

# LABOR SENATORS' DISSENTING REPORT

## Key Issues

1.1 The Labor Senators of the Committee argue that the Safety, Rehabilitation and Compensation Amendment (Improving the Comcare Scheme) Bill 2015 (the bill) represents a diminution of worker's rights, and represents the most fundamental change to the *Safety, Rehabilitation and Compensation Act 1988* (the SRC Act) since its introduction.

1.2 The Labor Senators do not agree with the Committee View expressed in the majority report, especially with regard to section 2.67 which states:

The committee takes very seriously the evidence provided by the Australian Public Service Commission concerning the increasing incidence of allegations of injured worker fraud. The committee regards it as imperative that greater rigour is introduced into the assessment of compensation claims and is confident that the changes brought in by the bill are both necessary and sufficient to accomplish this vital task.

1.3 and section 2.185, which states:

The weight of evidence presented to the committee during this inquiry clearly indicates that the integrity of the Comcare scheme has been compromised and that, as a result, to continue with the scheme on its current trajectory is financially unsustainable.

1.4 We maintain that there exists no policy justification for expanding self-insurance under Comcare (as per the changes suggested by the Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014), or evidence of widespread misconduct or abuse of the system that would justify the changes outlined in this bill. Despite limited examples outlined in the bill (and on previous occasions by Coalition Senators) the report does not demonstrate a compromise of the scheme, and Labor Senators argue the evidence contained in the report only demonstrates the weight of opposition to the amendments proposed by the bill.

1.5 The outcome of these bills combined will only be to shift costs from workers' compensation schemes to the injured worker, and therefore eventually, the public health system. The bill does not advance the positive amendments proposed by the Hanks Review, which would make the scheme fairer and more effective, and instead imposes the will of the current Government to reduce workers' rights and entitlements.

1.6 Broadly, the Government claims the bill:

- emphasises the vocational (rather than medical) nature of rehabilitation services and contains measures designed to improve return to work outcomes under the scheme;
- promotes fairness and equity in outcomes of injured employees by targeting support for those who need it most; and
- strengthens the integrity and viability of the scheme by clearly distinguishing between work and non-work related injuries, improving the quality of

compensable medical treatment and support services, and limiting legal and medical costs under the scheme.

1.7 However, in summary, the proposed changes in this Bill would immediately and significantly reduce the rights and protections of workers covered by the scheme.

*The bill reduces the compensation payment for the vast majority of injured workers*

1.8 Changes to eligibility rules in Schedule 1 of the bill provide a range of new tests and exclusions from compensation. Regulations foreshadowed in the bill, but not yet released, will provide Comcare with further and sweeping powers to change eligibility rules. Therefore the full impact of Schedule 1 on injured workers cannot be accurately estimated. The known changes are:

- 'designated injuries' and illnesses including aggravations, for example to the heart and blood vessels; brain and blood vessels associated with the brain; and intervertebral (spinal injuries), will face higher tests of proof for workers to access the Comcare scheme;
- the current exclusionary provision for injuries caused by 'reasonable administrative action' will be broadened by the term 'reasonable management action'. This will exclude any physical or psychiatric injury or illness resulting from a directive of management unless an injured worker can prove unreasonableness. Therefore injuries at work in a wide variety of everyday work settings will be excluded; and
- vulnerability or susceptibility to injury or disease would count against any injured worker, which will have a particularly discriminatory affect upon older workers and workers with disabilities.

1.9 Labor Senators argue that the changes to the bill have been introduced to exclude as many workers as possible from the scheme, allowing costs for employers to be lowered, creating a David versus Goliath situation with the onus on workers. There is no restriction on the number of lawyers that Comcare or a 'liable employer' or licensee can hire to support a denial of compensation, yet the worker, no matter how unfairly they have been treated, will not be able to recover more than a fraction of their legal costs, if at all.

1.10 Further to this, at pages 49-50 of the Regulation Impact Statement, the Government states:

Taylor Fry Actuaries conducted costings on the proposed package of changes in July 2014... the Government's package of changes will save both premium payers and licensees between 12 per cent and 21 per cent annually. This equates to between \$62million for premium payers and \$19 and \$32million for [31] licensees.

1.11 This demonstrates the basis of the bill is a cost-saving measure.

1.12 When the Comcare scheme was introduced in 1988, the Parliament increased workers' entitlement to a lump sum impairment payment in part to offset their relinquishment of common law rights. This bill reduces benefit payments for

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permanent impairment to up to 90 per cent of claimants<sup>1</sup> by reducing the amount of compensation payable to those suffering less than 40 per cent whole person impairment, dissolving the already meagre pain and suffering component into the flat rate and removing the lump sum compensation for secondary psychological conditions.

1.13 The bill also proposes to prevent those who are unable to work as a result of a work injury from accruing leave entitlements under their workplace agreement. Under the current scheme, such accruals are permitted for the first 45 weeks of a worker's incapacity. There is no justification for this financial penalty against workers, and punishes workers for sustaining an injury at the workplace, leaving them worse off over all.

