

Senate Standing Committee on Education and Employment Legislation
Inquiry into the Safety, Rehabilitation and Compensation Amendment (Improving the
Comcare Scheme) Bill 2015

Introduction

1. The Australian Public Service Commission (the **APSC**) welcomes the opportunity to make a written submission to the Senate Education and Employment Legislation Committee Inquiry into the Safety, Rehabilitation and Compensation Amendment (Improving the Comcare Scheme) Bill 2015 (the **Bill**).
2. The APSC is a central agency within the Prime Minister and Cabinet portfolio. It has a range of statutory responsibilities relating to the employment, conduct, development, performance, and conditions of Australian Public Service (**APS**) employees. It also provides advice and support to APS agencies in discharging their obligations in those areas.
3. The submission is made on behalf of the APS as an employer.¹ At 30 June 2014, there were 159,126 APS employees in 122 agencies, or semi-autonomous parts of agencies. These agencies and their employees are covered by the Comcare scheme.
4. The senior leadership of the APS welcomes the reforms to the Commonwealth's workers' compensation arrangements (**Comcare scheme**).
5. This submission will focus on four key aspects of the reforms as follows:
 1. Supporting employees in their recovery;
 2. Supporting employees to get back to work;
 3. Scheme sustainability; and
 4. Empowering managers to actively manage.
6. The APS believes that the Comcare scheme provides a generous set of entitlements for injured public service employees. However, there is general agreement amongst Secretaries and Chief Executive Officers that the current legislation focuses on administrative decision making rather than injury management and supporting staff to get back to work.
7. There is strong international evidence that injured workers will get sicker if they remain at home. Historical thinking was that injured employees should be at home until they are 100 per cent job ready. Current evidence is that the interests of employees are best served if they return to work as soon as possible, with workplace adjustments to support their return.
8. The APS acknowledges that APS agencies can play an important role in improving the management of return-to-work following injury, including through empathetic performance management.
9. The Bill will support work that is already underway within APS agencies to improve workplace health and safety, early intervention and rehabilitation of injured employees, and return-to-work arrangements. Secretaries and Chief Executive Officers are working closely with Comcare to improve their agencies' performance.

¹ Where this document states that the APS holds or supports a particular view, it should be read as referring to the APS as an employer.

10. There are also concerns amongst agencies that the Comcare scheme currently allows employees to make claims for compensation that do not stand up to public scrutiny. Claims for injuries that happened at work but were not caused or aggravated by the workplace, and claims for the cost of questionable rehabilitation practices, are costly and create negative perceptions of the APS. Stress claims that are made when supervisors take reasonable management action impact every supervisor in the APS, and co-workers.
11. Concerns that the scheme impedes the ability of managers to actively and effectively manage employees are also evident.
12. The Bill will address these concerns by changing the performance and people management culture that currently exists in some areas of the APS, and aid efforts to improve the return-to-work performance of agencies.

Key aspect 1: Supporting employees in their recovery

13. The Bill’s proposed amendments will enable injured employees to receive medical treatment earlier. The amendments will also ensure that any medical treatment provided is appropriate and will assist the employee to recover.
14. The table below outlines expenditure on medical treatment for Australian Government employees in recent years. Although there was a reduction in expenditure in 2013-14, the overall trajectory has been upward.

Figure 1: Medical treatment expenditure for Australian Government employees, 2009-10 to 2013-14

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
11059	\$42,671,051	10874	\$46,603,408	11393	\$50,243,194	11599	\$52,493,164	11609	\$48,627,617

