Inquiry into the Safety Rehabilitation and Compensation and Other Legislation Amendment Bill 2006

Senate Employment, Workplace Relations and Education Committee

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GPO Box 1989, Canberra, ACT 2601, DX 5719 Canberra
Telephone **+61 2 6246 3788**
Facsimile +61 2 6248 0639
19 Torrens St Braddon ACT 2612
www.lawcouncil.asn.au

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General Observations

This submission considers the *Safety, Rehabilitation and Compensation and Other Legislation Amendment Bill 2006*.

As indicated by the Explanatory Memorandum accompanying the Bill, the proposed legislative changes are clearly aimed at restricting or limiting future compensation claims under the *Safety, Rehabilitation and Compensation Act* scheme (the SRC scheme). The Law Council of Australia believes that some of the amendments being proposed will adversely affect many injured employees in the future.

It is noted that the *Comparative Performance Monitoring Report* of the Workplace Relations Ministers' Council (Eighth Edition, September 2006) suggests that this scheme already has the lowest level of premiums of any Australian jurisdiction. It is also noted that the SRC scheme is not the most generous scheme in terms of either the level of statutory benefits paid to injured workers or access to common law.

The Law Council notes that, while the Financial Impact Statement estimates that the proposed amendments will produce a reduced call on Comcare's premium pool of around $20 million per annum, it goes no further than indicating that the reduced call on the premium "may have" a beneficial effect on workers compensation premiums under the Comcare scheme. The Law Council is concerned that there has been no commitment to pass on an appropriate proportion in the anticipated savings by way of a reduction in premium, despite a clear intention to reduce benefits available to injured workers under the scheme.

Definition of Disease

The Bill alters the definition of disease, by providing that the degree of workplace contribution to the disease be increased from a "material degree" to a "substantial degree".

The amendment addresses the concern that courts and tribunals have taken an expansive view of the causal connection between an employee's work and his or her injury. The Law Council notes that concern may have been understandable prior to the Full Federal Court decision in *Comcare v. Canute* [2005] FCAFC 262. In that case, French and Stone JJ found (at 67 and 68) that there must be a close connection between the disease and the employment.

In practice this is not significantly different to other jurisdictions, despite the different wording.

The Law Council submits that, rather than introduce a new test and await litigation surrounding the test and its interpretation, it would be preferable to define "material degree" as meaning "a close connection between the disease and his or her employment".

Definition of Injury

The Bill proposes to alter the definition of "injury" under the SRC Act to ensure claims can not be brought for injuries arising out of 'reasonable administrative action undertaken in a reasonable manner'. The apparent aim of the amendment is to ensure that the exclusionary aspect of the definition of "injury" covers all aspects of the disciplinary process.

The Law Council is concerned that the extension of the exclusionary provision to reasonable "administrative action" takes this exclusion too far.

On one interpretation, it might be considered that all Government actions (and not just disciplinary ones) can be regarded as "administrative action".

Another danger of excluding all injuries arising from all "reasonable administrative action" under a no fault scheme is that certain judgments about fault must be imported. The basic premise upon which various Australian workers compensation schemes are based is that "reasonableness" of a particular action or omission is excluded (hence, the term 'no-fault'). The aim historically was to provide workers with a defined benefit in the event of incapacity. Questions of fault have historically been handled by the courts.

It is noted that the aim of restricting the definition is to provide premium ease for the employing department. However, whatever the intention of the legislature, the Law Council believes that this would amount to a "false economy", as the obligation to care for the injured is simply shifted to the taxpayer through the public health system and social security.

Certain jurisdictions already apply a test similar to the one proposed, namely South Australia and Tasmania. The Law Council is advised that in those jurisdictions there has been increased litigation (especially in Tasmania) and greater uncertainty as to entitlement.

It is submitted that it would be better to maintain the current definition and to define "disciplinary action" as "all steps taken pursuant to the disciplinary processes established by the relevant employer".

These proposed provisions will be particularly unfair given the interpretation by Comcare of the obiter comments made by the Full Federal Court in *Hart v Comcare* [2005] FCAFC 16. In that case, the court suggested that if there are several factors causing injury and just one of them relates to disciplinary action, then that will be construed as the primary cause. When read with the decision of Full Federal Court in *Comcare v Canute* [2005[FCAFC 262, this appears to require that all contributing factors, including workplace bullying and workload stress, which may materially contribute to the injury complained of, be disregarded in circumstances where administrative action against the complainant was taken or contemplated.

The amendments should make it clear that if employment, other than disciplinary action or failure to obtain a benefit, materially contributed to the injury, then it is compensable notwithstanding there may also be a component covered by the exclusionary provisions.

Journey Claims

The Bill seeks to restrict "journey claims" by limiting the circumstances in which an employee may make a claim for journeys to and from work, or for non work-related travel during work hours.

The rationale suggested is that employers have limited control over journeys to and from work and thus cannot take steps to protect health and safety.