1.14 Compensation entitlements would be suspended where an injured worker is absent from Australia in excess of 6 weeks, regardless of the reasoning. Under the current scheme, whilst a worker needs to seek approval prior to departure, compensation is not cut off if a worker leaves the country. In circumstances where a worker is totally unfit for work as a result of a compensable work related injury, there is no reason to force them to stay in Australia.

1.15 New tests would also require consideration of whether the worker would have hypothetically suffered a similar 'designated injury' at the 'same time in the worker's life' or at the 'same stage'. Degenerative changes can happen without any symptomatic expression and are generally asymptomatic until such time as a work injury occurs.

1.16 To remove injured workers from a workers' compensation scheme because of their vulnerability is unfair and inhumane. In a society where the working age now extends beyond 65 years, and the Government has declared it expects workers to work longer, our work force is ageing, and therefore becoming more susceptible, on the whole, to workplace injury. This provision effectively serves to discriminate against workers on the basis of their age, which is completely unjustifiable.

1.17 The bill also allows any injury that can be said to be caused by or even merely 'associated with' a pre-existing condition to be denied. The explanatory memorandum at paragraph 24 explains further that:

In assessing the contribution of the employment, this would require consideration of issues such as genetic pre-disposition, prior traumatic events, and personal and social factors which influence how a person perceives or experiences events to which they are exposed, whether that be in their employment or everyday life.

1.18 This paragraph would exclude workers who are impacted by (for example) family violence, war, heart disease or cancers linked to genetic pre-disposition (regardless of impact of work), recovery from drug use or psychiatric illness, family history of mental illness and so on. This would exclude a very wide range of workers and the onus would remain on the worker to exclude such predisposing factors.

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<sup>1</sup> Slater & Gordon, *Submission 14*.

*Changes in the bill invade workers' access to medical choice and privacy*

1.19 Rehabilitation and a proposed new 'Workplace Rehabilitation Plan Framework' set out in Schedule 2 will make rehabilitation employer driven — rather than doctor directed. Section 36H of the bill requires the employer to consult with the injured worker's treating doctor and the employee on the 'Workplace Rehabilitation Plan Framework' but it is not necessary for the doctor's medical opinion or the concerns of the worker to be accepted by the employer.

1.20 Comcare could compel third parties and the worker to provide documents about the worker, irrespective of relevance to a claim. Workers can be sanctioned by loss of compensation rights if they fail to comply with a document request. Comcare would be allowed by the bill to provide these documents to third parties for purposes of disciplining the worker. Workers can be sanctioned by loss of compensation rights if they fail to comply with a document request.

1.21 Whilst the Government argues that these changes have been introduced to avoid claims of unproven treatments being claimed under Comcare,<sup>2</sup> Labor Senators were unable to find any evidence that proves extensive examples of this in practice as claimed.

1.22 Labor Senators argue that these changes invade workers' access to medical choice and privacy. Workers have a right to privacy and confidentiality in the management of all medical records, and have a right to choose their own medical provider and rehabilitation service and the changes these bills introduce would remove access to that right.

1.23 Whilst we agree that a return to work is the desired outcome in most occasions, the ACTU gave evidence that the changes left employers with 'extraordinary powers to direct an injured worker on the health provider they must see, and what tasks they must undertake, even if this contradicts the opinion of an injured worker's treating medical doctor'.<sup>3</sup>

1.24 Further to these changes, the introduction of the employer-directed Workplace Rehabilitation Plan Framework would place an onus on an injured worker without any equivalent duty being placed on the liable employer, who would face no penalty if they fail genuinely to engage in the rehabilitation process.

*New job search requirements are excessively harsh on workers*

1.25 The proposals in this bill would see the job search requirements for Comcare recipients exceed those relating to Newstart recipients. The ACTU's submission to the Committee outlined the measures in this bill that exceed the current consideration within Social Security laws with regard to a person's personal circumstances.

By contrast the bill proposes a strict liability approach to injured worker breaches and if they have found a breach to have occurred without an excuse the employer considers reasonable, they notify Comcare without reference to the personal

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<sup>2</sup> Department of Employment, *Submission 22*, p. 6.

<sup>3</sup> ACTU, *Submission 26*, p. 25.

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circumstances or vulnerability of the injured worker. The employer's obligation is simply to inform the relevant authority of breaches by the employee (29ZB).<sup>4</sup>

*The bill includes a new punishing approach to workers with psychiatric injuries*

1.26 The current exclusionary provision for injuries caused by 'reasonable administrative action' will be broadened under the bill, excluding any physical or psychiatric injury or illness resulting from a directive of management unless an injured worker can prove unreasonableness.

1.27 The new test of 'susceptibility or vulnerability' to injury or illness will adversely affect those impacted by psychiatric injuries. Submitters claim this would see a reversal of years of work to combat stigma about mental illness in the workplace,<sup>5</sup> and leaves employers with no incentive to deal with workplace bullying.

