



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

SUBMISSION TO

**Independent Reviews
Office of the Secretary
Department of Customer Service**

ON

icare and workers' compensation independent review

Authorised by

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4 November 2020

SUBMISSION

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 61,000 practicing teachers and student teacher members.

Matters In Scope for the Review

Federation has commented on the matters which are relevant to our members. While not replying to all points within the Terms of Reference, our submission follows the numbering therein.

1) Comprehensive organisational review of icare, having regard to issues recently raised in the media and in Parliament.

This part of the Review will cover icare's:

a. Operations, including claims management, the claims agent model and incentive structures, return to work performance and the service provided to injured workers

All Federation members are covered by the Treasury Managed Fund rather than the Nominal Insurer. For this reason our members have not been affected to the same extent by the operation of the online claims management system. Neither the Department of Education nor TAFE NSW have moved towards an online system for lodging claims. To use the Department's processes as an example; to lodge a claim, our members call the Incident Report and Support Hotline on 1800 811 523 which takes them to the Health and Safety Directorate. The injured worker is asked a number of questions and the answers are recorded onto the system by the Departmental officer. This information is shared with Allianz as the scheme agent, a claim number is generated and the member is allocated to a Health and Wellbeing Advisor who fills the role of a Return to Work (RTW) Officer. This human interaction also allows the injured worker to ask questions and to be informed of the basics of the system, for example if they have not yet seen a doctor or do not have Certificate of Capacity this requirement is explained to them. Federation is of the opinion that the Department has continued better practice by maintaining the 1800 phone service rather than moving to an online claim form.

Incentives for Return To Work rehabilitation consultants, to achieve early RTW outcomes can lead to pressure being placed on Nominated Treating Doctors (NTDs) and workers. An ongoing concern in this area is when neither the NTD nor the rehabilitation consultant explain to the worker the difference between their medical appointments and the case conferences. The outcome of this confusion is that the capacity of the injured worker is decided in the case conference rather than beforehand in a medical appointment. This can lead to pressure on the doctor to upgrade capacity and workers returning to work before they are physically and/ or psychologically ready to do so.

Additionally, there seems to be no incentive for employers to provide suitable duties within the workers current capacity. Suitable duties for our members with a psychological injury, is often a request for a short term placement in a different school or workplace to enable them to regain confidence and capacity away from their substantive worksite. It is up to the Department, as the employer, to source suitable duties placements. While acknowledging that the Department has implemented a process for this to occur, the present process is reliant upon the time and effort of the local Director Educational Leadership. This person has many other tasks and priorities within their workload. It is delays in sourcing suitable duties, more than reluctance from workers or doctors to upgrade capacity, which appears to be the main cause of delays in RTW for our members with psychological injuries. SIRA should be working with scheme agents to supervise and encourage employers to provide suitable duties, especially in large organisations with many worksites where similar duties are performed.

b. Delivery of the recommendations of the 2019 Compliance and Performance Review of the Nominal Insurer (NI) ('the Dore Review')

Federation addressed the relevance of the Dore Review recommendations in our May 2020 submission to the 2020 Review of the Workers Compensation Scheme.¹

To reiterate, our submission included the following:

SIRA must actively regulate all insurers not just the nominal insurer/ icare.

The fact that errors in claim management are not confined to the nominal insurer (NI) has been recognised by SIRA. A Sydney Morning Herald article of 8 March 2020 reporting some of the outcomes of the Dore report stated that SIRA *demand a risk assessment audit for other NSW government workers compensation funds and the government property insurance scheme managed by icare, known as the Treasury*

¹<https://www.parliament.nsw.gov.au/lcdocs/submissions/68043/0007%20AEU%20NSW%20Teachers%20Federation.pdf>

*Managed Fund.*² Federation welcomes this level of scrutiny, while maintaining that other outcomes of the review should also be extended to the TMF Scheme.

As a result of the review, SIRA put forward a 21 point action plan to improve performance and management of the NI.³ Federation would contend that many of these improvements should also be extended to the TMF scheme. Those we believe relevant to both schemes include:

5: Noting icare has advised SIRA that icare and its agents now allocate a dedicated case manager where an injured worker is away from work for 2 weeks. SIRA recommends icare consider a further enhancement to allocate a dedicated case manager whenever an injured worker is likely to be (or has been) incapacitated for work for a continuous period of more than 7 calendar days. This would include any injured person meeting the definition of a worker with a significant injury as defined by s42 of the Workplace Injury Management and Workers Compensation 1998 Act (1998 Act) and would strengthen delivery of appropriate injury management as required by s45 of the 1998 Act.

