

# **Responses from legislation proponents — Report 12 of 2020<sup>1</sup>**

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**THE HON JOSH FRYDENBERG MP  
TREASURER**

Ref: MS20-001813

Senator the Hon Sarah Henderson  
Chair  
Parliamentary Joint Committee on Human Rights  
Parliament House  
CANBERRA ACT 2600

Dear Senator Henderson

Thank you for your letter on 27 August 2020 on behalf of the Parliamentary Joint Committee on Human Rights (the Committee) regarding the *Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 5) 2020* [F2020L00884] (the Rules).

In that letter, the Committee sought my advice as to the compatibility of the Rules with the rights to an adequate standard of living, work and equality and non-discrimination. In particular:

- how the reintroduction of the Child Care Subsidy (CCS) and Transition Payment compares to JobKeeper in terms of the likely effect on childcare workers;
- what is the proportion of child care workers who were not previously eligible for JobKeeper;
- whether a child care provider which breaches its obligations under the Transition Payment by terminating the employment of a worker who was in receipt of JobKeeper, will be required to reinstate the worker and/or provide some other form of compensation to that worker;
- whether a child care provider would be considered to breach its obligations under the Transition Payment were it to significantly reduce the rostered hours of a worker who was previously in receipt of JobKeeper;
- whether and how the measure is based on reasonable and objective criteria such that it serves a legitimate objective; and
- whether the measure is a proportionate means of achieving that objective.

In preparing the following responses to the Committee's request, input has been sought from the Department of Education, Skills and Employment, which has administration of the CCS and Transition Payment.

**How the reintroduction of the CCS and Transition Payment compares to JobKeeper in terms of the likely effect on childcare worker?**

The CCS and Transition Payment apply universally across all approved CCS providers, whereas JobKeeper Payments are restricted to those eligible — excluding any workers in the sector who were ineligible (for example, temporary migrant workers, and those casual employees who had been in their role for less than 12 months).

**What is the proportion of child care workers who were not previously eligible for JobKeeper?**

There is no comprehensive data available on the number of childcare workers whose employers were ineligible for JobKeeper Payment in respect of those workers as this does not have to be reported by employers. However, as per the testimony at the Senate Select Committee on COVID-19 on 9 June 2020, around 120,000 employees in the child care sector may have been receiving salary or wages that were supported in whole or in part by JobKeeper Payments, which is estimated to be around two thirds of the workforce. Across the sector there was significant variability of JobKeeper eligibility, including some providers having most or all of their educators ineligible, such as local government, those more reliant on casual workers like Outside School Hours Care, and those with employees on skilled visas.

As part of the Early Childhood Education Care Relief Package, Exceptional Circumstance Supplementary Payments were paid to certain providers not eligible for JobKeeper, including services that had more than 30 per cent of full-time equivalent staff ineligible for JobKeeper. As of 12 July 2020, 773 services were approved to receive this supplementary payment.

**Whether a child care provider which breaches its obligations under the Transition Payment by terminating the employment of a worker who was in receipt of JobKeeper, will be required to reinstate the worker and/or provide some other form of compensation to that worker?**

Providers which do not fulfil the conditions of the terms of the Transition Payment will be investigated. A provider may lose access to payments and be subject to sanctions under the Family Assistance Law. The Commonwealth may recover grant funds if there is a breach of the grant agreement or if providers or their services are found to have been ineligible.

**Whether a child care provider would be considered to breach its obligations under the Transition Payment were it to significantly reduce the rostered hours of a worker who was previously in receipt of JobKeeper?**

The Employment Guarantee requires providers to maintain employment of existing employees over the Transition Payment period. It also requires providers to offer employees more than one shift during the transition period. Providers which do not fulfil the conditions of the terms of the Transition Payment will be investigated. They may lose access to payments and be subject to sanctions under the Family Assistance Law. The Commonwealth may recover grant funds if there is a breach of the grant agreement or if providers or their services are found to have been ineligible.

**Whether and how the measure is based on reasonable and objective criteria such that it serves a legitimate objective?**

The objective of the Transition Package was to keep services open for children of essential workers, children experiencing vulnerability and disadvantage, and those children already enrolled. The criteria for support through these packages was being an approved CCS provider. That is, all approved services were eligible for support. This measure has been successful, in that as at 9 September 2020, 99.3 per cent of services have remained open.

**Whether the measure is a proportionate means of achieving that objective?**

The transition strategy sought to ensure the Early Childhood Education and Care sector was well-placed to be providing the care that families required to be able to return to work and study. While it represented a substantial investment by Government, it has been a successful measure. Based on the most recent and stable administrative data available (up to the week ending 9 August 2020), noting services have up to 28 days to submit and vary session data, charged hours of care exceeded pre-COVID hours (week ending 1 March 2020) across all jurisdictions, excluding Victoria, and were approximately 94.3 per cent of pre-COVID charged hours even in Victoria.

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

Yours sincerely

THE HON JOSH FRYDENBERG MP

17 / 9

/2020





The Hon Nola Marino MP

Assistant Minister for Regional Development and Territories  
Federal Member for Forrest

Ref: MC20-007432

Senator the Hon Sarah Henderson  
Chair  
Parliamentary Joint Committee on Human Rights  
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Dear Senator

*Sarah*

Thank you for your email of 27 August 2020 regarding the Norfolk Island Continued Laws Amendment (Employment) Ordinance 2020 (the Ordinance).

The Ordinance makes amendments to the *Employment Act 1988* (NI) (the Employment Act) to enable a private, third party workers' compensation scheme administrator (scheme administrator) to deliver the Norfolk Island Workers' Compensation Scheme (the Scheme). It also makes a number of improvements to the Scheme (for example, giving people better access to rehabilitation programs), bringing it closer into line with workers' compensation schemes in the rest of Australia.