Source: Comcare

15. The Bill introduces provisional medical expenditure payments, whereby an employee can claim up to \$5,000 in medical expenses without lodging a formal workers’ compensation claim. This improved focus on early intervention will help ensure that injured or unwell employees receive assistance as soon as it is needed and so improve their health outcomes. This will complement the early intervention programs some agencies already have in place.
16. Medical treatment will only be paid for where it is evidence-based and provided by legally qualified health practitioners. This will ensure that an employee receives good quality medical treatment that is appropriate for their injury or illness. Agencies will no longer be liable through premiums for the cost of treatments with little to no curative effect.
17. The APS supports the introduction of a requirement that employees with psychological claims see a medical practitioner with mental health qualifications early in the treatment of their condition. This will ensure that they receive appropriate treatment and have the support they need to recover and return-to-work. It will also assist employers to provide the required support to injured employees and reduce total claim costs.
18. The APS supports the proposed changes to permanent impairment provisions. The amendments would improve access to permanent impairment compensation. Where an employee’s injuries are such that

they cannot recover, the planned amendments will allow multiple injuries arising from the same injury to be combined when calculating compensation entitlements and increase the lump sum permanent impairment compensation for severely injured employees.

Key aspect 2: Supporting employees to get back to work

19. Return-to-work rates are falling in the APS, from approximately 89% in 2008-09, to 80% in 2012-13. Changes to the scheme which improve the return-to-work process are critical, given the strong evidence of the health benefits of work.
 - a. Work absence tends to perpetuate itself. The longer someone is absent from work, the less likely they become to return to work.² Where the loss of work is caused by ill health, unwarranted delay in return to work is often associated with delayed recovery.³
 - b. An early return to work has been shown to be beneficial for health and wellbeing.⁴
20. It is vitally important to assist an employee to return to work. APS employers support the strengthening of return to work provisions because it offers a greater ability to retain experienced and skilled staff. Supporting employees in their return to work aligns with a workplace culture that values and cares for employees.
21. The APS supports the proposed amendments to rehabilitation provisions and other levers, including step-downs, which will encourage return-to-work. The proposed changes will clarify the rehabilitation responsibilities of both employees and managers, and improve accountability.
22. An important change specific to the APS context is the clarification of rehabilitation responsibilities for ex-employees following machinery of government (MOG) changes. Where a MOG change means that an agency no longer exists, or has ceased to perform a function, the proposed amendments empower Comcare to take a more active role in rehabilitation including the power to determine which agency has rehabilitation responsibilities.

Key aspect 3: Scheme Sustainability

23. The Comcare scheme is one of the only remaining workers' compensation schemes that funds long-term support for employees. The APS believes it is important that the scheme continue to provide support for injured employees who are unable to return to work due to their injuries. However, the scheme must be sustainable. Many APS agencies have and continue to experience substantial increases in their workers' compensation premiums which have ballooned by 50 per cent over the last four financial years.⁵ This trend of rising costs cannot continue unchecked.
24. The proposed changes will strengthen eligibility requirements for compensation. These are important amendments as the current provisions do not clearly differentiate between work and non-work related injuries, leaving the scheme vulnerable to escalating and unpredictable costs.
25. The Bill introduces an additional threshold for some claims. The applicant's employment must have significantly contributed to the designated injury being claimed. The Bill also expands the matters that must be considered when determining whether the applicant's employment significantly contributed to

² Australasian Faculty of Occupational & Environmental Medicine Realising the Health Benefits of Work: A Position Statement. 2011: Royal Australian College of Physicians, p. 12.

³ Dame Carol Black, (2010) Foreword to the Australasian Faculty of Occupational & Environmental Medicine Realising the Health Benefits of Work: A Position Statement. 2011: Royal Australian College of Physicians.

⁴ Australasian Faculty of Occupational & Environmental Medicine Realising the Health Benefits of Work: A Position Statement. 2011: Royal Australian College of Physicians, p. 16.

⁵ Compendium of WHS and Workers' Compensation Statistics, 6th Edition', March 2015, Safety, Rehabilitation and Compensation Commission and Comcare, p. 49.

the claimed designated injury. By requiring an increased causal connection between the injury and the employee's employment, employers in the Comcare scheme will no longer be required to insure against the costs of injuries, like strokes and degenerative spinal conditions, over which they have little control or influence.