Such good practice should be expanded to all workers in NSW.

8: SIRA will invite icare to attend SIRA Tripartite Reference Group meetings at least once per quarter to outline progress on actions arising from the Review and on the performance of the NI. It is recommended the icare CEO attend whenever possible to engage with peak business organisations and unions.

TMF should also be expected to report to the Government Agencies and unions involved.

10. During 2020, SIRA will conduct and publish a quarterly compliance and performance audit of claims management by the NI, under Division 4 of the Workers Compensation Act 1987, including file reviews utilising an enhanced methodology. Audit reports will be provided to the SIRA and icare boards.

This information should be requested of all scheme agents to provide transparency and consistency across the schemes.

13. SIRA will engage constructively with the icare board and senior executives on the NI management and improvement plans; SIRA will retain its independent approach on compliance and enforcement matters

As SIRA has a similar level of responsibility for the TMF this is good practice for all areas of the scheme.

² <https://www.smh.com.au/national/nsw/errors-in-workers-comp-victims-payments-for-six-years-with-25-per-cent-underpaid-by-icare-20200308-p5480d.html>

³ <https://www.sira.nsw.gov.au/fraud-and-regulation/review-of-the-nominal-insurer/Response-and-actions#21>

16. As a priority, SIRA will lead consultation on measurement of return to work outcomes for injured people and is working with Safe Work Australia on its national RTW measurement framework.

19. SIRA will conduct a rolling survey to measure the customer experience of injured people and policy holders across workers compensation and CTP. The first survey will commence by March 2020 and will be published by June 2020.

Both 16 and 19 will affect all workers across NSW so should not be confined to the NI.

An extension of these items so that they are implemented across TMF as well as the NI would be a step towards increasing SIRA's oversight of all NSW Workers Compensation Schemes.

c. Realisation of benefits that it was established to achieve.

According to the icare website⁴, icare claim that they will:

Deliver value and affordability: We will deliver valued insurance products and services that lead to injury and loss prevention and limit risk, resulting in more affordable and stable premiums and contributions for employers and the NSW Government.

And

Improve injury outcomes: We will continue to support injured workers return to health and work through an effective claims operation and through improved management of individual cases, delivered in a financially sustainable way.

Federation has concerns with the order of these items. The purpose of the NSW Workers Compensation Scheme should be, first and foremost, to support injured workers and the stability of premiums should be a measure of how the scheme is managed and implemented by the regulator and their scheme agents.

The second point is also overly concerned with the need for the scheme to be financially sustainable. There is no mention of improving services to injured workers. It may be implied that 'improved management of individual cases' would include effective and timely medical treatment and support, coupled with the aim of providing both suitable duties and sustainable return to work outcomes, however it is disappointing that the needs of an injured worker are described in less detail than the financial needs of the scheme.

⁴ <https://www.icare.nsw.gov.au/about-us/our-strategy>

j. Relationship with the State Insurance Regulatory Authority (SIRA).

Federation is the union which represents the NSW Public Sector in the SIRA Tripartite Meetings. The communication between the Tripartite and SIRA has not always been effective. Unions were invited to propose questions to be presented to icare with the expectation that these questions would be answered at the meeting on 4 May 2020. Many of these questions concerned implications for workers compensation arising out of the spread of Covid in the NSW community.

Icare representatives attended the meeting and provided a presentation, however they did not directly address the questions. The unions voiced their disappointment to SIRA who followed up the matter and answers were provided by Don Ferguson as Interim CEO of icare on 26 August 2020.

Federation is of the opinion that improved communication between SIRA and icare and an ongoing, open communication between icare, SIRA and affiliates to Unions NSW would be to the advantage of injured workers.

2) Review of the government-managed workers compensation schemes (NI and Treasury Managed Fund (TMF)) and the legislative framework that supports them.

