TAMMY FRANKS.

Member of Legislative Council

Office of Tammy Franks MLC
Parliament House
North Terrace
Adelaide SA 5000

Friday, 16 February 2018

Dear Hon John Mansfield AM QC

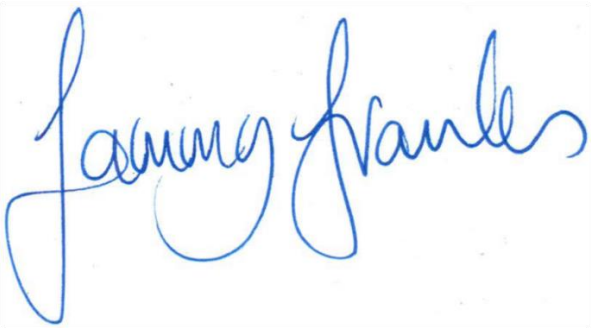
RE: Submission for the Review into the Return to Work Act 2014

Thank you for your invitation to make a written submission to the Review into the operation and administration of the *Return to Work Act 2014*.

My submissions to the review are included at the end of this letter.

Should you require any clarification or further discussion of these matters, please contact my office on 8237 9414 or franks.office@parliament.sa.gov.au.

Kind regards,



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THE GREENS

Review into the operation and administration of the Return to Work Act 2014

Submissions of the Hon Tammy Franks MLC

Introduction

It is my view that the terms of reference for this Review are particularly narrow in focus, with the primary emphasis placed on the dispute resolution process and other financial and administrative matters, while the entitlements of injury workers are not explicitly prioritised. I will, therefore, give greater consideration to item 10 of the terms of the Review, considering matters affecting the capacity of the Act to meet its objectives, with particular reference to how the operation of the Act impacts the rights of injured workers and identifying possible improvements. My submission will also respond to terms 1, 2, 3, 4, 6, 7 and 9.

1. **The extent to which the scheme established by the Act and the dispute resolution processes under the Act and the *South Australian Employment Tribunal Act 2014* have achieved a reduction in the number of disputed matters and a decrease in the time taken to resolve disputes.**

I note the data provided in the submission of RTWSA, pointing to a decrease in disputes under the current scheme and the duration of dispute resolution. While a decrease in the time taken to resolve disputes is advantageous, I submit that data on the incidence of matters in dispute of itself does not provide much information about the efficacy of the scheme in achieving its objectives.

The unfair and artibrary 30% whole person impairment threshold imposed by the Act as the sole measure of serious injury, for instance, potentially decreases the rate of dispute by limiting the number workers covered by the scheme. The Review should therefore consider whether this RTWSA data is more indicative of how the current Act diminishes the rights of injured workers than anything else.

I am also concerned by the recent assertion of the Law Society of SA that: "The time taken to resolve workers compensation disputes has blown out in recent times."[1] This claim appears to contradict the RTWSA submissions, and it is my submission that the Review should investigate whether the dispute resolution scheme is actually running with the efficiency presented by RTWSA and, if not, identify the reasons for this.

2. **Whether the jurisdiction of the SAET under the Act should be transferred to the South Australian Civil and Administrative Tribunal.**

SAET, as a specialist employment tribunal, seems suitably equipped to deal with matters arising under the Act. It is my submission that there not a strong argument for this jurisdiction to be transferred to SACAT.

3. **The extent to which there has been an improvement in the determination or resolution of medical questions arising under the Act.**

I agree with the RTWSA submission that 'improvement' is difficult to define. However, I do not agree with their submission on the *Mitchell* decision[2]. While the scheme needs to be financially viable, this should not occur at the expense of objects of the legislation, particularly supporting workers who suffer injuries at work. The *Mitchell* decision to combine the impairment of a principal injury with the associated impairment from the side effects of medications appears to be entirely consistent with the objects of the Act. Rather than encouraging a culture of dependence and litigiousness, *Mitchell* allows for a more comprehensive assessment of impairment than would be allowed under the RTWSA position. Furthermore, I submit that RTWSA is itself encouraging an adversarial, litigious culture by appealing decisions such as *Mitchell*. I therefore submit that the RTWSA submissions on this point be disregarded.

[1] Tony Rossi, "Workers Compensation delays need to be addressed", *Points of Law*, Law Society of SA 6/11/17
[2] [2017] SEAT 81

4. The performance of RTWSA in managing claims.

The Law Society of SA raised the following concern in November 2017:

> *"Meanwhile, ReturnToWorkSA, which determines the bulk of the claims in this State, has often steadfastly refused to negotiate a compromise with injured workers once it has taken a position. This sometimes means that the Corporation is spending more on disputed proceedings than the amount in dispute, and is forcing workers to either accept its position (in some cases where a Full Bench of the Tribunal has said its position is wrong) or wait until that issue is resolved by the Supreme Court."*[3]

This assessment is of great concern and it is my submission that the Review should investigate how, in the interests of better outcomes for injured workers, RTWSA could be less litigious in its approach to claims by adopting significantly greater focus on compromise.

