Appendix 1

Correspondence

ATTORNEY-GENERAL

CANBERRA

MC15/06437

Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

14 JUL 2015

Dear Chair Philip,

Response to the Human Rights Scrutiny Report on the Copyright Amendment (Online Infringement) Bill 2015

I am writing in relation to information that the Parliamentary Joint Committee on Human Rights (the Committee) has sought regarding the Copyright Amendment (Online Infringement) Bill 2015 (the Bill), as detailed in its report dated 13 May 2015.

The Committee has considered that the Bill engages and limits the right to freedom of opinion and expression and has sought advice on whether this limitation is proportionate.

The injunction power contained in the Bill is intended to target sources that supply significant amounts of infringing copyright content to Australian consumers. The Bill asks the Federal Court to balance a variety of interests in making an order and I expect the Court will be very circumspect in using this process.

Mechanisms that aim to change the behaviour of individual consumers through an educational approach, such as the Copyright Notice Scheme contained in the industry code submitted to the Australian Media and Communications Authority on 8 April 2015, would effectively complement but not replace a measure that disrupts the supply of infringing content. International experience has shown that disrupting the supply of infringing content will steer consumers towards legitimate avenues. Direct proceedings against individual infringers is not an effective means of addressing online copyright infringement due to the large number of infringers and the small quantum of damages that could be recovered from each infringer.

The Bill does not seek to limit the ability of persons to access or communicate information or ideas, other than where doing so would infringe another person's copyright. Where an online location provides a mixture of legitimate and infringing material, it is open to the Court to issue an injunction with regard to only specific pages, directories or indexes provided this is technically feasible. Moreover, the primary purpose test, combined with the factors in

subsection 115A(5) make it clear that only online locations that are deliberately and flagrantly infringing copyright will be captured. The injunction power is not intended to capture incidental infringement.

Furthermore, there are a number of reasons that make it impractical for copyright owners to take direct proceedings against infringing foreign-based online locations. The territorial nature of copyright means that copyright owners often face complex issues of private international law when enforcing their rights in the online environment.

This was discussed in a 2011 article published in the European Intellectual Property Review and authored by Ms Fiona Rotstein of the University of Melbourne, which stated:

> It is often difficult to know which nation's courts have jurisdiction over intellectual property disputes involving a foreign element and which conditions need to be met for decisions of foreign courts to be recognised and enforced within a country. It is also not easy to determine which nation's laws are to be applied to govern the substance of legal relationships involving a foreign element.[1]

The article also noted that it is unknown whether the copyright owner can bring an action in one forum in respect of multiple infringements in different countries.

The legal complexities and the possibility that copyright owners will need to attend foreign courts to enforce their rights means that any direct proceeding against a foreign online location are likely to be prohibitively costly, particularly for individual or lesser known copyright owners. In contrast, the process of seeking an injunction against a Carriage Service Provider would be a much simpler and more accessible process.

The Committee has also found that the Bill engages and limits the right to a fair hearing and has sought further advice on whether this limitation is proportionate.

The Committee has raised the concern that the opportunity for the operator of the online location to apply to be joined as a party is dependent on notification by the copyright owner and there may be circumstances in which the operator cannot be contacted despite reasonable efforts. However, in circumstances where the identity or address of the operator cannot be ascertained, the possibility of initiating direct proceedings against the operator would also be precluded. Therefore, if the requirement for notification was absolute, the copyright owner would be left with no remedy in these cases. An important objective of the Bill is to enable copyright owners to overcome the practical difficulties they face in taking action against foreign online locations. This objective would not be achieved if the operator of the online location could avoid any action by hiding their identity and location.

The rights of users will only be affected to a limited extent by an order. Where the user has a contractual relationship with the operator of the online location, this relationship will govern the consequences for the user of an injunction order which results in the blocking of the online location and any recourse that the user may have against the operator. To the extent that the user is denied access to legitimate information, this impact will only be significant if the information cannot be accessed from legitimate sources. Furthermore, the operator of the online location is not prevented from providing a modified, legitimate source of information at a new online location.

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[1] Rotstein, Fiona, 'Is there an international intellectual property system? Is there an agreement between states as to what the objectives of intellectual property laws should be?' *European Intellectual Property Review*, Vol 33, Iss 1, 2011

Therefore in my opinion, the Bill limits the right to freedom of opinion and expression and the right to a fair hearing to an extent that is proportionate to achieving its objective of reducing online copyright infringement.

Thank you again for writing on this matter.

Yours faithfully

(George Brandis)

ATTORNEY-GENERAL

CANBERRA

MC15/01744

The Hon Philip Ruddock MP
Chairman
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

17 JUN 2015

Dear Chair Phil

I refer to the letter of 13 February 2015 from Senator Dean Smith, the former Chairman of the Parliamentary Joint Committee on Human Rights, requesting my advice on matters raised in the committee's *Human rights scrutiny report 10 February 2015*, about the Freedom of Information Amendment (New Arrangements) Bill 2014.

The purpose of the Bill is to abolish the Office of the Australian Information Commissioner (OAIC), as part of the Government's commitment to reduce the size of government, streamline the delivery of government services and reduce duplication. The Bill does not affect the legally enforceable right of every person to request access to documents of an agency or official documents of a Minister. It does not make any changes to the objects of the *Freedom of Information Act 1982* (FOI Act) or the matters that agencies and ministers are required to consider in making decisions on FOI requests. It simply removes an anomalous and unnecessary layer of external merits review of FOI decisions.

The dual layers of merits review was examined in the 2013 report on the *Review of the Freedom of Information Act 1982 and the Australian Information Commissioner Act 2010* (Hawke FOI Review). The report noted that a number of submissions to the review, including that of the OAIC, questioned whether having access to three levels of merits review was the most efficient model for reviews of FOI decisions. A multiple review process where applicants can access a range of dispute resolution mechanisms can be confusing and creates complexity which adds to the resource burden for both applicants and FOI decision makers.

The establishment of the OAIC created an unnecessarily complex, multi-levelled system resulting in duplication of complaint handling and significant processing delays. These issues have existed from conception and are inherent in the design of the system, as opposed to practice or procedure of the OAIC. No amount of time to consolidate practices or refine procedures would redress the underlying issues with the system.

Prior to the establishment of the OAIC, there was compulsory internal review of FOI decisions before an applicant could apply for merits review at the Administrative Appeals Tribunal (AAT). Since the commencement of the OAIC, internal review has been available, but not compulsory, prior to seeking review in the OAIC.

Under the new arrangements, the AAT will have sole responsibility for external merits review of FOI decisions as it did for thirty years from commencement of the FOI Act in 1982 until the establishment of the OAIC in 2010. If an FOI applicant is not satisfied with an agency decision, they can apply for an internal review of the decision. There is no application fee for an internal review.

Compulsory internal review will ensure access to low-cost and timely review for applicants. It also provides an opportunity for agencies to reconsider the merits of the initial decision and give agencies primary responsibility for overseeing original FOI decisions. Following the abolition of the OAIC, agencies will again have sole responsibility for the initial review of agency decisions. If an applicant is not satisfied with an internal review decision, they may then apply to the AAT for an external review of the decision.

No changes are proposed for the AAT application fee under the new arrangements for FOI reviews. While there is a reduced fee of $100 that applies in cases of hardship, there are also circumstances where no application fee is payable. This includes where the FOI review relates to a decision about Commonwealth workers' compensation, family assistance and social security payments and veteran's entitlements. Further information is provided in the enclosed extract from the AAT website. Consistent with other AAT matters, a successful applicant before the AAT will receive a refund of all but $100 of the application fee.

It is appropriate that the existing fee regime applies to FOI applicants in the same way as it applies to other government decisions being reviewed by the AAT. Requiring the payment of a fee for an AAT application may also lead to consideration by applicants of whether or not seeking review is appropriate in the circumstances, rather than simply an automatic response to an agency decision that is not favorable to the applicant.

The Bill corrects the fundamental problems in the current system by streamlining FOI regulation to remove a layer of unnecessary external merits review. By doing so, the Bill brings the process into line with review arrangements for other government decisions. This will mean that FOI applicants will no longer need to navigate a complex multi-level system nor be subject to significant processing delays.

As noted above, under the new arrangements those applicants who wish to seek review of the initial FOI decision will be able to seek internal review of the decision. Where a party is not satisfied with the internal review decision, there is a further right of review to the AAT. There is a further right of appeal to the Federal Court of Australia on a question of law from a decision of the AAT and the AAT is also able to refer a question of law to the Federal Court during a review.

Those applicants who wish to make a complaint about agency processing under the FOI Act will be able to make their complaint directly to the Ombudsman, who will take over the OAIC's role of investigating FOI complaints.

In my view the removal of a layer of external merits review does not impinge on the right to an effective remedy for FOI applicants. The continued availability of internal review, external merits review, access to judicial review and a right of complaint to the Ombudsman ensures comprehensive access to an effective remedy.

The new arrangements were to commence on 1 January 2015. However, as the Bill is still before the Parliament, the OAIC remains responsible for privacy and FOI regulation and continues to exercise its functions under both the *Privacy Act 1988* and the *Freedom of Information Act 1982* (FOI Act).

Resources are being reappropriated to the OAIC for the remainder of 2014-15 to allow it to continue the exercise of privacy and FOI functions, and the OAIC will also receive an appropriation in 2015-16 for these functions.

The OAIC has implemented a streamlined approach for applications for merits review of FOI decisions. Straightforward matters are being finalised by the OAIC, and where appropriate more complex or voluminous matters are being referred to the AAT if the Information Commissioner decides that it is desirable in the interests of the administration of the FOI Act that the matter be reviewed instead by the AAT. In such an event, an applicant may apply to the AAT in accordance with regular AAT procedures. All new FOI complaints are being referred to the Ombudsman.

The appointment of the Information Commissioner ends at the end of October 2015. If the Bill has not passed by then, the Government will ensure that arrangements are in place for the continued exercise of all of the Information Commissioner functions. The former Freedom of Information Commissioner, Dr James Popple, was appointed as a full-time Senior Member of the AAT on 1 January 2015. Dr Popple has been appointed until 31 December 2017

Thank you again for writing on this matter.

Yours faithfully

(George Brandis)

AAT Application Fees *(information from the AAT website: AAT.gov.au).*

When are you eligible to pay a reduced fee?

If a full application fee is usually payable for an application, you can pay a reduced fee of $100 instead of the full application fee if you fall into one of these groups:

- you are receiving legal aid for your application
- you hold a health care card, a pensioner concession card, a Commonwealth seniors health card or any other card issued by the Department of Social Services or the Department of Veterans' Affairs that certifies entitlement to Commonwealth health concessions
- you are in prison or lawfully detained in a public institution
- you are under 18 years of age; or
- you are receiving youth allowance, Austudy or ABSTUDY.

You can also ask the AAT to reduce the fee you have to pay, if paying the full fee would cause you financial hardship.

Reduced fee because of financial hardship

The Registrar, a District Registrar or Deputy Registrar of the AAT can order that a reduced fee of $100 must be paid instead of the full application fee, if he or she decides that paying the full fee would cause you financial hardship.

In making a decision about whether paying the full fee would cause you financial hardship, a Registrar will take into account your financial circumstances. This includes a range of factors, such as the amount you earn, your living expenses, your assets and debts.

When do you not have to pay an application fee?

In certain circumstances, you do not have to pay an application fee.

