LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Legislation Scrutiny Committee

Inquiry into the Return to Work Legislation Amendment Bill 2020

May 2020

Contents

Chair's Preface

This report details the Committee's findings regarding its examination of the Return to Work Legislation Amendment Bill 2020. Amending both the Act and the Regulations, the main purpose of this Bill is to reverse a number of the changes made to the legislation in 2015 and to improve the operation of the Northern Territory workers' compensation scheme.

The Committee received 12 submissions to its inquiry, with the majority recommending amendments to specific sections of the Bill. Primary concerns highlighted by submitters related to the journey to and from work; removal of the weekly benefits cap for long-term incapacity; removal of requirement that rehabilitation or workplace based return to work programs be provided by an accredited vocational rehabilitation provider; and the definition of first responder in relation to post-traumatic stress disorder (PTSD). Several submitters also raised issues that were outside the scope of the Bill, including the overall design of the scheme itself and the five year cap on compensation for workers with injuries assessed as below 15% permanent impairment.

The Committee has recommended that the Assembly pass the Bill with the amendments proposed in recommendations 2 and 3. Both of these recommendations are technical in nature and aim to ensure the Bill is unambiguous and drafted in a clear and precise manner. The Committee has also made one recommendation for the Government's consideration, with recommendation 4 proposing that in any future reforms to the *Return to Work Act 1986* (NT), the Government review the limits on compensation that currently apply to workers who suffer a permanent impairment at a percentage of the whole person of less than 15%.

A number of submitters recommended that the definition of "first-responder" be extended to include remote first-responders, arguing that these workers are also highly vulnerable to PTSD. In determining the kinds of employment that will be linked with a condition that is proposed to be added to Schedule 2 of the Regulations (Prescribed diseases and kinds of employment), consideration is given to types of employment that demonstrate a noticeable increase in the condition compared to the broader population, with this being the case for first-responders who physically attend an incident. While it is not disputed that remote first-responders may also suffer from PTSD, it is unlikely to be as common in this group. Workers who do not fit the definition of first-responder are still able to claim compensation for PTSD but will need to prove their claim, with the data indicating that almost 70 percent of such claims are accepted.

On behalf of the Committee, I would like to thank all those who made submissions. The Committee also thanks Professor Aughterson and the Department of the Attorney-General and Justice for their advice. I also thank my fellow Committee members for their bipartisan commitment to the legislative review process.

Mr Tony Sievers MLA
Chair

Committee Members

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	Party:	Territory Labor
	Committee Membership	
	Standing:	House, Public Accounts
	Sessional:	Legislation Scrutiny Committee
	Chair:	Legislation Scrutiny Committee
	**Ms Sandra Nelson MLA** Member for Katherine	
	Party:	Territory Labor
	Parliamentary Position	Acting Deputy Speaker
	Committee Membership	
	Sessional:	Legislation Scrutiny
	Deputy Chair:	Legislation Scrutiny
	**Mr Joel Bowden MLA** Member for Johnston	
	Party:	Territory Labor
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	Committee Membership	
	Standing:	Standing Orders and Members' Interests
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Note: Pursuant to Standing Order 181, on Tuesday 10 March the Member for Karama, Ms Ngaree Ah Kit MLA was discharged from the Committee and replaced by Member for Johnston, Mr Joel Bowden MLA.

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Acknowledgements

The Committee acknowledges the individuals and organisations that provided written submissions.

Acronyms and Abbreviations

ACT	Australian Capital Territory
HIA	Housing Industry Association
ICA	Insurance Council of Australia
MTA SA/NT	Motor Trade Association SA/NT
NSW	New South Wales
NT	Northern Territory
NTCA	Northern Territory Cattlemen's Association
PAYG	Pay as you go
PTSD	Post traumatic stress disorder
QLD	Queensland
SA	South Australia
Tas	Tasmania
UWU	United Workers Union
WA	Western Australia

Terms of Reference

Sessional Order 13

Establishment of Legislation Scrutiny Committee

(1) Standing Order 178 is suspended.

(2) The Assembly appoints a Legislation Scrutiny Committee.

(3) The ordinary membership of the scrutiny committee will comprise three Government Members, one Opposition Member nominated to the Speaker in writing by the respective Whip and one non-party aligned Member to be appointed by motion.

The Committee's membership will be supplemented by alternate members who may be nominated to participate at meetings and undertake a role on the committee in the place of ordinary committee members. The nomination of alternate committee members will be in writing by the ordinary member to the committee chair.

Alternate Committee members must be from the same category of Members of the Assembly as the ordinary member nominating them such as the same political party or a non-party aligned Member.

(4) The functions of the scrutiny committee shall be to inquire and report on:

(a) any matter referred to it:

(i) by the Assembly;

(ii) by a Minister; or

(iii) on its own motion.

(b) any bill referred to it by the Assembly;

(c) in relation to any bill referred by the Assembly:

(i) whether the Assembly should pass the bill;

(ii) whether the Assembly should amend the bill;

(iii) whether the bill has sufficient regard to the rights and liberties of individuals, including whether the bill:

(A) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and

(B) is consistent with principles of natural justice; and

(C) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and

(D) does not reverse the onus of proof in criminal proceedings without adequate justification; and

(E) confers powers to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and

(F) provides appropriate protection against self-incrimination; and

(G) does not adversely affect rights and liberties, or impose obligations, retrospectively; and

(H) does not confer immunity from proceeding or prosecution without adequate justification; and

(I) provides for the compulsory acquisition of property only with fair compensation; and

(J) has sufficient regard to Aboriginal tradition; and

(K) is unambiguous and drafted in a sufficiently clear and precise way.