1.28 The bill eliminates any lump sum payments for permanent impairment and non-economic loss for those suffering from a secondary psychological condition. The elimination for lump sum payments for secondary psychological injury could lead to workers whose injuries are not neatly covered by the Act, and for whom secondary psychological injury was their only compensable claim, being denied benefits. Slater & Gordon outlined an example in their submission:

Tom is a truck driver. Whilst moving a pallet during the course of his employment, the worker assisting him, let go, leaving Tom to take the whole weight of the pallet. Tom was unable to support the weight and sustained a severe sudden onset of pain in the inguinal region. Tom underwent surgery for repair of both left and right hernias. The hernias were repaired but subsequent to the surgery, Tom developed sharp bilateral pain directly over the internal inguinal ring bilaterally running to the upper medial part of the thigh bilaterally. The symptoms were considered not to be a recurrent hernia but rather a 'neuroma' associated with scarring in the iliohypogastric nerve. Tom was assessed as suffering from a nil per cent in accordance with tables 8.7 and 9.13.3 of the Comcare Guide and owing the inability to claim for chronic pain under the Guide, was unable to make a claim for the injury, notwithstanding its severity. Tom's only avenue for a lump sum payment was via a psychological claim. Tom satisfied the 10 per cent threshold required for a permanent impairment payment for his psychological condition and is awarded approximately \$36,000. Under the proposed scheme, Tom would have no entitlement to a lump sum payment.<sup>6</sup>

1.29 Workers suffering a psychiatric injury will also be impacted by the new Schedule 14, which would see them face added complexity in claims for 'gradual onset injury' like depression or anxiety exacerbated by workplace issues over time.

1.30 Labor Senators argue that the work undertaken to recognise and destigmatise workplace psychiatric injury would be wound back by these changes to Comcare.

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<sup>4</sup> ACTU, *Submission 26*, p. 55.

<sup>5</sup> ACTU, *Submission 26*, p. 19.

<sup>6</sup> Slater & Gordon, *Submission 14*, p. 20.

*The amendments re-introduce fault as a means to bar injured workers from compensation*

1.31 Employers have a duty of care to provide a safe working environment and workers' compensation laws must acknowledge this duty of care. As such, workers' compensation must operate as a no-fault jurisdiction.

1.32 Since the 1980s, a fundamental feature of the Australian workers' compensation system was the payment of benefits regardless of fault, workers covered by the legislation merely had to prove that their injuries were work related. Both employers and employees benefit from a no-fault system, protecting employers from potentially damaging lawsuits. Statutory no-fault benefits were provided in exchange for the mandatory relinquishment of the worker's right to recover compensation for the real extent of their loss from his or her employer under the tort of negligence, giving up common law rights. It is not just of benefit to workers.

1.33 The bill seeks to limit or exclude workers from receiving no-fault benefits, without returning the right to sue for injuries as a result of employer negligence. This bill returns the Australian workers' compensation system back to consideration of contributory negligence, where it is upon the worker rather than the employer to ensure the workplace is safe.

1.34 These changes must be considered together with the changes outlined in the Government's Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014, which would see injuries caused by any arguable employee misconduct being excluded from benefits. No other workers' compensation jurisdiction contains such a clause.

1.35 Like the aforementioned bill, the changes to Comcare in this bill stands in complete contradiction to the implementation of the National Disability Insurance Scheme (NDIS) and a National Injury Insurance Scheme (NIIS), which would allow injured workers excluded from Comcare benefits to apply for taxpayer funded NDIS care and support services, shifting the burden from the employer back to the taxpayer.

1.36 Labor Senators note, as we have previously, that amendments to the no-fault scheme are without evidence or research to justify such an amendment.

**Labor Senators' summary view**

1.37 Labor Senators agree that this bill represents the most fundamental reform of the SRC Act since its introduction.

1.38 Labor Senators would have welcomed changes to the SRC Act that improved the speed with which claims and disputes are processed, allowed injured workers earlier access to rehabilitation and access to provisional medical expense payments and improved the quality of medical treatment and attendant care, but we do not support the broader suite of legislative proposals contained in the bill.

1.39 Workers' compensation schemes should be designed to provide a safety net for workers injured in workplace accidents, not as a business model to reduce costs for employers that chips away at no-fault benefits and common law trade-offs.

1.40 Safe Work Australia estimates that only 5 per cent of the cost of workplace injury is borne by the employer, with 74 per cent borne by the workers themselves, and the remaining 21 per cent borne by the community. Any cost shifting from employers further onto workers will only serve to exacerbate this disparity.

1.41 Further to the voting down of the bill, Labor Senators suggest that the government should establish an inquiry as a matter of urgency to examine the extent of cost shifting by workers' compensation schemes onto injured workers and government services, including the public health system and social security.

### **Recommendation 1**

**1.42 The Labor Senators recommend that the Senate reject the bill.**

**Senator Sue Lines**  
**Deputy Chair**