1. No fee is payable if the decision to be reviewed is listed in Schedule 3 to the *Administrative Appeals Tribunal Regulations 1976* (see list below). This includes decisions about Commonwealth workers' compensation, family assistance and social security payments and veterans' entitlements.
2. No fee is payable if the decision was made under the *Freedom of Information Act 1982* in relation to a document which relates to a decision under Schedule 3 to the *Administrative Appeals Tribunal Regulations 1976.*

Decisions which do NOT attract an application fee under Schedule 3 of the *Administrative Appeals Tribunal Regulations 1976*

Decisions under the following Acts or enactments:

- Any determination under section 58B of the *Defence Act 1903*
- *A New Tax System (Family Assistance) Act 1999*, *A New Tax System (Family Assistance) (Administration) Act 1999*, Schedules 5 and 6 to the *A New Tax System (Family Assistance and Related Measures) Act 2000*
- *Defence Force Retirement and Death Benefits Act 1973*
- *Defence Service Homes Act 1918*
- Part III of the *Disability Services Act 1986*
- *First Home Owners Act 1983*
- *Home Deposit Assistance Act 1982*
- *Homes Savings Grant Act 1976*

- *Military Rehabilitation and Compensation Act 2004*
- *National Disability Insurance Scheme Act 2013*
- Subsection 40AA(8), 40AA(10), section 40AB, 40ABA or 40AC of the *National Health Act 1953*
- Subsection 4(7) of the *Nursing Homes Assistance Act 1974*
- *Papua New Guinea (Staffing Assistance) Act 1973* and Papua New Guinea Staffing Assistance (Superannuation) Regulations
- *Safety Rehabilitation and Compensation Act 1988*
- *Seafarers Rehabilitation and Compensation Act 1992*
- *Social Security Act 1991*, *Social Security (Administration) Act 1999*, *Social Security (International Agreements) Act 1999*
- Section 33 of the *Social Services Act 1980* of Norfolk Island
- *Superannuation Act 1976*
- *Student and Youth Assistance Act 1973*, other than Division 6 of Part 4A
- *Veterans' Entitlements Act 1986.*

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION
AND BORDER PROTECTION

Ref No: MC15-064719

The Hon Philip Ruddock MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Philip.

Thank you for your two letters of 13 May 2015 concerning the remarks of the Parliamentary Joint Committee on Human Rights (the Committee) in relation to the Migration Amendment (Strengthening Biometrics Integrity) Bill 2015, the Migration Legislation Amendment (2014 Measures No. 2) Regulation 2014, and the Australian Border Force Bill 2015. I apologise for the delay in responding.

The Committee's remarks are contained in its *Twenty-Second Report of the 44th Parliament*. My response addressing the remarks is enclosed.

Please note that my response to the Australian Border Force Bill 2015 (passed on 14 May 2015) will be provided at a later date, as the Committee is likely to consider a range of related instruments shortly.

Thank you for bringing the Committee's views to my attention.

Yours sincerely

PETER DUTTON 25/6/15

Parliament House Canberra ACT 2600 Telephone: (02) 6277 7860 Facsimile: (02) 6273 4144

Attachment A

Migration Amendment (Strengthening Biometrics Integrity) Bill 2015

Breadth of discretion

The Committee considers that the broad discretionary power to collect personal identifiers engages and limits the right to privacy. As noted above, the statement of compatibility has not sufficiently justified this limitation for the purpose of international human rights law. The Committee therefore requests the advice of the Minister for Immigration and Border Protection as to whether the measure is a proportionate means of achieving the stated objective.

The approach in the Bill is proportionate as personal identifiers can only be collected for a purpose set out in the *Migration Act 1958* or *Migration Regulations 1994*. These legislated purposes ensure the collection of personal identifiers is not done arbitrarily, and are necessary to the Department's functions and activities. As stated in the Explanatory Memorandum to the Bill, the Department collected an additional personal identifier (i.e., fingerprints) from less than two percent of people granted a visa in 2013/14. This very small number evidences that the current purpose for the collection of personal identifiers is appropriate and limited to legitimate needs to not only verify identity, but also to conduct necessary immigration, security and law enforcement checks to protect the Australian community.

The Bill expands the circumstances in which personal identifiers may be collected beyond those currently set out in the Migration Act:

- visa decision-making (sections 40 and 46) – non-citizens only;
- at Australia's border, on entry or departure from Australia, or travel from port to port on an overseas vessel (sections 166, 170 and 175) – citizens and non-citizens;
- evidencing that a non-citizen holds a lawful visa (section 188) and when a non-citizen is being detained on the basis that they hold a visa that is subject to cancellation on certain grounds (section 192) – non-citizens only; and
- immigration detention decision-making (section 261AA) – non-citizens only.

The Bill does not:

- add new types of personal identifiers that the Department is authorised to collect
- expand the circumstances where Australian citizens can be required to provide personal identifiers to locations other than the border
- amend the existing legislative rules and public scrutiny that the Department's handling of personal identifiers is subject to.

Developments in biometric technologies are at the forefront of the reforms in the Bill. Technological innovation now allows the Department to collect personal identifiers quickly, using non-intrusive scanners and other devices. Yet, the Department cannot utilise this new technology effectively because of limitations in current legislation. The Bill authorises the use of verification checks that take advantage of advances in biometric technology collection.

A verification check is a non-invasive, quick scan of a person's fingers using a hand-held mobile scanner. A verification check is able to be completed in approximately 30 seconds.

The Department currently collects personal identifiers, namely a facial image and fingerprints, by a time-consuming identification test. It is impractical to use identification test procedures at Australia's border because it is:

- time consuming - the current process that involves collecting both facial-image and 10 fingerprints may take 30-60 minutes to complete; and
- ineffective as the Department does not have resources to conduct more than a few identification tests per flight.

The safeguards that apply to an identification test are not necessary for a verification check, noting that unlike an identification test a person's biometric information is not retained after the completion of a verification check. The Department has been conducting verification checks in public at two international airports since 2012. More than 12,000 checks have been conducted on a consent basis, without incident, indicating the broad acceptance of the check among travellers. Conducting verification checks in public is consistent with other technology-enabled checks currently conducted in public at airports, such as the explosives trace detection test that is accepted by the travelling public as a necessary part of the overall security apparatus at airports.

Collecting personal identifiers by a means of a verification check provides the Department with flexibility to meet the increasing challenges at Australia's borders to identify persons of concern and conduct appropriate security checks accurately and quickly, and in a way that does not burden legitimate travellers. A verification check is efficient and quick. Only those individuals identified as being of higher risk would be subject to a verification check.

Officers conducting verification checks must act in accordance with the Australian Public Service Code of Conduct and the Department's professional integrity framework. Administrative and criminal penalties may apply for breaches.

The Committee considers that the broad discretionary power to collect personal identifiers may engage and limit the right to equality and non-discrimination particularly in relation to profiling and targeting of individuals for scrutiny. As noted above, the statement of compatibility has not sufficiently justified this limitation for the purpose of international human rights law. The Committee therefore requests the advice of the Minister for Immigration and Border Protection as to whether the measure is a proportionate means of achieving the stated objective.

It is the Government's view that the Bill is not discriminatory in its purpose or its impact. Individuals are not currently targeted for additional scrutiny at Australia's borders because of any single characteristic, such as religion or nationality, and the Bill provides no change to the current approach.

The Department has developed a range of sophisticated and innovative tools and capabilities to analyse risk when making visa application decisions and when people are crossing Australia's border. These mathematical, statistical and intelligence techniques produce evidence-based data that can be used to detect persons of higher risk. Examples where these tools are used include where a person:

- 'fails' automated immigration clearance through Smartgate or a manual face-to-passport check, because their facial image does not 'match' the passport photo or the passport is listed as 'stolen';
- an alert is triggered against the Department's Central Movement Alert List; and
- matches a profile (e.g., a person might match a profile for identity fraud, which may include combinations or patterns of a range of variables, such as age or where and how a ticket was purchased).

These same tools and capabilities will continue to be used to detect persons of risk. Under the Bill, the Department will be able to respond to such risks more effectively by using biometrics to resolve identity and security concerns, rather than relying on paper-based documents.

The Committee considers that the broad discretionary power to collect personal identifiers may engage and limit the right to equality before the law, particularly in relation to profiling and targeting of individuals for scrutiny. As noted above, the statement of compatibility does not provide a specific assessment of whether the right to equality before the law is engaged and limited. The Committee therefore requests the advice of the Minister for Immigration and Border Protection as to whether the measure is compatible with the right to equality before the law and particularly whether the limitation is a proportionate measure for the achievement of that objective.

As stated above, the same tools and capabilities that are currently used to detect persons of risk will continue to be used and the Bill makes no changes to the methods used to identify persons who may be requested to provide their personal identifiers to resolve concerns about a person's identity or their immigration, security or criminal histories. The Bill will authorise the use of new technology to conduct a more accurate, faster and higher-integrity check using a fingerprint scan in less than one minute.

The recent case of the convicted terrorist Khaled Sharrouf, who in December 2013 used his brother's passport to leave Australia to participate in terrorist-related activities, illustrates the need to expand the use of fingerprint-based checks to resolve concerns at the border. Under the Bill, the Department will be able to respond to such risks more effectively and quickly by using a verification check to resolve identity and security concerns.

The Committee considers that removing the current restrictions on collection of personal identifiers on minors engages and limits the obligation to consider the best interests of the child as a primary consideration. As noted above, the statement of compatibility has not sufficiently justified this limitation for the purpose of international human rights law. The Committee therefore requests the advice of the Minister for Immigration and Border Protection as to whether the measure is a proportionate means of achieving the stated objective.

The Bill aims to amend existing consent and presence requirements for minors to protect vulnerable children from trafficking and exploitation, and detect radicalised individuals who may seek to harm the Australian community.

The Department is currently prohibited by law from collecting certain types of personal identifiers from minors under the age of 15 years. In locations away from Australia's border, the Migration Act currently requires that a parent, guardian or independent person must consent to, and be present for, the collection of personal identifiers from minors. This means that a parent, guardian or independent person can prevent the Department from collecting personal identifiers from a minor by refusing consent or refusing to be present with a minor during collection of personal identifiers.

Allowing the current consent and presence requirements to remain unaltered reduces the effectiveness of using personal identifiers to combat identity fraud, including trafficking, and to detect undisclosed adverse security, law enforcement and/or immigration information of minors. The reasons for the amendments relating to minors are already outlined in the Explanatory Memorandum and Statement of Compatibility with Human Rights for the Bill. These include:

- improved integrity of identity data to more accurately identify that the right person is subject to action, and not another person who is misidentified;
- greater consistency with partner countries where fingerprints are collected based on operational policy
- enabling the case-by-case collection of personal identifiers from individual minors identified as of concern
- more protection for children who have been, or who are at risk of being trafficked
- effectively addressing the current problem of a person claiming to be a minor under 15 years of age to avoid identity, security, law enforcement and immigration checks that would otherwise apply
- detecting radicalised minors who are returning after participating in conflicts in the Middle East and elsewhere, where an increasing number of cases are evident, including some now reported in the media and are involved in violent extremism.

It is anticipated that the Bill will impact on only a small number of minors in specific circumstances, including:

- offshore to protect minors from people smugglers and traffickers;
- on entry and departure at Australia's border in certain circumstances where a minor is identified as at risk or as of concern; and
- applicants from the Refugee and Humanitarian caseload, who are a particularly vulnerable group.

Existing safeguards in the Migration Act relating to access, disclosure and retention of biometrics will continue to provide robust protections for all people affected by amendments in the Bill, including minors. The Department will implement additional policy guidelines that provide guidance to officers on how the new power to collect personal identifiers is to be exercised. The policy guidance will cover how personal identifiers are to be collected from minors and it will ensure that this is done in a respectful way. The policy guidance will be publicly available.

Migration Legislation Amendment (2014 Measures No. 2) Regulation 2014 [F2014L01461]

1.507 In accordance with its previous analysis, the Committee considers that providing for the registration of children adopted through inter-country adoption proceedings engages and may limit the rights of the child, and in particular the obligation to ensure that inter-country adoption is performed in the best interests of the child under article 21 of the Convention on the Rights of the Child. As set out above, the statement of compatibility does not provide any information to justify that limitation for the purpose of international human rights law. The Committee has already consulted that the Australian Citizenship Amendment (Intercountry Adoption) Act 2014 which the measure in the measure in the regulation implements is likely to be incompatible with the rights of the child. The Committee therefore seeks the views of the Minister of Immigration and Border Protection as to the compatibility of the measure with the obligation to ensure that inter-country adoption is performed in the child's best interests.