26. The Bill also increases the threshold for perception-based claims by providing that where a claim is largely based on an employee's perception of an incident or state of affairs, the employee must have reasonable grounds for that perception. This will introduce further rigour into the scheme when determining liability for psychological injury claims.
27. Two case studies are presented below. Under the proposed changes, injured employees in cases such as these will not be entitled to compensation, unless they have reasonable grounds for their belief about, or interpretation of, an incident or state of affairs.

Case studies – employee perception of an incident or state of affairs

Example 1 – Electromagnetic frequency emissions

- In 2013, an Australian Government employee made a workers' compensation claim for severe ongoing migraines as a result of electromagnetic frequency (EMF) emitted by equipment such as computers, televisions, mobile phones and power lines.
- There was limited evidence in support of the employee's perception that his condition was caused by employment. The claimant flew light aircraft from his rural property. Expert witnesses advised that EMF would be higher in the aircraft than in an office environment.
- The Administrative Appeals Tribunal found that the employee's perception was that the disorder from which he suffered was caused by exposure to EMF and that the aggravation of the disorder was caused by his exposure to EMF at work. The fact that he had this perception and in fact experienced a worsening of symptoms was found to be sufficient to establish a causal collection with his employment and there was no requirement that his perception be reasonable or based in fact. The Administrative Appeals Tribunal upheld the claim for workers' compensation.

Example 2 – Employee perception of actions of a colleague

- In 2012, an Australian Government employee submitted a claim for workers compensation for 'work related stress'
- In her claim, the employee alleged that when she requested a fellow colleague assist her to move a table on a trolley, the colleague did so by moving the table 'wildly from side to side' and 'banging on glass and metal'. The employee further stated that the colleague's behaviour was 'volatile and extremely pressured' and she could 'feel the intensity of his anger and rage'.
- Whilst CCTV footage shows the employee and her colleague moving a table together, it did not reveal any behaviour which may be construed as aggressive or violent.
- Comcare applied the Federal Court decision of *Wiegand v Comcare* in finding that the employee's *perception* of the events significantly contributed to her condition.
- The claim was therefore eligible and compensation was paid.

Source: Comcare

28. Legislative amendments are effective in driving cultural change. The amendments will reset employee perceptions and expectations of what constitutes a reasonable basis upon which to make a workers' compensation claim and what should be paid for under the scheme.

29. Managers in the APS regularly report that some employees covered by the Commonwealth scheme see Comcare as a 'soft touch'.
30. Such an attitude is not healthy for the individual concerned, undermines the majority of hard working and ethical public servants and is not fair on agencies and taxpayers.

Fraud

- 178 fraud notifications were received during 2013/14, which is a 15% increase on the previous year and continues the steady increase in notifications. The ongoing increase is attributed to the Comcare Fraud Response Unit's greater level of engagement, both internally and externally to Comcare.
- The vast majority of fraud allegations continue to be received from Claims Service Officers, which accounted for 42% of all allegations. The second major source of fraud reports came from the injured worker's workplace, which accounted for 15% of all allegations.
- Injured worker fraud accounted for more than 95% of all allegation types, with the exaggeration or embellishment of an injury accounting for 40% of all allegation types. The second most prevalent allegation of fraud was for injured workers earning an undisclosed income, or working without notifying Comcare or their workplace.
- Covert surveillance was undertaken on 20 injured workers in 2013/14. Surveillance resulted in 17 injured workers being identified as being not entitled to their previously approved worker's compensation claim. This in-turn realised \$4.6M in actual savings, with a further potential saving of \$16.2M in medical and further claims. The 2013/14 surveillance cost/benefit ratio showed that every \$1.00 invested in surveillance activities returned \$19.00.'

Source: Comcare

31. The APS believes in providing support to employees who are injured and genuinely need support. Doing so requires a viable and sustainable workers' compensation scheme. The APS cannot afford to continue paying for a scheme that accepts claims that are unrelated to work, and provides treatment and services to employees that are not evidence-based.
32. The taxpaying public expects the Comcare scheme to be fair and comparable to other schemes. The cost associated with defending spurious claims has been increasing. If unchecked, this has implications for the scheme's viability. In addition, a prevalence of spurious claims invokes a broader impact of undermining respect for APS employees.