In response to the Parliamentary Joint Committee on Human Rights' request for information about an employee's right to compensation being suspended if they fail, without reasonable excuse, to attend an assessment, provide information or engage with a rehabilitation program, I provide the following.

**a) How long payments may be suspended for;**

*Requirement to attend assessment for permanent incapacity (section 32A)*

Subsection 32A provides that an employee's right to lump sum compensation in relation to a loss or impairment of a bodily or mental function is suspended until the employee receives a new notice setting out new arrangements for an assessment and the employee attends that assessment.

*Requirement to undertake rehabilitation program (section 38)*

Subsection 38(3) provides that an employee's right to compensation in relation to an injury or condition would be suspended until the employee begins, or continues with, a rehabilitation program.

*Requirement to provide information (section 47)*

Subsection 47(3) provides that if a claimant fails, without reasonable excuse, to provide information required by the Employment Liaison Officer (ELO), any right of the claimant to compensation in relation to the injury, condition or death is suspended until the claimant complies with a notice to provide the information.

*Requirement to attend independent medical examination (section 47B)*

Subsection 47B(2) provides that an employee's right to compensation in relation to an injury is suspended until the employee receives a new notice setting out new arrangements for an independent medical examination and the employee attends that examination.

**b) whether there is any requirement that new notices be promptly provided;**

Key performance measures and strict timeframes for assessing claims and making compensation payments are included in the Service Level Agreement between the Department of Infrastructure, Transport, Regional Development and Communications and the private third party claims administrator contracted to administer the Scheme.

**c) what is the legitimate objective behind suspending such payments and how is suspending such payments rationally connected (that is, effective to achieve) to that objective; and**

*Requirement to attend assessment for permanent incapacity (section 32A)*

The purpose of an assessment for permanent incapacity is to help determine the amount of compensation an employee is entitled to receive in relation to a loss or impairment of a bodily or mental function. It is therefore in the best interests of the employee to attend the assessment and therefore unlikely that this provision would be required.

In cases where an employee fails to attend an assessment there is no way for the employee's entitlement to compensation to be accurately determined. This may result in the employee receiving more than the amount they are entitled to or, conversely, in them receiving less. The primary objective behind the suspension of an employee's entitlement to compensation is therefore to provide an incentive to employees who may not be acting in their own best interests to attend an assessment, and to facilitate the compensation process.

Additionally, the provision helps ensure the assessment of claims is fair and transparent and that decisions about entitlements to compensation are made using independent evidence from a registered medical practitioner.

*Requirement to undertake rehabilitation program (section 38)*

Rehabilitation programs aim to provide injured employees a pathway back into the workplace and help people regain control and independence. Participation in rehabilitation programs can assist with recovery from injury and improve employees' physical and mental health. It is therefore in the best interests of an employee to participate in a rehabilitation program and therefore unlikely that this provision would be required.



In cases where an employee fails to participate in a rehabilitation program, their recovery from injury and return to work is likely to be delayed, which could in turn have significant detrimental impacts on their mental health. The primary objective behind the suspension of an employee's entitlement to compensation is therefore to provide an incentive to employees to participate in a rehabilitation program for the recovery of physical and mental health.

*Requirement to provide information (section 47)*

In order for an assessor to accurately assess an employee's claim for compensation they must have access to information relevant to the claim. It is therefore in the best interests of the employee to provide all information relevant to the claim and unlikely that this provision would be required in the majority of cases.

In cases where an employee fails to provide the relevant information, there is no way for an employee's entitlement to compensation to be accurately determined. This may result in the employee receiving more than the amount they are entitled to or, conversely, in them receiving less. The primary objective behind the suspension of an employee's entitlement to compensation until the relevant information is received is therefore to provide an incentive to employees who may not be acting in their own best interests.

In addition, the provision helps ensure the assessment of claims is fair and transparent and that decisions about entitlements to compensation are made using appropriate evidence.

*Requirement to attend independent medical examination (section 47B)*

The purpose of the independent medical examination is to help determine the amount of compensation an employee is entitled to receive. It is therefore in the best interests of the employee to attend an examination and unlikely that this provision would be required.

In cases where an employee fails to attend an independent medical examination there is no way for an employee's entitlement to compensation to be accurately determined. This may result in the employee receiving more than the amount they are entitled to or, conversely, to them receiving less. The primary objective behind the suspension of an employee's entitlement to compensation is therefore to provide an additional incentive to employees who may not be acting in their own best interests to attend an examination.

Additionally, the provision helps ensure the assessment of claims is fair and transparent and decisions about entitlements to compensation are made using evidence from an independent, registered medical practitioner.

**d) what safeguards are in place to ensure any limitation on rights is proportionate to the objective sought to be achieved.**

*For all requirements*

The employee may have a reasonable excuse for not fulfilling the requirements. Where this occurs, the compensation they are entitled to will not be suspended. Examples of a reasonable excuse could include illness, difficulty accessing transport or urgent family business.

Section 65 of the Employment Act provides for internal review of decisions made in relation to claims for compensation. If an application for review is received, the matter will be reviewed by someone other than the original decision maker and must be completed within 10 business days.

*Requirement to attend independent medical examination (section 47B)*

Subsection 47A(6) provides for a limitation on the frequency of the independent examinations an employee is required to undergo to be prescribed in rules.

In summary, the key objectives of a workers' compensation scheme are to support injured workers and to assist them to return to the workplace. The measures in the Ordinance engage certain human rights, but they are also consistent with those rights in that they are reasonable, necessary and proportionate to achieving the legitimate objectives as described above.

Thank you for bringing your concerns to my attention and I trust this is of assistance.

Yours sincerely

Nola Marino

11 SEP 2020