The Government has provided its response to the Committee regarding the *Australian Citizenship Amendment (Intercountry Adoption) Act 2015* and its compatibility with Article 21 of the Convention on the Rights of the Child. This response was provided by former Minister the Hon Scott Morrison MP on 5 August 2014. I note the contents of this response to the Committee and the Committee's findings in the 10th Report. I note the following excerpts from the response to the Committee by the former Minister:

> *'Given that all of the country programmes which the Australian Government has established must meet the standards of the Hague Convention, the government is of the view that Australia's intercountry adoption programme as a whole is consistent with Article 21 of the CRC.*
>
> *The guiding principle of all intercountry adoptions undertaken by Australia, including through the bilateral arrangements with non-Hague countries, is that the best interests of the child shall be the paramount consideration. An application for Australian citizenship is simpler and quicker than an application for a subclass 102 Adoption visa and is certainly less expensive. A more efficacious means of an adopted child's entry into Australia where supported by a Hague Convention compliant programme is in the child's best interests because it means the child can begin their life with their adoptive family in Australia more quickly without compromise to their safety and well-being.*
>
> *Therefore, the bill is consistent with Article 21 of the CRC.*
>
> *The proposal is also in keeping with Articles 9 and 18 of the Hague Convention, which respectively encourage expediting adoption processes and taking the necessary steps to ensure an adopted child can reside permanently in Australia.'*

I concur with the former Minister's response and rely on its contents in respect to Schedule 6 of the Migration Legislation Amendment (2014 Measures No. 2) Regulation 2014. As such, I have no further advice to the Committee.

SENATOR THE HON. ERIC ABETZ
LEADER OF THE GOVERNMENT IN THE SENATE
MINISTER FOR EMPLOYMENT
MINISTER ASSISTING THE PRIME MINISTER FOR THE PUBLIC SERVICE
LIBERAL SENATOR FOR TASMANIA

30 JUN 2015

The Hon. Philip Ruddock MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Mr Ruddock

This letter is in response to your letter of 13 May 2015, concerning the request for further information about the Safety, Rehabilitation and Compensation Amendment (Improving the Comcare Scheme) Bill 2015 by the Parliamentary Joint Committee on Human Rights. I apologise for the delay in this response.

Any suggestion that this Bill seeks to deny injured workers their "right" to social security or to health and a healthy environment is not supported by the facts. This Bill's fundamental premise is to improve the Comcare scheme to better support injured workers, improve return to work rates and ensure a sustainable scheme into the future.

The amendments are essential for the Comcare scheme to succeed in supporting injured employees to return to work while retaining its long tail, leaving it as the most generous workers compensation scheme in Australia. The focus of the amendments on return to work or recovery at work for injured workers reflects strong evidence internationally that being at work is actually good for health. Studies show that, if an injured worker is off work for 20 days, then the chance of ever getting back to work is 70 per cent but this drops off to just 35 per cent if an injured worker is off work for 70 days. Extended time off work is not conducive to rehabilitation. Return to work rates in the Australian Public Service have been falling and claim costs have been rising. In the public service, for example, the cost of psychological claims has risen in real terms by almost 40 per cent since 2010. The amendments will achieve better outcomes in recovery and return to work, especially for workers with psychological injuries. In all cases, medical and rehabilitation support will be available much earlier to enable workers to have better opportunities to recover from workplace injury. This Bill would see injured workers better supported to recover faster and to return to work. It would be disappointing if the Committee would rather continue with the status quo which has led to workers staying at home and developing secondary conditions such as mental ailments as a result of having a lack of purpose.

Injured workers, their colleagues, their employers and taxpayers are entitled to better performance from the Comcare scheme. Under the Government's changes, the scheme will ensure injured workers and employers work together to achieve productive and safe workplaces. Under this 'two-way street' approach, employers will be required to ensure healthy workplaces and to support injured workers and employees will be required to attend medical treatments, participate in rehabilitation and do their best to get back to work when they can.

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I have attached a comprehensive response to the issues raised by the Committee and trust that the Committee will see these important reforms are for the betterment of workers and ensuring a sustainable scheme into the future.

I trust this information will be of assistance to the Committee.

Yours sincerely

ERIC ABETZ

Encl.

ATTACHMENT

Safety, Rehabilitation and Compensation Amendment (Improving the Comcare Scheme) Bill 2015

Response to Parliamentary Joint Committee on Human Rights

Redefining work related injuries (Schedule 1)

Right to social security

Right to health and a healthy environment

At paragraph 1.304, the Committee requested further information to show that 'redefining work related injuries ... pursues a legitimate objective'.

Schedule 1 to the Bill contains amendments to the *Safety, Rehabilitation and Compensation Act 1988* (**SRC Act**) which tighten the criteria which must be satisfied before particular injuries, such as heart attacks, strokes or spinal disc injuries, are compensable as work-related injuries.

Article 9 of the International Covenant on Economic, Social and Cultural Rights (**ICESCR**) provides for the right to social security, including the right to social insurance. General Comment 19 elaborates on the right of social insurance in the context of workers' compensation: 'States parties should also ensure the protection of workers who are injured in the course of employment or other productive work.'[1] The legitimate objective of these amendments is to more clearly define when an injury occurs 'in the course of employment or other productive work' for the purposes of eligibility for workers' compensation. This is to ensure that an employer's liability will not extend to diseases or injuries that are manifestations of underlying medical conditions which have no significant basis in employment.

The Committee requested further information on the sustainability of the Comcare scheme and the ability of insured employers to meet premium increases.

The Comcare scheme has come under increasing financial pressure. A $687 million deficit (based on the asset to liability ratio) in 2011-2012 was identified following a change in actuarial model in 2011-2012. It was driven by reductions in market interest rates and increases in average claims costs. There have been sharp increases in the premiums charged to Commonwealth entities and authorities. In February 2015, the ACT government announced its intention to leave the scheme due to the high premium costs resulting from a 180 per cent increase in nine years to $97 million for 2014-2015.

Successive governments have applied an efficiency dividend to the resourcing of government agencies. For the past decade, this has averaged 1.88 per cent. In essence this means that, after allowing for changes in responsibilities, agencies' administrative funding has declined in real terms each year. At the same time, Comcare premiums have risen by 50 per cent over the four year period from 2010-11 to 2013-14. This has put significant pressure on agencies.

[1] Committee on Economic, Social and Cultural Rights, General Comment No. 19 para 17.

Rational connection between measure and objective

The rational connection between the legitimate objective and these amendments is to distinguish between heart attacks, strokes and spinal disc injuries which are connected to employment only because they happened to occur at the workplace, and those which are significantly contributed to by a person's employment.

Measure is a reasonable and proportionate means of achieving the objective

The amendments are reasonable because they seek to clarify the injuries which are attributable to employment. The amendments are proportionate because they maintain coverage under the Comcare workers' compensation scheme for injuries which have a sufficient nexus to employment. Historically, heart attacks, strokes and some spinal disc injuries were considered to be the culmination of a disease and therefore the 'significant contribution test' was applied to determine liability for compensation. In *Health Insurance Commission v Van Reesch* [1996] FCA 1118, the Full Federal Court applied the High Court decision in *Zickar v MGH Plastic Industries Pty Limited* [1996] HCA 31 to the 1971 Act (the predecessor to the SRC Act) and, by implication of its relevant terms, to the SRC Act. The High Court in *Zickar* held that the sudden rupture of blood vessels was an 'injury'. In applying *Zickar*, the Full Court noted that a spinal disc prolapse, which was not an inevitable consequence of a pre-existing back condition, could also properly be identified as an 'injury'. As a result the range of compensable injuries has considerably expanded.

The Committee requested further information on other support available to individuals who are injured or unwell and who would no longer be eligible for workers' compensation.

The purpose of workers' compensation is to give greater protection and security to workers against injury, illness and death occurring in the course of employment. It is not a substitute for a social security/welfare system. For people who are not eligible for workers' compensation for injuries, because their injury was not caused by their employment, social security/welfare payments will continue to be available. The Commonwealth's disability support and discrimination, superannuation, social security and health care legislation all maintain a person's right to health and social security support.

Social Security

Australia's social security system provides payments for those unable to work, either partially or wholly, because of injury/illness, including access to:

- the *Disability Support Pension*, which provides financial support where there is a physical, intellectual or psychiatric condition that prevents a person from working, or if a person is permanently blind
- the *Sickness Allowance*, which is a short-term payment to a person who is employed or self-employed, but who temporarily cannot work or study because of a medical condition
- the *Mobility Allowance*, which helps a person participate in approved activities where a person has a disability, illness or injury—the allowance helps with transport costs if a person uses public transport without substantial assistance, either permanently or for an extended period

Australia's social security system also provides for a carer's allowance and payment. If a person's medical condition is such that they require care in the home, their relatives/partner may receive a carer's allowance through the Australian Government social security system. The carer payment is an income support payment for people who personally provide constant care in the home of someone with a severe disability or illness.

Australian Government services that are available nationally to persons with a disability or injured as a result of a non-work related injury include Job Access and employment services such as Disability Employment Services (**DES**), jobactive and the Remote Jobs and Communities Program (**RJCP**). JobAccess is a free information and advice service about the employment of people with disability. JobAccess helps people with disability, employers, service providers and the community to access information about services, financial assistance and workplace solutions.

Disability Employment Services, jobactive and Remote Jobs and Communities Program

The services that are available to persons injured as a result of a non-work related injury include **DES** to help all eligible job seekers with disability, injury or health condition to prepare for, find and keep a job. DES providers develop return-to-work plans and work with the person and their employer (if the person is employed) to ensure all the supports are in place the keep them in employment. If the person is not employed they develop a return-to-work plan to assist the person to secure appropriate new employment. Examples of the types of on-the-job supports provided include on-the-job training, co-worker and employer support, access to incentives for the employer, free workplace modifications and adjustments to cater to the employees' restrictions. Alternatively, many people with a disability are supported by jobactive providers to find employment.

jobactive

On 1 July 2015, the Australian Government is introducing new employment services called jobactive to better meet the needs of job seekers and employers and improve job outcomes.

Job seekers will have access to tailored help from a jobactive organisation, based on their assessed needs. This could include:

- help looking for work, writing a resume and preparing for interviews
- referrals to jobs in their local area
- training that is suited to the skills that local employers need
- case management so that job seekers are ready to take up and keep a job
- support to complete Work for the Dole or other eligible activities to provide them with work-like experiences, to help them learn new skills and improve their chances of finding a job.

RJCP

The RJCP provides a jobs, participation and community-development service in 60 remote regions across Australia. The programme supports people to build their skills and get a job or to participate to their capacity in activities that contribute to the strength and sustainability of communities. It also helps remote-area employers to meet their workforce needs and supports communities in remote Australia to plan and build a better future.

Key features of RJCP are:

- Employment and participation activities, including personalised support for job seekers;
- The Remote Youth Leadership and Development Corps (Youth Corps) to help young people move successfully from school to work;
- Providers and communities working together through the development of Community Action Plans to identify the strategies and resources needed to overcome barriers to employment and participation; and
- The Community Development Fund to help communities build strong social and economic foundations

National Disability Insurance Scheme

For people who suffer a disability as a result of heart attacks, strokes or spinal injury, the National Disability Insurance Scheme provides support including access to community services, funded personal plans and supports over a person's lifetime.

Medicare

The health needs of injured people whose injuries are not covered under workers' compensation, are covered by the Australian Government's Medicare system. Medicare provides access to medical and hospital services for all Australian residents and certain visitors to Australia. Medicare covers free and subsidised treatment by health professionals such as doctors, specialists, optometrists and, in certain circumstances, dentists and other allied health practitioners. Medicare also provides free treatment and accommodation in a public hospital.

PBS Scheme

The *Pharmaceutical Benefits Scheme* (**PBS**) provides highly discounted medications to the Australian public and an additional discount for those on a low income who hold a Health Care Card (**concession card**). The payment for all PBS listed medications for those with a concession card is $6.10 (1 January 2015) while those without a concession card pay up to $37.70 (1 January 2015). The Australian Government pays the remaining cost.

Disability discrimination legislation

The Commonwealth's *Disability Discrimination Act 1992* (**DD Act**) covers direct and indirect discrimination, and places positive obligations on employers in relation to employees with a disabling health condition, injury or illness. An employer's main obligations under the DD Act are:

- not to discriminate directly by less favourable treatment
- not to discriminate indirectly by treatment which is less favourable in its impact
- to make reasonable adjustments (e.g. performance requirements, equipment and facilities provided) where required
- to avoid and prevent harassment.