This part of the Review will consider:

a. whether the workers compensation schemes are delivering on their policy objectives

The policy objectives of the workers compensation scheme in NSW are outlined in section 3 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act). Those policy objectives are as follows:

- (a) to assist in securing the health, safety and welfare of workers and in particular preventing work-related injury,*
- (b) to provide—*
 - prompt treatment of injuries, and*
 - effective and proactive management of injuries, and*
 - necessary medical and vocational rehabilitation following injuries,**in order to assist injured workers and to promote their return to work as soon as possible,*
- (c) to provide injured workers and their dependants with income support during incapacity, payment for permanent impairment or death, and payment for reasonable treatment and other related expenses,*
- (d) to be fair, affordable, and financially viable,*
- (e) to ensure contributions by employers are commensurate with the risks faced, taking into account strategies and performance in injury prevention, injury management, and return to work,*
- (f) to deliver the above objectives efficiently and effectively*

The ordering from (a) to (f) above infers a priority order for the scheme's policy objectives. It is no accident that the elements of injury prevention, access to necessary treatment for rehabilitation and income/medical expense support for injured workers listed above measures of the scheme's affordability. Clearly the policy objective is to put the treatment, rehabilitation and income/medical expense needs of the injured worker at the centre of all decisions made under the scheme.

However, in practice the scheme does not always operate in a manner that puts the injured workers' needs at the centre of all decision-making. This has been the experience of our members in the areas of provision of suitable duties, the intrusion of rehabilitation providers into medical areas, loss of income support and treatment expenses at arbitrary points of time.

Employers covered by the TMF have an obligation to provide suitable work to injured workers who are able to return to work with medical restrictions. The obligation arises under section 49 of the 1998 Act. Suitable work must be provided when requested by the injured worker who is seeking workplace rehabilitation.

Federation members tend to experience difficulties in accessing suitable work on request mostly when recovering from psychological injury. According to SIRA's system overview statistics, for 2019-20, psychological claims in Education and Training under the Treasury Managed Fund⁵ were 19% of all claims (867 of 4,372). For these injured teachers, medical restrictions on rehabilitation in the workplace usually preclude suitable work on the worksite where the injury was incurred. Accordingly, requests are made for duties to be provided in another local school and the Department of Education's Director Educational Leadership (DEL), with oversight of that school worksite and about 20 others in the area, locates opportunities for the injured worker's temporary placement in another school. This is not usually provided in a timely manner, which impacts adversely on the injured worker's rehabilitation and their income support in the second entitlement period.

For instance, after being medically certified as ready for workplace rehabilitation, a Department of Education teacher who had incurred an anxiety injury in 2019, arising from an incident for which a student was suspended, waited 4 months for a Department of Education temporary placement in another local school. During this time, the injured worker's income support was compulsorily stepped down from 95% to 80% for not engaging in the minimum statutory requirement of 15 hours' work a week to maintain the higher payment in the second entitlement period. Whilst this may have resulted in an efficiency saving for the scheme, the delay did little to promote the scheme's priority of injured worker workplace rehabilitation and income support. This could be remedied

by SIRA working with scheme agents for the TMF to compel employers to provide timely suitable work to improve return to work timeframes and outcomes.

Federation members covered by the TMF have also reported rehabilitation providers inappropriately intruding into medical areas in the operation of the scheme. The prime example reported by our members is where the provider arranges a conference with the injured worker and their nominated treating doctor on the pretext that it is a case conference. However, our members have reported that, in the conference, the provider asserts that it is imperative that the medical practitioner certifies an increase to the range of duties the injured worker is capable of undertaking. Rather than conducting the conference as a case conference to implement a certificate of capacity in the workplace, the conference in effect becomes a medical assessment. This operational practice poses a significant risk to the medical/psychological recovery of injured workers covered by the TMF. In order to improve their return to work rates, rehabilitation providers engaging in this practice are not putting the injured worker covered by the TMF at the centre of scheme decision-making.

Federation members in work covered by the TMF are also continue to experience financial hardship and denial of treatment under the scheme. This is common when the compulsory step-down in weekly payments and treatment expenses fall under the *Workers Compensation Act 1987* (the 1987 Act). Injured workers are required to draw against accrued leave, including sick leave, and are threatened with medical retirement by the Department of Education. For instance, a teacher with a chronic psychological injury arising from the harassing behaviours of students in 2015, and who had a current independent medical examination report still supporting a graduated return to work, is one such teacher threatened with medical retirement when weekly payments ceased 5 years after the date of injury under section 39 of the 1987 Act. The operation of the scheme still promotes outcomes that do not place injured workers' needs for rehabilitation, treatment and income support needs at the centre of scheme decision-making.

b. financial sustainability of the two schemes.