Key aspect 4: Empowering managers to actively manage

33. The APS believes that managers must be able to actively and effectively manage their employees, not only when there are underperformance issues, but also to manage changes in business needs. Within the APS, managing people and underperformance is an ongoing priority.
34. The narrowness of the current provision excluding 'reasonable administrative action' can impede a manager's ability to actively and effectively manage their employees. The APS supports the proposed legislative reforms in this area.
35. The current reasonable administrative action provision restricts access to compensation where an employee's injury is caused by a "reasonable administrative action, taken in a reasonable manner, in respect of the employee's employment". Reasonable administrative actions include: performance appraisals, counselling actions, disciplinary actions or anything done in connection with the employee's

failure to obtain a promotion, reclassification, transfer or benefit.

36. The reasonable administrative action provisions were introduced to protect an employer's capacity to manage their staff through legitimate human resource management actions undertaken in a reasonable manner. This means that when an employer has exercised a legitimate human resource action, which was reasonable in the circumstances and done in a reasonable manner, an employee should not be eligible for workers' compensation for an ailment that arises from that action. Such provisions should serve to prevent compensation claims from being used to impede genuine and reasonable management action.
37. However, over time, the Courts have adopted a narrow interpretation of the definition of reasonable administrative action. This has resulted in unintended consequences. Anecdotal evidence suggests that APS managers are often apprehensive of workers' compensation claims or allegations of bullying and harassment when they are being pro-active and responsible managers.

Case studies – Examples of narrowness of current reasonable administrative action exclusions

Example 1 – Performance management

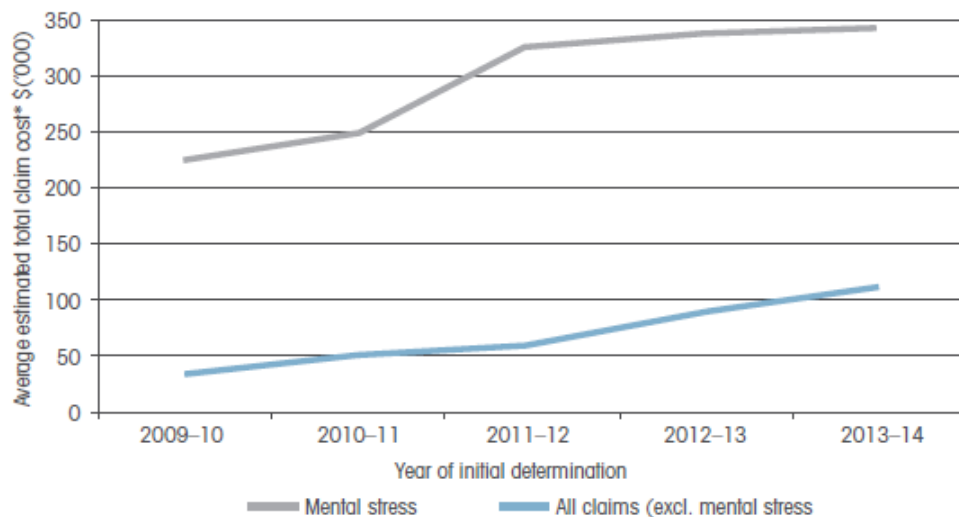
- An Australian Government employee's manager had a discussion with her about aspects of her performance, and a failure to follow direction.
- The employee filed a workers' compensation claim for psychiatric symptoms she claims arose out of that discussion. The employee claimed her manager was ineffective, subjected her to bullying and harassment, and socially isolated her from the rest of the team when she complained.
- The employee's claim progressed to the Administrative Appeals Tribunal, where Comcare agreed that the employee had been properly diagnosed as suffering from adjustment disorder with symptoms of anxiety and that her employment made a significant contribution to the condition.
- However, Comcare denied liability for the claim on the basis that the manager took reasonable administrative action in a reasonable manner.
- In 2014, the Tribunal found that the discussion between the employee and her manager did not constitute administrative action and was not action taken in respect of the employee's employment. It ruled in favour of the employee and ordered Comcare to pay compensation.