Superannuation and related insurances

The Australian Government has legislated that all Australian employers must provide superannuation coverage to all employees. The new 'My Super' legislation, commencing in 2013 with full compliance required by 2017, requires that all superannuation funds must provide default opt-out death and total and permanent disability insurance coverage. A majority of superannuation schemes also currently provide opt-in income protection insurance at lower than market rates.

Introduction of 'Compensation Standards' (Schedule 1)

Right to social security

Right to health and a healthy environment

Schedule 1 to the Bill inserts a new section 7A which empowers Comcare to determine a Compensation Standard that relates to a specified ailment and sets out the factors that must, as a minimum, exist before it can be said that an employee is suffering from the ailment. A Compensation Standard can also set out matters that must be taken into account in determining whether an ailment or the aggravation of an ailment was contributed to, to a significant degree, by an employee's employment.

The Committee agreed that ensuring that an employer's liability does not extend to diseases or injuries which have no significant basis in employment could be a legitimate objective. The Committee also agreed that the measure is rationally connected to this objective. This is because the amendments will enable Comcare to establish criteria for particular ailments which will determine whether an employee is eligible for workers' compensation.

The Committee stated at paragraph 1.312 that it required further information to show that the amendments were proportionate to the stated objective.

Measure is a reasonable and proportionate means of achieving the objective

This amendment is reasonable and proportionate to the stated objective because Compensation Standards will provide greater transparency and consistency in relation to the matters that are taken into account in determining whether a person suffers from a compensable injury or disease. Compensation Standards will be subject to the *Legislative Instruments Act 2003* (**LI Act**) and will contribute to ensuring the integrity of the scheme while having the benefit of parliamentary scrutiny.

The Department of Veterans' Affairs currently uses similar decision support tools to determine liability for claims made by Australian Defence Force (**ADF**) members under the *Military Rehabilitation and Compensation 2004* (**MRC Act**) and the *Veterans' Entitlements act 1986.* The Statements of Principles (**SoPs**) used under those Acts are determined by the Repatriation Medical Authority. The SoPs include a set of diagnostic criteria based on sound medical-scientific evidence that are used to establish a connection between a medical condition and service in the ADF. The SoPs also identify the factors which must exist, as a minimum, to cause a particular kind of disease, injury or death. The SoPs were created to provide a more equitable, efficient, consistent and non-adversarial system of dealing with claims for liability. It is anticipated that Comcare will develop the Compensation Standards along similar lines to the SoPs. However, unlike the SoPs, which are specific to defence-related service, the Compensation Standards will be specific to employment-related injury and disease and will enable a more equitable and consistent approach to determining liability for workers' compensation claims.

Under the SRC Act, an employee who believes that an injury or disease was significantly contributed to by his or her work can lodge a claim for workers' compensation based on a diagnosis from a medical practitioner linking the claimed condition to employment. However, given that medical practitioners do not have access to the employee's workplace, and are unlikely to have specific knowledge of relevant workplace events, it is questionable whether workplace causality can be based on medical diagnosis alone. This is particularly the case for psychological or psychiatric injury claims. Where a medical practitioner does not have full knowledge of relevant workplace events, a Compensation Standard can be used to support the practitioner's assessment of causation. A causality-based diagnostic model will:

- inform medical practitioners about what constitutes a compensable injury and
- provide greater scheme-wide consistency and transparency in the initial liability decision-making process.

In cases of physical injury, it is relatively easy to establish workplace causality. However, for psychological or psychiatric injuries, this can be difficult because a person's mental health is compromised. Currently, when claims are rejected, an injured employee may be subjected to a lengthy dispute resolution process involving reconsideration of a claim and possible referral to the Administrative Appeals Tribunal (**AAT**). This is not an ideal outcome, particularly for someone who has compromised health.

Compensation Standards will establish clear, transparent criteria for determining workplace causality for a limited range of conditions, such as adjustment disorder, to support better decision making and reduced disputation. Liability for most conditions will be determined without a Compensation Standard, making the development of a Compensation Standard the least restrictive measure for determining liability for conditions where diagnoses are currently inconsistent across the scheme. Clearer rules, as outlined in a Compensation Standard, may further reduce the need for an injured employee to engage in lengthy disputation. In particular, Compensation Standards will assist where workplace causality is disputed or harder to establish and will make it simpler for employees, especially those with mental injuries, to negotiate the claims process.

The Committee expressed concern that there appears to be no requirement for the Compensation Standards to be based on objective evidence. The Committee also expressed concern at the broad discretion available to Comcare in establishing the Compensation Standards and regarding whether appropriate consultation would be carried out.

Comcare will be establishing a working group to develop Compensation Standards with membership to include representatives from relevant expert groups including employers, employee advocates and medical experts. This working group will be tasked with ensuring that any Compensation Standards developed are based on objective evidence.

Further, a Compensation Standard will be a legislative instrument and therefore subject to the requirements under the LI Act. Section 17 of the LI Act requires that, before making a legislative instrument, the rule-maker (in this case, Comcare) must be satisfied that any consultation that is considered by the rule-maker to be appropriate and reasonably practicable to undertake has been undertaken. Section 26 of the LI Act requires that the explanatory statement to the legislative instrument contain either a description of the nature of the consultation, or, if no consultation was undertaken, an explanation as to why no consultation under section 17 was undertaken. Furthermore, a Compensation Standard will be tabled before Parliament (section 38 of the LI Act), subject to disallowance by Parliament (section

42 of the LI Act) and subject to scrutiny by the Senate Standing Committee on Regulations and Ordinances (Senate Standing Order 23).

Workplace rehabilitation plans (Schedule 2)

Rights of persons with disabilities to rehabilitation

Right to health and a healthy environment

Schedule 2 to the Bill contains amendments which emphasise the vocational (rather than medical) nature of rehabilitation services.

The Committee agrees that the measure pursues a legitimate objective to pursue a core purpose of the Comcare scheme to, as far as possible, provide for early intervention and rehabilitation support for injured employees to stay in or return to suitable employment. The Committee seeks advice as to:

- whether there is a rational connection between the limitation and the legitimate objective
  whether the limitation is a reasonable and proportionate measure for the achievement of that objective, and particularly whether a less rights restrictive alternative would achieve the same result.

Rational connection between measure and objective

The amendments distinguish medical and vocational rehabilitation, thereby clarifying the roles and responsibilities of participants in the system (i.e. to provide medical treatments or vocational treatments). This clarification will enable the Comcare scheme to better provide for early intervention and rehabilitation support for injured employees to enable them to stay in or return to suitable employment. This is the rational connection between the amendments and the legitimate objective.

Medical rehabilitation is the process of enhancing and restoring functional ability and quality of life to those with physical or mental impairments or disabilities.

Vocational rehabilitation is aimed at maintaining injured or ill employees in, or returning them to, suitable employment.

Providers of vocational rehabilitation are engaged to provide specialised expertise in addition to that generally available within the employer's and insurer's operations. Providers are engaged for those injured employees where return to work is not straight forward. Service provision is largely delivered at the workplace by:

- facilitating an early return to work of the employee;
- identifying and designing suitable duties for the injured employee and assisting employers to manage the employee in these duties;
- identifying and coordinating rehabilitation strategies that ensure employees are able to safely perform their duties;
- providing the link between the claims manager, the employer and treatment providers to ensure a focus on safe and sustainable return to work; and

- arranging appropriate retraining and placement in alternative employment when an employee is unable to return to pre-injury duties.

The vocational rehabilitation model has been refined and developed over the last 25 years and the SRC Act has not kept up to date with those developments. The current definition of rehabilitation program in the Act, in that it includes provision for medical services, is out of step with the Nationally Consistent Approval Framework for Workplace Rehabilitation Providers (**National Rehabilitation Framework**).The National Rehabilitation Framework was developed by the Heads of Workers' Compensation Authorities, a group comprising the Chief Executives (or their representatives) of the peak bodies responsible for the regulation of workers' compensation in Australia and New Zealand.

The National Rehabilitation Framework which has been in place since 1 July 2010 specifically limits the work of approved rehabilitation program providers to vocational tasks, so as to minimise the perceived conflict of interest for the delivery of treatment services together with vocational programs.

Comcare's operational standards, to be met by all persons who are approved as rehabilitation program providers require, that:

> *A provider must ensure that no conflict of interest arises when providing rehabilitation services. Specifically, treatment and occupational rehabilitation services must not be provided to the same individual.*

The removal of the provision of medical treatment from the definition of a workplace rehabilitation plan in the Bill is consistent with contemporary thinking in relation to vocational rehabilitation.

Measure is a reasonable and proportionate means of achieving the objective

These amendments are reasonable and proportionate to the stated objective. This is because access to medical rehabilitation and the right to health are not restricted by removing the references to medical treatment in the workplace rehabilitation plan. The Bill positively engages the right to health by providing for access to rehabilitation from injury notification rather than as currently provided for, on acceptance of a claim. The Bill also positively engages the right to health by providing access to provisional medical expense payments before a claim is determined.

Further, safeguards have been put in place to ensure that an injured employee is medically fit to participate in workplace rehabilitation. For example, an employer is obliged to consult with the employee and any treating medical practitioner when developing a workplace rehabilitation plan.

Obligations under a workplace rehabilitation plan not subject to review (Schedule 2)

Right to a fair hearing

Schedule 2 to the Bill contains amendments to the formulation of workplace rehabilitation plans. Not every part of a workplace rehabilitation plan will be subject to review. The employee's responsibilities and the obligations of the liable employer contained in the workplace rehabilitation plan, will not be reviewable.

The Committee, at paragraph 1.331, has requested further information as to why the measure is needed in pursuit of the objective, which is to promote compliance with rehabilitation plans, rather than arguments regarding particular employee responsibilities and obligations of the liable employer. The Committee has also requested further information as to whether there is a rational connection between the objective and the amendments, and whether the amendments are reasonable and proportionate.

Rational connection between measure and objective

By ensuring that the details of the plans are not reviewable, the amendments will provide for greater flexibility in the plans to accommodate changes in the employee and employer's circumstances. The plans will therefore more accurately reflect each party's circumstances. This is the rational connection between the objective and these amendments.

A workplace rehabilitation plan outlines the rehabilitation objectives or goals and related services, supports and activities that will assist an employee with their rehabilitation and return to work. A workplace rehabilitation plan will include an employee's responsibilities and an employer's obligations in relation to the employee's rehabilitation. Where a rehabilitation provider is engaged, the plan will also include the rehabilitation provider's services and estimated costs.

Typical employee responsibilities include undertaking medical treatment and counselling with an expected outcome of continuing to recover and commencing graduated return-to-work according to an agreed schedule and within medical restrictions. The expected outcome is that the employee will have a safe and durable return to work.

A typical employer obligation for a supervisor is to support and monitor the employee's performance while in the workplace and to ensure that suitable work, within the employee's current medical restrictions, is available. This responsibility will support rehabilitation and graduated return to work programs.

Typical responsibilities of a workplace rehabilitation provider include liaising with the employee to ensure the employee is supported through the rehabilitation process and liaising with the employee's treating GP to discuss medical restrictions and the recovery process.

Under the proposed amendments, the goals of a workplace rehabilitation plan will be reviewable. An engaged rehabilitation provider's services and estimated costs will also be reviewable.

The most important component of a workplace rehabilitation plan is the stated objectives or goals. A workplace rehabilitation plan's goals will be reviewable when the plan is first developed and whenever any change is made to those goals.

The more detailed elements of a workplace rehabilitation plan tend to be responsibilities allocated to the rehabilitation provider.

The Bill introduces a new section (s36E) which allows an employee who has sustained a workplace injury to request that the liable employer formulate a workplace rehabilitation plan for the injury. Under existing legislation, an employee does not have the power to request a rehabilitation plan be developed in relation to the injury to assist their return-to-work. The section places an obligation on the employer to consider the request and if the employer decides not to formulate a workplace rehabilitation plan, that decision is reviewable.

Measure is a reasonable and proportionate means of achieving the objective

The amendments are reasonable and proportionate because:

- the content of rehabilitation plans are developed in consultation with the employee, their medical practitioners and their employer;
- the goal or objective which informs an employee's responsibilities and employer obligations in the plan is reviewable; and
- the amendments promote compliance with the goals and objectives of a rehabilitation plan rather than more administrative arrangements regarding particular employee responsibilities and obligations of a liable employer.