Federation makes no comment except to state that the schemes must remain viable to ensure that all injured workers have access to their full entitlements under the legislation.

3) Statutory review required by s32 of the SICG Act:

This part of the Review will assess:

- a. whether the policy objectives of the SICG Act remain valid which are:

23 Principal objectives of SIRA

The principal objectives of SIRA in exercising its functions are as follows:

- (a) to promote the efficiency and viability of the insurance and compensation schemes established under the workers compensation and*

motor accidents legislation and the Home Building Act 1989 and the other Acts under which SIRA exercises functions,
(b) to minimise the cost to the community of workplace injuries and injuries arising from motor accidents and to minimise the risks associated with such injuries,
(c) to promote workplace injury prevention, effective injury management and return to work measures and programs,
(d) to ensure that persons injured in the workplace or in motor accidents have access to treatment that will assist with their recovery,
(e) to provide for the effective supervision of claims handling and disputes under the workers compensation and motor accidents legislation and the Home Building Act 1989,
(f) to promote compliance with the workers compensation and motor accidents legislation and the Home Building Act 1989.

Federation is concerned that the order of the principal objectives of SIRA, place the efficiency and viability of the scheme, which are financial objectives above those concerned with the health and wellbeing of individuals. This blatant emphasis on monetary efficiency has been to the detriment of individual workers who need to be supported by the scheme.

In the System Objectives of the *Workplace Injury Management and Workers Compensation Act 1988 No 86*⁶, the financial viability of the scheme is part of point (d) but in the Principal Objectives of the SIRA legislation it is listed as point (a). If, as reported by the media⁷, the scheme is in deficit, there is evidence of unintended or perverse outcomes when the organisation put into place to achieve this as one of its outcomes has proven to be so poor at financial management. More recent media coverage has also questioned the tendering of contracts⁸.

Federation has ongoing concerns with the effectiveness of the quasi privatisation of NSW government services through the creation of government owned corporations. As an entity SIRA was instructed:

(a) to promote the efficiency and viability of the insurance and compensation schemes established under the workers compensation and motor accidents legislation and the Home Building Act 1989 and the other Acts under which SIRA exercises functions

SIRA, as the regulator supervising icare was informed by the legislation that their first objective was to promote an efficient system with a financial aim ahead of the needs of those injured in workplaces and on our roads. The resulting 'corporation' appears to have managed the system in such a way that it is in no better a financial

⁶ <https://www.legislation.nsw.gov.au/view/html/inforce/current/act-1998-086#>

⁷ <https://www.abc.net.au/4corners/the-financial-scandal-and-human-cost-of/12496682>

⁸ https://www.smh.com.au/business/workplace/multimillion-dollar-icare-contracts-were-awarded-in-sham-tender-20201031-p56ae1.html?fbclid=IwAR2UeGulxluUb-rJe_c-G8na6AKOIWdmz0Q0koXAz-2O9rrOpTcH7EaqATs

position than when it had been managed directly by the state government and staffed by directly employed public servants.

b. whether the terms of the SICG Act remain appropriate for securing those objectives

The terms of the SICG act remain appropriate, however they should be rearranged to reflect the order provided in the WIMCA, thereby placing the wellbeing of injured workers as the priority and the financial and other administrative or organisational objectives as a means rather than the objective of the scheme.

Recommendations for improvements in line with parts 1-3 of the Terms of Reference, including in relation to:

c. any amendments to the SICG Act

As explained above, the objectives of the SICG Act should be re ordered so as to better reflect the priorities of the *Workplace Injury Management and Workers Compensation Act 1988 No 86*.

d. any amendments to the Workers Compensation Act 1987 (WC Act) or Workplace Injury Management and Workers Compensation Act 1989 (WIM Act) to the extent they relate to the above Terms of Reference

To summarise matters referred to earlier, legislative change should:

1. Encourage human interaction over online forms for the lodgment of claims
2. Reform the incentives for rehabilitation providers to return workers to the workplace by set dates.
3. Increase supervision and incentives for large employers to provide suitable duties to workers, especially those with capacity to return to work in their current role, but at a different worksite.
4. Remove timed cut off points for the removal of weekly payments and medical expenses.

The overall aim of all of the relevant legislation must be to provide a safe workplace to all workers in NSW and a humane system of support providing weekly payments and medical expenses to those injured at work. For those who recover, a timely return to work in line with their current capacity and for those who do not, ongoing support to enable them to continue their lives without the risk of poverty.