Example 2 - Disciplinary action against team member

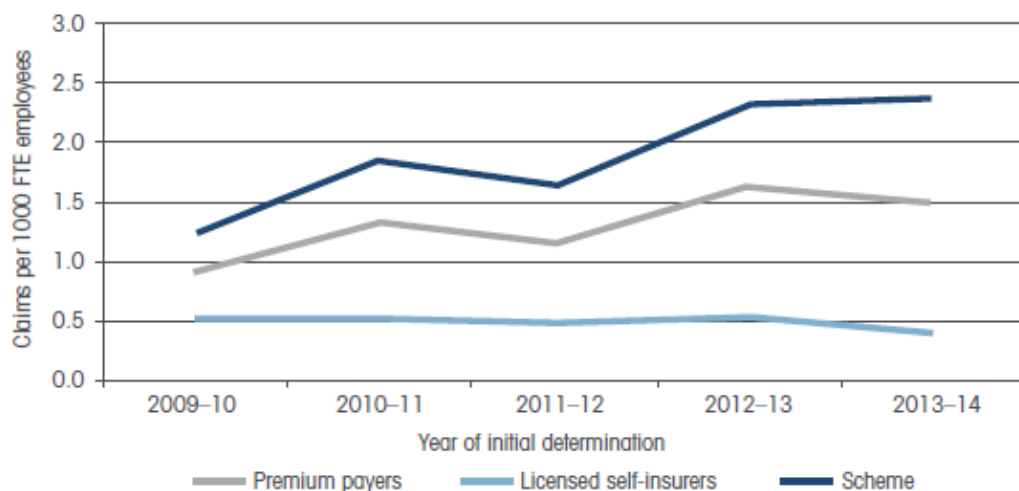
- In 2008, an employee made a claim for a condition she claimed arose as a result of being directed to discipline her team member for a breach of the APS Code of Conduct.
- The employee believed that there was no evidence to support the allegation of a breach and that the direction to discipline the team member was inconsistent with the employer's policy.
- Liability was initially denied on the basis that the direction to raise the issue with the team member constituted reasonable administrative action taken in a reasonable manner.
- However, following the principles in *Commonwealth Bank of Australia v Reeve*, the direction to discipline the team member did not constitute reasonable administrative action taken in a reasonable manner in respect of her employment, which would have seen it excluded; rather it was an ordinary feature of her work. Accordingly, Comcare could no longer rely upon the exclusion and liability was accepted.

38. Employers in the APS are subject to a strict framework of rules and regulations when managing employees and workplace change including under the *Public Service Act 1999*, the *Fair Work Act 2009* and the *Work Health and Safety Act 2011*. The APS welcomes the amendments which broaden the exclusionary provisions of reasonable administrative action to include all ‘reasonable management actions’. This reflects the true intent of the current provisions.
39. Failure to manage underperformance is a drain on resources and productivity, which also has a negative impact on co-workers, and must be addressed⁶. The proposed amendments will empower managers to better manage underperformance and workplace change without fear of reprisal through a workers’ compensation stress claim, if they manage their workers in a reasonable manner.
40. The number of compensation claims for mental stress and the average total cost of mental stress claims are increasing, as illustrated in the following graphs:⁷.

Average total cost* of mental stress claims (premium payers)



Incidence of mental stress claims



⁶ Australian Public Service Commission State of the Service Report: State of the service series 2013-14, p. 154.

⁷ Compendium of WHS and Workers’ Compensation Statistics, 6th Edition’, March 2015, Safety, Rehabilitation and Compensation Commission and Comcare, p. 21.

41. The APS acknowledges that it has a responsibility to prevent bullying. Also, they are committed to engendering a workplace culture that does not tolerate bullying. In circumstances where bullying does occur, employers have an important role under the Act to manage early intervention and rehabilitation. The amendments strengthen and clarify this role and the mutual obligations of employers and employees.