While some areas of a workplace rehabilitation plan are not subject to merits review by the AAT, procedural fairness in the decision-making process is preserved in the right to judicial review under the *Administrative Decisions (Judicial Review) Act 1977*, the *Judiciary Act 1903* and the Constitution. The principles of procedural fairness and natural justice not only allow an employee to seek judicial review of a decision improperly made (under the legislation cited), they compel a decision maker to make decisions in a fair and reasonable manner.

Expanded definition of suitable employment (Schedule 2)

Right to work

Right to just and favourable conditions at work

Right of persons with disabilities to work

Right to rehabilitation

Schedule 2 to the Bill includes an amendment which broadens the definition of 'suitable employment' to include any employment which is suitable employment. Currently, suitable employment as defined in section 4 of the SRC Act does not allow for employment by a different employer to be 'suitable employment', even if that employment would otherwise be suitable for the employee. For an injured employee who continues to be employed by the Commonwealth or a licensee, 'suitable employment' must be employment within the Commonwealth or the relevant licensee.

The Committee, at paragraph 1.340, has requested further information on how the new definition of 'suitable employment' is proportionate for the achievement of the legitimate objective to strengthen the obligations of employers to provide greater opportunities for injured employees to engage in suitable employment and thereby improve health and return to work outcomes for injured employees.

Measure is a reasonable and proportionate means of achieving the objective

The amendments are reasonable and proportionate in that there are substantial safeguards in place to ensure that suitable employment is appropriate to the individual circumstances of an employee. What constitutes suitable employment is specific to an individual and must take into account the employee's age, experience, training, language and other skills, and the employee's suitability for rehabilitation or vocational training and any other relevant matter.

The capacity of an employee to remain or engage in suitable employment must be assessed in consultation with the employee and their medical practitioner to ensure that the employment reflects the capacity and abilities of an employee.

The restriction in the definition of 'suitable employment' under the SRC Act is unique to the Commonwealth legislation and is at odds with the nationally recognized return-to-work hierarchies as outlined in the National Rehabilitation Framework.

The rehabilitation process outlined in the National Rehabilitation Framework is aimed at encouraging and returning an injured employee to 'suitable employment'/suitable duties as soon as it is safe to do so, and incorporates:

- assessment of need:
  - early, accurate identification of risks and needs ensures the most appropriate intervention is applied to achieve a safe return to work
  - assessment of need continues throughout the course of service delivery as new information is received
- return to work planning—return to work planning is required when all necessary assessments have been completed and an employee needs assistance to:
  - return to work with the pre-injury employer;
  - undertake physical upgrading or transitional duties with a host employer prior to return to work with the pre-injury employer; or
  - find a new job.

Return to work planning will:

- specify strategies that address the identified risks, needs, strengths and capacities having regard to the 'employee's medical status, functional capacity, vocational status, psychosocial concerns, employer requirements, workplace issues and any other return to work barriers
- take place in consultation with the employee, the treating doctor, the employer (if the employee is still employed) and the union (if involved), to align expectations of key parties
- be consistent with the insurer's Injury/Case/Claim Management Plan
- consider personnel management and industrial issues in the workplace and adopt strategies to address these issues if they are barriers to the employee's return to work
- take account of the preferred hierarchy for placement but not at the expense of the employee's needs or the employer's capacity, namely:
  - same job/same employer
  - different job/same employer
  - similar job/different employer
  - different job/different employer.

The process also requires active implementation and review of the employee's return to work and providing support to the employee and the employer to ensure the return to work is durable.

As can be seen from the process outlined above, the return-to-work process is highly consultative and sensitive to the needs of the employee in ensuring that their rehabilitation back to the workplace is managed taking into account their specific needs. The majority of employees are encouraged and supported to return to work, there are only a very small percentage of employees for whom mandating a return to work is required. For those employees who do not cooperate with the return to work process, the SRC Act currently requires that an employee's rights to compensation under the Act are suspended until the employee begins to co-operate.

The changes to the definition of 'suitable employment' therefore enable access to greater opportunities in returning injured employees to work and bring the Commonwealth legislation into line with the National Rehabilitation Framework and with state and territory workers' compensation schemes.

Amendments to the amount and type of medical expenses covered (Schedule 5)

Right to social security

Right to health and a healthy environment

Schedule 5 contains amendments which allow for Comcare to set a schedule of fees (the 'medical services table') for the reimbursement of costs for medical treatment obtained by an employee. The medical services table will not limit the types of medical treatment, but will limit the amount payable by the relevant authority for specified treatments. Schedule 5 also contains amendments which allow for Comcare to prescribe Clinical Framework Principles, which must be taken into account when determining whether medical treatment was reasonably obtained.

The Committee, at paragraph 1.349, requested further information as to how these measures are proportionate to the legitimate objectives of improving the sustainability of the scheme by focussing limited resources on medical treatment that is reasonable, and containing medical costs under the scheme.

Medical services table

A key objective of the Bill, in addition to improving the sustainability of the scheme, is to improve the health, recovery and return-to-work outcomes of injured employees. This will be achieved by ensuring that medical treatment is evidence-based, outcomes-focussed and provided by registered and accredited health practitioners. In addition, new measures will ensure early reimbursement of medical expenses, even before a claim for compensation is lodged.

Fee schedules are currently used in other Australian workers' compensation jurisdictions and thorough investigation of their effectiveness has been undertaken. There is evidence that fee schedules prevent overcharging for the same service.

The Committee expressed concern at the broad discretion available to Comcare in setting scheduled fees in the medical services table for specific medical treatments, and the lack of requirement to consult with, or have regard to figures set by, the Australian Medical

Association. The medical services table will be a legislative instrument, and therefore subject to the requirements under the LI Act. Section 17 of the LI Act requires that, before making a legislative instrument, the rule-maker (in this case, Comcare) must be satisfied that any consultation that is considered by the rule-maker to be appropriate and reasonably practicable to undertake has been undertaken. Section 26 of the LI Act requires that the explanatory statement to the legislative instrument contain either a description of the nature of the consultation, or, if no consultation was undertaken, an explanation as to why no consultation under section 17 was undertaken.

Furthermore, the medical services table will be tabled before Parliament (section 38 of the LI Act), subject to disallowance by Parliament (section 42 of the LI Act) and subject to scrutiny by the Senate Standing Committee on Regulations and Ordinances (Senate Standing Order 23).

Whether treatment was reasonably obtained

In determining whether treatment was reasonably obtained, the amendments require that regard must be had to the Clinical Framework Principles and any other matter Comcare considers relevant.

This provision has a two-fold purpose in that it establishes key medical principles (as outlined in the Clinical Framework) and maintains the discretionary element that is a feature of current scheme practice by taking other factors, including non-medical factors, into consideration when making a determination as to the compensability of the treatment. For example, an injured employee living in a remote area may not be able to access treatment that fully satisfies Clinical Framework Principles. In this case, the remoteness of the location would be a relevant factor that Comcare would be able to take into account in order to determine that a treatment was reasonably obtained. It is reasonable that relevant non-medical factors are taken into regard when determining whether treatment was reasonably obtained, so that the treatment can be examined in the context of the employee's circumstances.

The Clinical Framework Principles will also be a legislative instrument, and the requirements of the LI Act apply (see above).

Measure is a reasonable and proportionate means of achieving the objective

The amendments to establish the medical services table and the Clinical Framework Principles, which together will assist in determining whether medical treatment was reasonably obtained, and the amount which will be reimbursed in respect of this medical treatment, are reasonable and proportionate. The establishment of a fee schedule will specify the maximum compensable amount payable for a number of medical treatments. However, this measure also contains flexibility in that treatments that are not specified in the fee schedule will be assessed and paid as charged, providing they meet the standards outlined in the Clinical Framework. This ensures the sustainability of the scheme – by limiting some amounts payable, but retaining enough flexibility to ensure that items that fall outside the schedule are able to compensated.

Compensable household and attendant care services (Schedule 6)

Right to social security

Right to health and a healthy environment

Schedule 6 to the Bill contains amendments which provide that attendant care services will only be compensable if they are provided by a qualified provider of attendant care services.

The Committee agreed that ensuring that individuals providing attendant care services are appropriately trained and qualified is a legitimate objective, and that the measures are rationally connected to that objective. However, the Committee noted the difficulty that the qualification and registration process could present to family members who wanted to provide attendant care services, particularly in circumstances where a family member is providing sufficient and appropriate care but is unable to meet the qualifications or registration requirements. The Committee (at paragraph 1.358) considered that it could be possible to include statutory exemptions for family members to provide attendant care services without registration at the discretion of Comcare. Subsequently, the Committee requested further information to demonstrate that the amendments were proportionate to the legitimate objective.

Items 11 and 16 of Schedule 6 to the Bill provide that compensable attendant care services can be provided by accredited, registered or approved providers of attendant care services. These items also contain a provision that compensable attendant care services may be provided by an individual authorised by the relevant authority in relation to the employee, with the requirement that the relevant authority may only authorise such an individual if there are special circumstances. These provisions are designed to, and will allow, a family member in special circumstances to be able to provide compensable attendant care services without obtaining qualifications or undergoing the registration process. These provisions ensure that the amendments are reasonable and proportionate to a legitimate objective.

Reducing compensation paid to employees suspended for misconduct (Schedule 9)

Right to social security

Right to an adequate standard of living

Schedule 9 contains an amendment which corrects a significant undermining of disciplinary processes which currently allows an employee who would not otherwise receive an income due to being suspended from work to continue to receive weekly incapacity payments for workers' compensation during that period of compensation.

The Committee, at paragraph 1.368, has requested more information as to how the measure is aimed at achieving a legitimate objective, whether there is a rational connection between the limitation and that objective, and whether the limitation is reasonable and proportionate.

Addresses a pressing concern

This situation arose as a result of the Federal Court decision in *Comcare v Burgess* [2007] FCA 1663 which ruled that paragraph 8(10)(a) of the SRC Act – which is expressed to apply to an injured employee who continues to be employed during his or her incapacity – does not contemplate the situation where an employee continues to be employed but is suspended from that employment without pay, and therefore does not apply in this situation. The result of this decision is that an employee who would not have earned anything if free from incapacity (because he or she is suspended without pay) is able to receive an income because of his or her incapacity.

Rational connection between measure and objective

The employment relationship contains certain rights and obligations under law. Where an employee has been suspended for misconduct, they have acted in a manner which breaches the terms of this relationship. To allow a suspended employee to continue to receive income replacement for workers' compensation under these circumstances fails to respect the employment relationship and associated entitlement systems; in this case, the workers' compensation safety net.

Measure is a reasonable and proportionate means of achieving the objective

This measure is reasonable in that it recognises and supports the rights of employers to suspend an employee, and their entitlements, for actions endangering the safety of other employees or the workplace. It ensures the integrity of the suspension process where periods of suspension and compensation occur simultaneously.

This measure is reasonable and proportionate in that, while suspended, an employee continues to receive other workers' compensation entitlements. These include payment of medical expenses, permanent impairment lump sum compensation, household and attendant care services and any other benefit for which the employee is eligible. This measure only reduces the income replacement benefit amount to zero to reflect the amount that the employee would be earning while suspended from employment. Payment of incapacity benefits will recommence when the period of suspension ends.

Calculation of compensation – introduction of structured reductions (Schedule 9)

Right to social security

Schedule 9 to the Bill contains amendments which provide for earlier structured reductions ('step downs') to weekly incapacity payments.

At paragraph 1.378, the Committee requested further information as to how these amendments were proportionate to the legitimate objective of addressing a concern identified by the Review that a single step down point after 45 weeks creates a disincentive for early return to work by injured employees.

Measure is a reasonable and proportionate means of achieving the objective

In most schemes across Australia, there is more than one step-down of incapacity payments, with the first step-down occurring reasonably early in the life of a claim. Victoria and South Australia have their first step-downs after 13 weeks. The majority of States and Territories have at least one step-down by 26 weeks. In contrast, the first (and only) step- down in the Comcare scheme occurs much later, at 45 weeks.