In fact, the original rationale for allowing journey claims under the English Acts of the early twentieth century was that travel to work outside the house substantially increased the risk to workers.

The Law Council believes that this rationale has not diminished in importance in the present working environment and journeys undertaken as part of or in relation to employment or study should be covered.

This is at least partially acknowledged in the current proposal.

On that basis, it is submitted that the legislation should make clear that the following journeys are also covered and this ought to be reflected in the amendments to Section 6(1)(b) which ought to cover:

- travel to and from the place of education under the conditions proposed in the new Section 6(1)(e);
- travel to and from the medical, rehabilitative treatment identified in new section 6(1)(f).

Funeral Benefits

The Law Council welcomes the increase and the indexation of funeral benefits under Section 18.

Treatment of Superannuation

The Commonwealth Workers Compensation schemes are the only schemes of any Australian jurisdiction to deal with superannuation.

Although the Comcare scheme claims to provide incapacity benefits at 75%, incapacitated employees who are retired on incapacity grounds or who receive a redundancy package contribute to this sum by way of deduction of any pension or by deducting an amount from any lump sum.

As the object of superannuation is to provide a retirement income (post 65), the effect of these provisions is that injured employees must subsidise the Commonwealth's obligations to provide incapacity payments using their superannuation entitlements.

This is particularly stark in the case of lump sum payments. The formula of dividing by 520 essentially means that the lump sum is applied instead of compensation for that 10

year period such that it may be exhausted prior to reaching 65 years of age and becomes a negative if retirement occurs prior to age 55.

This approach also provides a real incentive for statutory corporations like Telstra and Australia Post to use retirement as a means of relieving their premium burden rather than redeployment, which is contrary to the intention of the Act (see section 40, for example).

The Law Council's view is that superannuation payments should not be taken into account in any way in the calculation of benefits. Superannuation contributions are a statutory requirement that the Federal Parliament imposed on all employers many years ago. The policy is simple and straightforward. Australia has an aging population and the burden of funding reasonable Social Security payments to those who are retiring or likely to in the next 15-20 years will be substantial. Accordingly, the Australian Government has sought to ensure retirees can enjoy a reasonable lifestyle without creating a major burden for Australian taxpayers.

Instead, benefits should be provided pursuant to the *Safety Rehabilitation and Compensation Act 1988*, and retirees encouraged or required to "roll over" benefits until age 65 when incapacity entitlements cease under the legislation.

The Law Council is also concerned that the proposed amendments seek to overturn the decision in *Lonergan v Comcare* [2005] FCA377. The case illustrates the problems of the approach under the Bill.

Mr Lonergan, an employee of Comcare, was injured at work and his claim accepted. He recovered sufficiently to undertake his usual work but was subsequently involuntarily retrenched. Following his retrenchment, Mr Lonergan established a business. Approximately twelve months later he had a recurrence of his work injury and could no longer work.

Comcare sought to take into account his superannuation entitlements in calculating incapacity benefits but the Federal Court held that it was not able to do so because Mr Lonergan was not incapacitated at the time of retirement.

It seems entirely reasonable that Mr Lonergan's retirement benefits should not be taken into account, as there was no relationship between Mr Lonergan's injury (and subsequent incapacity) and his retirement. Moreover, there does not appear to be any logical basis upon which Mr Lonergan's superannuation should be taken into account even if he had been partially or totally incapacitated at the time he was made redundant or retired.

The payments are not "double dipping" as they are unrelated to incapacity. It is further noted that Comcare is not entitled to take into account the benefits of an insurance policy or a claimant's good fortune, were they to win a lottery for example.

The current amendments reproduce the nominated 5% Superannuation Contribution (SC) for injured persons who are retired.

Those employees who are totally incapacitated but are still employed receive compensation at 75% and are not required to contribute to their own Superannuation.

There appears to be no logical basis upon which an amount of 5% should be deducted if that employee is then retired, particularly if they weren't contributing personally prior to retirement. This would allow them to continue to contribute to superannuation, particularly if they "roll-over" their entitlements.

One positive aspect of the proposed changes is that there will now be a flexible view of return on investment on interest received from the lump sum as the current deemed 10% is too high and the definition of Superannuation Amount (SA) has been amended to reflect return on lump sum rather than the lump sum itself.

However, in summary there can be little justification for superannuation to be taken into account, unless retirement is a result of the injury, and there is no justification for deducting 5% from member Superannuation Contributions in any event.

Transitional Arrangements

In general, the Law Council supports the proposed transitional arrangement as fair, equitable and not retrospective in effect.

The only concern is in respect of the definition of suitable employment (clause 43 of part 2 of the Bill).

Although the Law Council generally agrees with this approach, it ought to exclude employees retired prior to the date on which the Bill receives Royal Assent.

The Law Council believes that it is unfair to alter the basis of calculation of incapacity in circumstances where an injured party cannot now re-join their workplace or undo their retirement.

Attachment A

Profile – Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the "constituent bodies" of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.