I note that with regard to service delivery for seriously injured worker the RTWSA states:

> *"As at December 2017 there are 521 current serious injury claims (which have accumulated since 1987), that is, where workers have been determined to have a permanent whole person impairment of greater than 30%, and are therefore entitled to income support until retirement age and lifetime medical and related expenses."*

I submit the Review should investigate how this figure of 521 claims differs from the previous scheme, and, if the 2017 figure represents a significant decrease, what has become of the previous claimants who are no longer entitled to this support.

6. Changes in return to work rates at key milestones outlining factors influencing any improvement or deterioration.

There is a need for greater transparency here. While the RTWSA data demonstrates improvement in the rate of returning to work under the new legislation, there should be greater clarity about how return to work is defined. It is my submission that the Review should seek clarification from RTWSA around whether their definition includes a return to employment of any capacity or whether the definition is restricted to long term, meaningful employment. I would argue that only the latter approach provides a reliable picture of the return to work situation under the Act.

[3] Tony Rossi, "Workers Compensation delays need to be addressed", *Points of Law*, Law Society of SA 6/11/17

7. **Factors contributing to non-seriously injured workers failing to achieve a return to work within two years.**

I submit that the way the Act defines serious and non-serious injury is deeply flawed and must be scrutinised by this Review. The 30% whole person impairment threshold for serious injury is an arbitrary measure that bears no connection to the reality for many injured workers. There are people who suffer work related injuries but are assessed below the threshold, despite having no real capacity to return to the workforce. Those in this situation are neglected under the current scheme and it is my submission that the legislation should be amended to correct this.

9. **Whether the scheme has yet achieved financial stability and if not when the scheme will be likely to be mature and stable.**

The data supplied by RTWSA demonstrates that the scheme has reached financial stability, to the point where it is now generating a considerable profit. According to the figures in the RTWSA submission, the scheme is currently overfunded at 119.5% and with net assets of $500m,[4] while also achieving a significant reduction in the average premium rate. I submit that the Review should consider whether a scheme that generates a profit and delivers a substantial benefit to employers while restricting the entitlements of injured workers is consistent with the objects of the legislation and therefore not fit for purpose.

On the figures supplied, the scheme appears fashioned to generate a profit but this should not be the design of RTWSA.

The 2017 financial statement also lists liabilities that include tax equivalents of $73m. This is more money that should be used to support injured workers rather than going back to government. I submit that the Review should consider measures that remove the tax liabilities of the scheme in order for more funds to be available for worker entitlements.

[4] As of 30 June 2017

10. Other recommendations based on a review of the administration and operation of the Act that are appropriate and consistent with the objects of the Act.

The objects of the Act includes supporting "*workers who suffer injuries at work*" (s. 3 (1)) and ensuring "*that workers who suffer injuries at work receive high quality service, are treated with dignity, and area supported financially*" (s. 3 (2)(a)).

I submit that the current scheme is not consistent with these objects, by failing workers who do not meet the criteria for serious work injury but are in need of support, such as those:

- who require ongoing medical assistance more than 12 months after the weekly payments end;
- whose injuries do not meet the 30% threshold but cannot meaningfully undertake work;
- whose injuries are psychological and therefore have difficulty in meeting the 30% threshold;
- who do not meet the threshold because of multiple injuries; and
- whose claims are rejected because employment is deemed to be a substantial cause, but not the significant cause of injury.

The financial stability of the scheme provides scope for the Act to be amended, with changes made so that workers, such as those who currently find themselves outside the scope of the scheme, would be supported in a manner that is consistent with the objects of the legislation.

Accordingly, the Review should consider changes to the 30% whole person impairment threshold. 30% remains too restrictive. By comparison, NSW operates with a 20% threshold. I submit that the threshold in South Australia should be lowered to 15% and, even then, there should be alternatives for those who do not meet the test despite significant injury, such as by:

- Operating a hybrid scheme, as in Queensland, where workers have a choice of pursuing claims at common law or via the workers compensation scheme, or both (and where there is no threshold test); or
- Having the option of using a common law narrative test where the threshold is not met, as in Victoria.

This would allow the scheme to better support workers, providing for those who are currently unable to meet the threshold but have no capacity to return to work in a meaningful fashion.

Other changes that would, similarly, assist the scheme to operate consistently with the objects of the legislation include:

- Disregarding whether injuries are sustained from one injury or several when determining whether an injury is serious (and thereby curtailing one current area where significant dispute arises);
- Introducing provisions so that injured workers (non-serious) can be supported to access medical assistance beyond the current 12 month restriction where there is a legitimate need;
- A thorough review of the Impairment Assessment Guidelines against the objects of the Act, with amendments made to better support injured workers; and
- Changes to the way psychological injury is assessed, including consideration of the usefulness of any threshold test here (given the difficulties in determining such injuries against the whole person), and removing the requirement for the workplace to be "the significant cause", with the attribution of "a significant cause" being sufficient.