The Review of the *Safety, Rehabilitation and Compensation Act 1988* considered three models of compensation step-down and recommended a three level system of step-down that had earlier step down points than the current scheme but ultimately resulted in employees receiving 80 per cent of their normal weekly earnings, a higher level than the 75 per cent currently received.

The step-down model subsequently chosen for the SRC Act reduces the final income to 70 per cent of the employee's pre-injury average remuneration, which is lower than the final step-downs available in Queensland and New South Wales, where injured employees receive 85 per cent or 90 per cent respectively of their pre-injury earnings. However, both

Queensland and New South Wales significantly cap the total amount of income replacement that can be paid to employees. It is worth noting that the Commonwealth workers' compensation schemes (the SRC Act, the MRC Act and the *Seafarers Rehabilitation and Compensation Act 1992*) as well as the Australian Capital Territory workers' compensation scheme are the only 'long tail' schemes left in Australia, which means that income replacement under the SRC Act is paid for the duration of an employee's incapacity until age 65. The Bill will extend eligibility for incapacity payments to the age of eligibility for the age pension.

The majority of long term claimants will not be impacted by the reduction of the final step-down from 75 per cent to 70 per cent of pre-injury average weekly remuneration. This is because the SRC Act currently requires that for those employees who are in receipt of superannuation payments, incapacity payments are reduced by a further 5 per cent to 70 per cent (this requirement is being removed by the Bill). It is anticipated that approximately 26 per cent of long term claimants[2] will be impacted by the reduction to 70 per cent, however, these claimants may benefit from the increased support available in the Bill for those with serious injuries.

The Bill also significantly increases (by over $100,000) the lump sum payable for permanent impairment and introduces an algorithmic formula to ensure that those with more serious impairments receive a greater proportion of the lump sum than is currently the case.

The current weekly cap on household and attendant care services is also being removed for those employees who have suffered catastrophic injuries.

The final step-down will be reduced to 70 per cent of the employee's average remuneration, while at the same time:

- removing the 5 per cent reduction for those in receipt of superannuation;
- extending the payment of incapacity benefits in line with the increases in the age of eligibility for the age pension;
- significantly increasing the lump sum permanent impairment payments for the severely injured and; and
- removing the cap on payments for household and attendant care support for the catastrophically injured.

This balances the reduction in the step-downs in incapacity benefits to 70 per cent and is therefore a proportionate limitation on the right to social security.

Capping of legal costs (Schedule 11)

Right to a fair hearing (equal access)

Schedule 11 to the Bill contains amendments which allow for Comcare to prescribe a schedule of legal costs, which will cap the amount that the AAT will be able to award to a successful claimant.

The Committee, at paragraph 1.388, stated that it was unable to complete its assessment of whether this measure is proportionate to the legitimate objective of removing incentives for

[2] Based on data obtained from Comcare, as at 1 May 2015.

employees to participate in drawn out proceedings until it has reviewed the schedule of legal costs.

The schedule of legal costs will be a legislative instrument, and therefore subject to the requirements under the LI Act. Section 17 of the LI Act requires that, before making a legislative instrument, the rule-maker (in this case, Comcare) must be satisfied that any consultation that is considered by the rule-maker to be appropriate and reasonably practicable to undertake has been undertaken. Section 26 of the LI Act requires that the explanatory statement to the legislative instrument contain either a description of the nature of the consultation, or, if no consultation was undertaken, an explanation as to why no consultation under section 17 was undertaken.

Furthermore, the schedule of legal costs will be tabled before Parliament (section 38 of the LI Act), subject to disallowance by Parliament (section 42 of the LI Act) and subject to scrutiny by the Senate Standing Committee on Regulations and Ordinances (Senate Standing Order 23).

In the period from 2011-12 to 2013-14, legal costs in the Comcare scheme increased by more than 34 per cent. In 2013-14, this equated to an amount of $122,243,305(Table 1). This was driven partly by:

- the length of time it takes to resolve disputes; for example, in 2012-13, nationally, 88.6 per cent of workers' compensation disputes were resolved within nine months but only 47.7 per cent of disputes within the Comcare scheme were resolved during this time. In comparison, Queensland and Western Australia resolved more than 90 per cent of their workers' compensation disputes within 9 months;

- a dispute system that offers little incentive to resolve scheme disputes before they reach hearing stage at the AAT—legal costs are currently not reimbursed at the reconsideration stage, meaning there is little incentive to resolve a dispute before proceeding to the AAT; and

- limited ability for an employer or Comcare to recover legal costs for a claim that is either vexatious or dismissed by the AAT.

If dispute times are not reduced and spending on legal costs continues to increase at this rate, the scheme will not be sustainable in the long-term.

In addition to a schedule of legal costs, the Bill is introducing several measures to address the spending on legal costs and improve dispute resolution timeframes. These include:

- statutory timeframes for initial claim determination liability and all reconsiderations (there are currently no timeframes);

- in eligible cases, the scheme will reimburse costs at the reconsideration stage providing the dispute does not progress to the AAT. If the claimant wishes to proceed to the AAT, the claimant will be required to repay reconsideration legal costs before being able to make an application, but will retain current eligibility for reimbursement of certain costs at the AAT stage; and

- once the case has proceeded to the AAT, a party to the proceeding (such as Comcare, or an employer) can apply for costs to be awarded against the claimant if the

application is dismissed by the AAT (for example, because the application is frivolous or vexatious).

These steps will encourage claimants to engage legal representation at the reconsideration stage and avoid the lengthy dispute resolution process associated with a disputed claim progressing to an AAT hearing. Currently, it is the AAT's practice to award a successful applicant legal costs, including counsel's fees, at a rate equal to 75 per cent of the Federal Court scale. This is regardless of the length of time it takes to resolve an application and offers little incentive for parties to resolve applications as soon as possible. The schedule of legal costs, which will be developed by Comcare, in consultation with relevant stakeholders, will be designed to create an incentive to reduce the time taken to resolve claims and reduce the overall cost of applications.

Table 1. Legal costs in the Comcare scheme 2009-2014

2009-10		2010-11		2011-12		2012-13		2013-14	
No of claims	Total Cost	No of claims	Total Cost	No of claims	Total Cost	No of claims	Total Cost	No of claims	Total Cost
2493	$88,260,691	2023	$92,665,754	1746	$104,452,097	1985	$114,136,794	2237	$122,245,305

Source: Comcare

The Committee expressed concern that, in the schedule of legal costs, the cap on the amount of legal fees that may be awarded would be set so low that law firms may not provide representation for clients without the means to pay. As noted above, the schedule of legal costs will be a legislative instrument, and therefore subject to the requirements under the LI Act. It is expected that Comcare will undergo extensive consultations in accordance with section 17 of the LI Act with the legal community to ensure that the schedule of legal costs both discourages proceedings being unnecessarily drawn out and represents a fair rate to enable employees to be able to afford legal representation. Section 26 of the LI Act requires that the explanatory statement to the legislative instrument contain either a description of the nature of the consultation, or, if no consultation was undertaken, an explanation as to why no consultation under section 17 was undertaken. Furthermore, the schedule of legal costs will be tabled before Parliament (section 38 of the LI Act), subject to disallowance by Parliament (section 42 of the LI Act) and subject to scrutiny by the Senate Standing Committee on Regulations and Ordinances (Senate Standing Order 23).

Changes to payments for permanent impairment (Schedule 12)

Right to social security

At 1.395, the Committee has requested evidence to show that the changes to calculations of permanent impairment are the most effective in responding to degrees of impairment and that any individual's loss of compensation under the amendments is both necessary as a result of resource constraints and proportionate in the operation of the whole scheme.

The approach to the calculation and assessment of permanent impairment compensation in Australian workers' compensation jurisdictions is generally informed by both policy and the need to protect the financial viability of the scheme. The diversity in approach to assessment means that benefits can vary significantly from one scheme to another, and that there is little capacity for scheme administrators to learn from shared experience. Medical assessors also have difficulty in developing assessment skills that can be used across the schemes. This is particularly important for the Comcare scheme given its national operation.

The Hanks Review of the scheme, undertaken in 2013, also identified deficiencies in the way the scheme compensated the most severely impaired employees and the Government sought a cost neutral solution that directed compensation to those who needed it most without increasing employer costs.

At present, compensation for permanent impairment is comprised of 2 elements – a payment to reflect the degree of permanent impairment and a payment to reflect the loss of quality of life. Non-economic loss is assessed both quantitatively, in reference to the percentage of permanent impairment, and qualitatively, using questionnaires. This process has been open to criticism on the basis that the effect on quality of life is unpredictable and, consequently, unquantifiable. Where measurement of a component of non-economic loss is qualitative, it is inconsistent and highly subjective. Also, the process of calculating the permanent impairment value already includes an assessment on the impact on activities of daily living.

Additionally, it has been argued that assessing the degree of permanent impairment in a linear fashion is an overly simplistic and fails to take into account the variances between and within impairment levels.

The Department reviewed the methods of calculating permanent impairment lump sum compensation in other jurisdictions and considered both linear and algorithmic models. Australian schemes use both linear and algorithmic models to calculate the amount of compensation payable but, because of the variability of approaches, there is no evidence to indicate that one is better or more effective than the other. However, it was found that the algorithmic model used in NSW more closely aligned with the policy intent to increase compensation for the most seriously injured.

Consequently, the changes proposed by the Bill will:

- achieve a degree of consistency with practices in other schemes;
- address criticisms of the current methods of assessment and calculation of permanent impairment;
- provide maximum support to those with higher levels of impairment; and
- achieve a higher degree of scheme sustainability.

Under the changes, permanent impairment and non-economic loss payments will be combined. The current combined total of these payments is $243,000 but the maximum payable will be increased to $350,000. There will still be assessment of the effect on quality of life but this will be part of the overall assessment of the percentage of permanent impairment, which will then be calculated as a percentage of overall permanent impairment.

The scheme will adopt a national permanent impairment assessment guide that is currently being developed by Safe Work Australia. This will allow for some jurisdictional variation but will establish nationally consistent methods of assessment. The planned guide will be based on the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, fifth edition, as amended by the NSW Scheme, and currently in use by the NSW scheme.

Based on an analysis of models used in state schemes and informed by the recommendations of the Hanks' Review, an algorithmic compensation calculation model was developed that allows an increase in the maximum compensation available to target employees with the most serious injuries while maintaining cost neutrality in respect of all permanent impairment compensation claims. Adoption of the NSW compensation calculation model also provides

greater alignment with Safe Work Australia's proposed national guide for the assessment of permanent impairment, which will be based on the permanent impairment guidelines currently used by the NSW scheme.

Removal of compensation for psychological or psychiatric injuries and ailments that are secondary injuries (Schedule 12)

Right to social security

Right to equality and non-discrimination

Schedule 12 to the Bill contains amendments which remove compensation for permanent impairment for psychological injuries and ailments which are secondary injuries.

The Committee, at paragraph 1.401, agreed that improving scheme equity by better targeting support [so that] the level of compensation payable for permanent impairment should reflect the severity of an employee's injury and the impact it has on their life. The Committee further agreed that it is necessary to prioritise resources in the Comcare scheme and ensure that severely impaired employees are properly compensated.

However, the Committee requested information and evidence to explain the economic cost to Comcare of compensating secondary psychological or psychiatric injuries and ailments to show that the amendments are a proportionate limitation on the right to social security.

In the last five years, claims for psychological conditions in the Comcare scheme have consistently increased in both number and cost (Table 2). This has resulted in an increase in the number and cost of claims for permanent impairment due to psychological injury, not just for primary psychological injuries, but also for secondary psychological injuries.

Table 2. Psychological injury/disease claims in the Comcare scheme 2009-2014

2009-10		2010-11		2011-12		2012-13		2013-14	
No of claims	Total Cost	No of claims	Total Cost	No of claims	Total Cost	No of claims	Total Cost	No of claims	Total Cost
3187	$70,098,884	3209	$78,330,633	3218	$81,521,166	3558	$95,908,948	3749	$103,800,066

Source: Comcare

Lump sum permanent impairment payments for psychological injury constitute the largest single category of permanent impairment liabilities for Comcare and are a significant liability for all employers covered by the SRC Act. For example, in 2009-2010, approximately 20 per cent of the total cost of all permanent impairment claims was attributed to claims for psychological injury. Based on available data, it is difficult to quantify the proportion that relates to secondary psychological injuries, however it is estimated that this proportion is significant.

