerely



Erina Early

Secretary – Northern Territory

United Workers Union