Measure is a reasonable and proportionate means of achieving the objective

The removal of lump sum compensation for secondary psychological or psychiatric permanent impairment is a proportionate means to achieving the stated objective. This is because the removal of the entitlement will allow for a wide range of benefits to continue to be available to injured employees, including those with a secondary psychological condition. These ongoing benefits are described in Table 3 and, it should be noted, include eligibility for lump sum permanent impairment compensation (of up to $350,000) for the primary injury.

The Government's approach to achieving the stated objective was informed by an examination of permanent impairment lump sum compensation practices in Australian state workers' compensation schemes. Permanent impairment lump sum compensation is payable for primary psychological conditions in New South Wales, Tasmania, Victoria and Western Australia, but is not paid for secondary psychological conditions. South Australia and the ACT do not pay any permanent impairment lump sum compensation for psychological injuries, regardless of whether they are primary or secondary injuries.

After considering alternative state compensation models, the Government adopted the measure it considered the least restrictive, yet allowed it to achieve its objective of long-term sustainability and the provision of support to the most severely injured employees in the scheme. The scheme will continue to pay permanent impairment lump sum compensation for all primary injuries, including psychiatric and psychological injuries, yet also increase the maximum amount payable by over $100,000. This will ensure that adequate support is provided for the catastrophically injured in terms of lump sum compensation. At the same time, in order to improve long-term scheme viability, the scheme will remove permanent impairment lump sum compensation for secondary psychological injuries, while ensuring psychological injury claimants retain access to all other scheme benefits. As referred to in Table 3, this includes, but is not limited to, access to income support, medical treatment and compensation for dependents in the event of an employee's death.

Table 3. Summary of workers' compensation benefits for eligible employees with primary and secondary (psychological) conditions

Benefit	Primary condition covered?	Secondary psychological or psychiatric condition covered?	Conditions
Permanent impairment lump sum compensation (whether for physical or psychological injury)	Yes	No	Up to $350,000 (increased from previous maximum of up to $243,000)
Combine multiple permanent impairments	Yes	Yes	Increases eligibility for permanent impairment lump sum compensation
Income support	Yes	Yes	Until pension age
Payment of medical expenses	Yes	Yes	Lifetime, if required
Household services	Yes	Yes	Limits based on severity of injury: Non-catastrophic: $442.40 weekly for 3 years Catastrophic: no limits (previously capped at $442.40 weekly)
Attendant care services	Yes	Yes	Limits based on severity of injury: Non-catastrophic: $442.40 weekly for 3 years Catastrophic: no limits (previously capped at $442.40 weekly)
Post-surgery services	Yes	Yes	Up to 6 months after surgery
Aids, appliances & modifications to home, car, equipment	Yes	Yes	As required
Death payments – dependent lump sum	Yes	Yes	Up to $504,419.16
Death payments – dependent weekly	Yes	Yes	$138.72 weekly per dependent child (up to 16 years of age, or 25 years of age if studying full-time)
Death payments – funeral expenses	Yes	Yes	Up to $11,267

Obligations of mutuality (Schedule 15)

Right to social security

Right to health and a healthy environment

Right to rehabilitation

The Act currently provides for a number of employee obligations which result in the suspension of all compensation entitlements in cases of non-compliance. However, due to a lack of clarity about the extent of the obligations, the consistency of their terms and their self-executing nature, they do not provide effective support for the achievement of rehabilitation and return-to-work outcomes.

Schedule 15 to the Bill contains new provisions, which share similarities with some state and territory workers' compensation schemes and which amend the Act to streamline and enhance the existing regime of sanctions. In particular, these amendments:

- identify specified activities that an injured employee must comply with as 'obligations of mutuality'. These are fair and reasonable activities to expect people receiving workers' compensation payments to undertake to improve their health and their ability to work; and
- provide for the mandatory application of a 3-stage sanctions regime that results in the suspension of compensation rights, and finally the cancellation of compensation, including medical treatment, rehabilitation and most appeal rights,

where obligations of mutuality have been repeatedly breached without reasonable excuse.

The Committee has requested clarification of the following items and that the Minister demonstrate that they are proportionate to achieving the outcomes sought. At paragraph 1.420, the Committee requires the Minister to show that the obligations of mutuality are proportionate to achieving improvement of health and rehabilitation outcomes and the integrity of the Comcare scheme.

Measure is a reasonable and proportionate means of achieving the objective

The obligations are proportionate as they have been drafted in such a way as to ensure they are suitably prescriptive to ensure clarity, but broad enough to respect the limitations or scope of the objects they prescribe. For example, an employee is required to follow reasonable treatment advice, but the obligations do not interfere with the practitioner/patient relationship. Also, rehabilitation and work readiness plans are highly dependent on a number of very specific factors, not the least of which relate to the type of injury, the patient's general health and the requirements of a job. It is not possible to prescribe these items other than broadly without severely limiting an employee's right to make decisions about their health, recovery and rehabilitation.

As mentioned earlier, the Bill takes a broad, yet suitably prescriptive approach to ensure obligations are clarified. At paragraph 1.422 the Committee believes that the obligation to seek suitable employment is more restrictive than is strictly necessary to achieve the objective (i.e. disproportionate) as the bill does not specify how it will be determined that an employee has 'failed to seek' suitable employment. The Minister believes that this requirement is proportionate, as there is currently a requirement in the SRC Act for an employee to undertake job seeking, with prescribed sanctions for not meeting these obligations (s19(4)(e)). Therefore there are already a suite of measures which are currently used to demonstrate that job seeking obligations are being met, and which will continue to demonstrate whether an employee is seeking suitable employment. These measures include, but are not limited to providing copies of employees' job seeking diaries, job applications and employer responses to job applications where available.

The Committee is concerned (paragraph 1.423) that that a person's right to compensation 'must be permanently removed if the person has failed to follow medical treatment advice'. The Bill does not require a person to follow <u>all</u> medical treatment advice provided in order to avoid being subject to the sanctions or cancellation regime. The obligation upon an employee is to follow medical treatment advice from a legally qualified medical practitioner or legally qualified dentist (health practitioners, such as physiotherapists or chiropractors, are not included in this category). An employee is also able to defer following advice in order to seek a second opinion, and where the employee has advice from two or more medical practitioners or dentists, the employee is free to choose which advice to follow. In addition, an employee is free to refuse to follow medical treatment advice to undergo surgery or take or use a medicine without breaching the obligation of mutuality. This ensures an employee's right to alternative treatment or a treatment they prefer over another and, so doing, preserves an employee's right to make decisions about their own recovery. The obligation merely requires employees to actively participate in their own treatment, whatever that may be.

The Committee was concerned in paragraph 1.424 that the nature of a 'workplace rehabilitation plan' means that there may be a high degree of specificity in relation to an injured employee's responsibilities under the plan. Workplace rehabilitation plans outline the responsibilities of an employee, their supervisor, their claims manager and/or their rehabilitation provider. The plan is developed in consultation with an employee so that there is mutual agreement about the ability to carry out and comply with the content and objectives of the plan. The plan contains a greater degree of specificity for rehabilitation providers as to how they will assist an employee achieve the stated objectives. The responsibilities in the workplace rehabilitation plan are generally at a high enough level that suspension of an employee for specific activities would be appropriate.

The Committee was concerned at paragraph 1.425 as to whether the limitation on the right to social security and the right to health was proportionate. The sanctions regime has been developed in an escalating framework to ensure that the consequences for non-compliance are transparent and that the system provides an effective deterrent. The Bill provides three levels of sanctions, making it easy for employees to understand how their entitlements will be reduced if they breach their obligations. The determination that an employee has breached an obligation and is subject to level 1 or 2 of the sanctions regime must also be accompanied by a statement that sets out (if the breach has not already stopped), what actions the employee should take to stop the breach. Compensation and rehabilitation will only be cancelled when an employee has refused, without reasonable excuse, to comply with their obligations under the Act on three qualifying occasions. An employee, then, will not lose their right to compensation, except where they have made a conscious choice to breach their obligations on three qualifying occasions.

Similarly, the scheme will not restrict an employee's right to health, except where the employee has made a conscious choice to not participate in activities to manage their recovery. Such activities fall well within the boundaries of reasonableness and include attending medical assessments, following reasonable medical treatment advice and complying with rehabilitation obligations. The scheme cannot provide the impetus to engage in the recovery process, but it does provide an employee with every assistance and encouragement to do so. The sanctions recognize that most people are willing and eager participants in the injury management and rehabilitation process but, where it is clear that a person receiving workers' compensation payments does not intend to engage in any, or all, of the activities designed to facilitate their recovery and improve return-to-work outcomes, the sanctions provisions will be engaged.

Cancellation of compensation for breaches of mutual obligations (Schedule 15)

Right to social security

Right to health and a healthy environment

Right to rehabilitation

Schedule 15 to the Bill contains amendments to the effect that employees who breach (without reasonable excuse) an obligation of mutuality in relation to an injury or an associated injury will be subject to a 3-stage sanctions regime. At the final stage, an employee's right to compensation, rehabilitation and the right to continue to institute or

continue proceedings (other than in relation to the sanctions or cancellation regime) are cancelled for that injury and any current or future associated injuries.

At paragraph 1.430, the Committee accepted that the stated objective of seeking to improve health and rehabilitation outcomes (by ensuring that employees actively participate in their rehabilitation) and improving the integrity of the Comcare scheme is a legitimate objective. The Committee also accepted that the measures are rationally connected to that objective. However, the Committee required further information as to the proportionality of the amendments.

Measure is a reasonable and proportionate means of achieving the objective

An employee's compensation rights will only be cancelled after three breaches of an obligation of mutuality without reasonable excuse. As discussed in the Statement of Compatibility with Human Rights, and by reference to the High Court's judgment in *Corporate Affairs Commission v Yuill* [1991] HCA 28, 'reasonable excuse' refers to physical or practical difficulties in complying with a requirement. In order to strongly encourage compliance with the obligations of mutuality, which are rationally connected to the stated legitimate objective, a rigorous deterrent is needed against refusal to comply with the obligations of mutuality, where such refusal occurs without reasonable excuse and not because of physical or practical difficulties in complying. It is therefore proportionate that employees who continually refuse to comply with obligations to actively participate in their rehabilitation and return-to-work cease to be supported by the Comcare scheme, after those repeated breaches of the obligations of mutuality without reasonable excuse.

Paragraph 24 to the General Comment 19 to ICESCR provides that the withdrawal, reduction or suspension of benefits (being social security benefits) should be circumscribed, based on grounds that are reasonable, subject to due process, and provided for in national law. The Committee on Economic, Social and Cultural Rights noted that, under ILO Convention No. 168 (1988) on Employment Promotion and Protection against Unemployment, such action can only be taken in certain circumstances. One permissible circumstance is when the person has failed without just cause to use the facilities available for placement, vocational guidance, training, retraining or redeployment in suitable work. This circumstance is directly applicable to suspension or cancellation of compensation rights after failures to meet the obligations of mutuality in relation to suitable employment. It is also analogous to the suspension or cancellation of compensation rights where an employee fails to meet the other obligations of mutuality. That is, in General Comment 19, and in the ILO Convention No. 168, there exists a concept that the right to social security may also be balanced with a concept of requiring the recipient of social security benefits to fulfil certain obligations to work towards re-employment. A similar concept is borne out by the suspension and cancellation regime provisions.

Although there is no express requirement in the Bill that requires a relevant authority to contact an employee and undertake appropriate inquiries before determining that an employee has breached an obligation of mutuality, procedural fairness is preserved in the right to judicial review under the *Administrative Decisions (Judicial Review) Act 1977*, the *Judiciary Act 1903* and the Constitution. The principles of procedural fairness and natural justice not only allow an employee to seek judicial review of a decision improperly made (under the legislation cited), they compel a decision maker to make decisions in a fair and reasonable manner.

An employee's right to compensation for medical treatment will not be suspended at any stage; cancellation will occur after three breaches, without reasonable excuse, of the obligations of mutuality. Cancellation of an employee's right to compensation for medical treatment will not cancel an employee's right to medical treatment. An employee whose right to compensation for medical treatment has been cancelled will continue to have access to medical treatment, although compensation will no longer cover the cost. In that situation, the employee, supported by schemes such as Medicare and the Pharmaceutical Benefits Scheme, would need to cover the cost of the necessary or desired medical treatment as though the treatment sought was in relation to a non-work related injury suffered outside the workers' compensation scheme.

A determination that a breach of an obligation of mutuality has occurred cannot be made unless the relevant authority is 'satisfied' that the employee breached an obligation of mutuality. There is no intention in the legislation that requiring a relevant authority to be 'satisfied', rather than 'reasonably satisfied', will lessen the test that the relevant authority is to apply. Throughout the SRC Act, each requirement that a body be satisfied of a particular condition is a reference that the body must be 'satisfied', rather than 'reasonably satisfied'. Even if the requirement in the Bill were for the relevant authority to be 'reasonably satisfied', the degree of satisfaction of the relevant authority will be immaterial if the relevant factual pre-condition is not met on the balance of probabilities.

The Bill does not allow a relevant authority the discretion to decide not to apply the sanctions or cancellation regimes, or to reinstate compensation rights once they have been cancelled. This policy decision is proportionate to the objective of strongly encouraging compliance with the obligations of mutuality, with the deterrent that suspension or cancellation will occur if the obligations of mutuality are breached. It also ensures a transparent and equal process so that each employee is treated the same under the SRC Act. An employee will not have breached an obligation of mutuality if the employee had a reasonable excuse for complying with the requirement.

A suspension or cancellation in respect of an injury will also apply in respect of associated injuries. Associated injuries are injuries which arise out of, or in the course of, the same incident or state of affairs, or which result from another injury. Associated injuries are also diseases which are contributed to, to a significant degree, by the same incident or state of affairs, or which result from another disease. As associated injuries are closely related to each other, they are often not distinguishable for the purposes for workers' compensation. An employee who suffers a leg injury and a back injury in an accident and whose compensation rights were suspended as a result of a failure to follow reasonable medical treatment in respect of the back injury would not continue to be eligible for compensation (such as weekly incapacity payments) in respect of the leg injury. A piece-meal approach to compensation and rehabilitation would undermine the legitimate objective of improving health and rehabilitation outcomes by ensuring employees actively participate in their rehabilitation.

Removal of review rights in certain circumstances (Schedule 15)

Right to a fair hearing

The current suspension mechanisms in the SRC Act discussed above in the context of mutual obligations are:

- not fair in that they operate automatically to suspend compensation and can result in overpayments spanning long periods;

- not consistent (for example, the sanction relating to the suitable employment obligations differs to the sanction relating to rehabilitation obligations); and

- not effective in supporting the existing compliance framework.

To address these issues, Schedule 15 to the Bill provides for the suspension of an employee's rights to institute or continue proceedings in relation to compensation (other than proceedings in the AAT in relation to the sanctions regime). However this will only occur while the employee:

- is subject to either the level 1 or 2 sanctions regime because of a breach of mutuality (other than an obligation relating to suitable employment) and
- remains in breach of the obligation.

If an employee becomes subject to the cancellation regime, the employee's rights to institute or continue any proceedings in relation to compensation and rehabilitation (other than proceedings in the AAT in relation to the sanctions regime) are cancelled. These amendments only apply in so far as the rights relate to that injury (or an associated injury).

At paragraph 1.441, the Committee agreed that the stated objective of improving health and rehabilitation outcomes (by ensuring employees actively participate in their rehabilitation) and to ensure the integrity of the scheme is a legitimate objective. However, the Committee required further information as to the rational connection to the objective and proportionality of the amendments.

In particular, the Committee has requested information to explain how the removal of review rights would be effective or capable of achieving this stated objective or that this is the least restrictive rights alternative.

The rational connection between the objective and these amendments is to support active engagement in the rehabilitation process by employees through a mix of encouragement and sanctions in the form of a graduated response to employees who are not actively engaged in their recovery and rehabilitation.

Effective rehabilitation requires active participation. It is detrimental to the health outcomes of an injured employee for that employee to remain the passive recipient of compensation where the employee has some capacity or potential to be in suitable employment. An employee's return to work will clearly be impeded if that employee chooses not to engage in the process.

Early recovery from injury brings with it a range of benefits, for both injured employees and their employers. For employees, there is the obvious benefit of recovering from injury more quickly, and returning to work and life. For employers, early rehabilitation means that the investment in existing employees is not lost, productivity and workplace morale are improved and premiums (for premium payers) compensation costs (for licensees) are lowered.

As discussed above, in the context of the definition of suitable employment, the majority of employees are actively engaged in their rehabilitation and return to work. There is only a small percentage of employees for whom mandating a return to work is required. To provide for such employees to institute or pursue proceedings in relation to compensation while they

are subject to the sanctions regime would defeat the purpose of the regime and contribute to unnecessary costs and delay being incurred by parties to the proceedings.

As discussed above, before determining that an employee has breached an obligation of mutuality resulting in the suspension, requirements to procedural fairness are preserved in the right to judicial review under the *Administrative Decisions (Judicial Review) Act 1977*, the *Judiciary Act 1903* and the Constitution. The principles of procedural fairness and natural justice not only allow an employee to seek judicial review of a decision improperly made (under the legislation cited), they compel a decision maker to make fair and reasonable decisions.

The amendments are reasonable and proportionate because they do not affect an employee's rights of review and to pursue proceedings in the AAT in relation to the sanctions regime. They provide for an effective means of graduated enforcement response to ensure that injured employees are actively engaged in their recovery and rehabilitation. They are proportionate in that they are complemented by other more supportive amendments proposed including early access to medical treatment and rehabilitation and access to a greater range of suitable employment options that must be responsive to the recovery and personal circumstances of an injured employee.

SENATOR THE HON. ERIC ABETZ
LEADER OF THE GOVERNMENT IN THE SENATE
MINISTER FOR EMPLOYMENT
MINISTER ASSISTING THE PRIME MINISTER FOR THE PUBLIC SERVICE
LIBERAL SENATOR FOR TASMANIA

29 JUN 2015

The Hon. Philip Ruddock MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Chair Philip,

This letter is in response to your letter of 18 March 2015 concerning the Seafarers Rehabilitation and Compensation and Other Legislation Amendment Bill 2015.

The Committee has raised concerns regarding the potential impact of the Bill on a purported right to social security. This Bill simply sought to address a Federal Court decision which fundamentally changed the historic application of the Act and would have left thousands of formerly injured workers in a state of limbo.

But for the Government's swift action, the Federal Court decision meant there was the potential for workers who had been compensated under the Seacare scheme to repay all monies paid and to have those claims reassessed under the relevant state scheme that applied at the time of injury in the state where the injury occurred. It is disappointing that the Committee's report failed to reflect this fact.

Following the introduction of the Government amendments, the Bill was passed in the Senate on 13 May 2015 with the support of Government, Opposition and Greens Senators. The Bill was passed in the House on 14 May 2015.

The Government amendments to the Bill adequately address the concerns of the Committee that the Bill may limit access to compensation under the Seafarer Act for some seafarers who have historically been considered to be covered by the Act. To any extent that the Bill limits the rights of seafarers who have been injured and received compensation under state workers' compensation legislation to claim additional compensation under the Seafarers Act, this is proportionate and appropriate since the Bill also protects the sustainability of the Seacare scheme, limits the exposure of maritime industry employers to compensation claims for which they are not likely to be insured and will assist with protecting the validity of compensation payments already paid to seafarers under state workers' compensation legislation.

I trust this response will assist the Committee.

Yours sincerely

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The Hon Scott Morrison MP
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CANBERRA ACT 2600

Dear Mr Ruddock

Thank you for your letter dated 13 May 2015 on behalf of the Parliamentary Joint Committee on Human Rights (the Committee) in relation to the Social Services Legislation Amendment Bill 2015. I welcome the opportunity to address the Committee's questions on the Bill as presented in the *Twenty-second Report of the 44th Parliament.*

The Committee seeks advice whether the proposed changes are aimed at achieving a legitimate objective.

This policy is intended to ensure the integrity and sustainability of the income support system. The purpose of social security payments such as the Disability Support Pension is to provide a safety net for those most in need to help meet their daily living needs in the community. It is the responsibility of states and territories to provide for a person who is in prison or psychiatric confinement in accordance with a state or territory law. Part of this responsibility is to provide for a person's basic needs such as sustenance, health care and shelter. The Australian Government considers that a person who is undergoing psychiatric confinement because they have been charged with a serious offence will have their basic needs met by the state or territory, in the same way as a person who is on remand or convicted and held in prisons. It is therefore a legitimate objective to provide that a person is not eligible to receive a social security payment while they are undergoing that confinement.

The Committee seeks advice whether there is a rational connection between the limitation and that objective.

The amendments made by the Bill will ensure the same social security treatment for people charged with a serious offence in the criminal justice system, whether they are confined in a psychiatric institution or prison. The amendment will support the original intent of section 1158 of the *Social Security Act 1991* (the Act), that income support payments are not payable to a person who is in gaol or a person who is undergoing psychiatric confinement because the person has been charged with an offence.

The Act currently provides that a person is not taken to be undergoing psychiatric confinement while the person is undertaking a course of rehabilitation. In *Franks v Secretary, Department of Family & Community Services [2002]* FCAFC 436, the Federal Court considered that 'a course of rehabilitation' should be interpreted broadly. The effect of this decision is that the vast majority of people who are undergoing psychiatric confinement will be taken to be undertaking a course of rehabilitation. This means that a social security payment will be payable to almost everyone who is undergoing psychiatric confinement because the person has been charged with an offence.

This broad interpretation of when a person is undertaking a course of rehabilitation is not however consistent with the original policy intent that most people who are undergoing psychiatric confinement as a result of being charged with an offence are not eligible to receive social security payments.

Providing that a social security payment is not payable to a person who is undergoing psychiatric confinement because the person has been charged with a serious offence, seeks to support the original policy intent and will assist albeit in a small way, in ensuring the sustainability of the social security system by ensuring that payments are appropriately targeted to those in need.

The Committee seeks advice whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

This policy is proportionate and will not have an unreasonable impact on persons in psychiatric confinement because they are already receiving in-kind benefits in the form of accommodation and other services in the relevant institution where they are confined.

This policy does not have a punitive intent, rather it is a recognition that people in these circumstances, like those in gaols, have a reduced need for social security payments as their basic needs are met by the states and territories that confine them.

This measure will not apply to a person who is undergoing psychiatric confinement because they have been charged with an offence that is not a serious offence, or for reasons unrelated to the commission of an offence. The Government recognises that people can be caught up in criminal proceedings, and then psychiatric confinement, by being charged with minor offences that in some cases would not result in them being confined if they did not have a disability.

With regards to the impact of this measure on the families of patients, the current arrangements for social security payments make provisions for the partners of people in psychiatric confinement. While a social security payment recipient's partner is imprisoned or undergoing psychiatric confinement because the partner has been charged with an offence, the recipient can be paid a higher partnered rate of their social security payment which is equal to the single rate of the payment. Where a social security recipient was a carer for a child (or other person) prior to undergoing psychiatric confinement, and that caring responsibility has passed to another person, that other person is able to claim social security payments in respect of the child (or person), subject to all standard eligibility criteria. This may include Parenting Payment, Family Tax Benefit, Carer Payment and Carer Allowance.

The Government recognises that the transition of these vulnerable people from psychiatric confinement back into the community is not as straightforward as for those who have been imprisoned. It is for this reason that the Bill allows for a Legislative Instrument to be made to set out circumstances in which a person can be taken to be in a period of integration back into the community. During this period, the person will not be taken to be undergoing psychiatric confinement and as a result, they may be eligible to receive social security payments, particularly where the person has a degree of autonomy. The Government believes that this goes some way to support the original intent of the psychiatric confinement provisions in the Act, and is a reasonable and proportionate way to address this issue.

Thank you again for corresponding on behalf of the Parliamentary Joint Committee on Human Rights.

Yours sincerely

The Hon Scott Morrison MP
Minister for Social Services
25/6/2015