(iv) whether the bill has sufficient regard to the institution of Parliament, including whether the bill:

(A) allows the delegation of legislative power only in appropriate cases and to appropriate persons; and

(B) sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly; and

(C) authorises the amendment of an Act only by another Act.

(5) The Committee will elect a Government Member as Chair.

(6) The Committee will provide an annual report on its activities to the Assembly.

Adopted 27 November 2019

Recommendations

Recommendation 1

The Committee recommends that the Legislative Assembly pass the Return to Work Legislation Amendment Bill 2020 with the proposed amendments set out in recommendations 2 and 3.

Recommendation 2

The Committee recommends that proposed section 3B of the Bill be amended so that the persons included in "member of the immediate family" are the same in both subsections (3) and (4), such as by inserting in section 3B(3) the word "prescribed" immediately before the phrase "member of the immediate family".

Recommendation 3

The Committee recommends that the Bill be amended to:

- Retain existing section 75B(1A) without amendment.
- Insert a new subsection into section 75A(1) to the effect that, notwithstanding section 50 and section 75B, an employer may, but is not required, to use an accredited vocational rehabilitation provider for the purpose of section 75A(1)(c).

Recommendation 4

The Committee recommends that, in any future reforms to the *Return to Work Act 1986* (NT), the Government review the limits on compensation that currently apply to workers who suffer a permanent impairment at a percentage of the whole person of less than 15%.

1 Introduction

Introduction of the Bill

1.1 The Return to Work Legislation Amendment Bill 2020 (the Bill) was introduced into the Legislative Assembly by the Attorney-General and Minister for Justice, the Hon Natasha Fyles MLA, on 19 February 2019. The Assembly subsequently referred the Bill to the Legislation Scrutiny Committee for inquiry and report by 5 May 2020.[1]

Conduct of the Inquiry

1.2 On 20 February 2020 the Committee called for submissions by 11 March 2020. The call for submissions was advertised via the Legislative Assembly website, Facebook, Twitter feed and email subscription service. In addition, the Committee directly contacted a number of individuals and organisations.

1.3 The Bill, associated *Explanatory Statement,* and *Statement of Compatibility with Human Rights* was also forwarded to Professor Ned Aughterson, for review of fundamental legislative principles under Sessional Order 13(4)(c).

1.4 As noted in Appendix 1, the Committee received 12 submissions to its inquiry.

Outcome of Committee's Consideration

1.5 Sessional order 13(4)(c) requires that the Committee after examining the Bill determine:

(i) whether the Assembly should pass the bill;

(ii) whether the Assembly should amend the bill;

(iii) whether the bill has sufficient regard to the rights and liberties of individuals; and

(iv) whether the bill has sufficient regard to the institution of Parliament.

1.6 Following examination of the Bill, and consideration of the evidence received, the Committee is of the view that the Legislative Assembly should pass the Bill with proposed amendments as set out in recommendations 2 and 3.

Recommendation 1

The Committee recommends that the Legislative Assembly pass the Return to Work Legislation Amendment Bill 2020 with the proposed amendments set out in recommendations 2 and 3.

[1] Hon Natasha Fyles MLA, Attorney-General and Minister for Justice, *Draft – Daily Hansard – Day 5 – 19 February 2020*, http://hdl.handle.net/10070/756095, p. 3.

Report Structure

1.7 Chapter 2 provides an overview of the policy objectives of the Bill and the purpose of the Bill as contained in the Explanatory Statement.

1.8 Chapter 3 considers the main issues raised in evidence received.

2 Overview of the Bill

Background to the Bill

2.1 In 2013 the Country Liberals government commissioned a review of the Northern Territory (NT) Workers Compensation Scheme, the first comprehensive review to be undertaken since 1984.[2] The final report was submitted in July 2014, with the government responding to the report in November 2014 and supporting 58 recommendations with minor variations.[3] Following in principle acceptance of the recommendations, the government amended the Act through the Workers' Rehabilitation and Compensation Legislation Amendment Bill 2015 and the Return to Work Legislation Amendment Bill 2015. Both Bills were passed by the Assembly in March 2015 and August 2015 respectively. These Bills addressed a range of matters arising from the Review, with the Workers' Rehabilitation and Compensation Legislation Amendment Bill 2015 also amending the name of the Act to the *Return to Work Act 1986*.[4]

2.2 A ministerial statement on the proposed amendments, noted that a recent actuarial review indicated that insurers had lost money through the scheme in three of the last five years, with the net outcome also being a loss.[5] The actuarial review, together with the Review of the Northern Territory Workers Compensation Scheme, contributed to the overall purpose of the amendments which was to ensure the scheme remained affordable to business while also "striking a balance between the cost of the scheme and the benefits for injured workers".[6]

2.3 Some of the amendments made by the Country Liberals government, such as the presumptive legislation for firefighters and volunteers, an increase in death and funeral benefits and an increased period of compensation for older workers, enhanced outcomes for workers while others, such as the exclusion of journey claims to and from work, caps on the calculation for normal weekly earnings and the five year cap on benefits for less serious injuries reduced the potential benefits.[7]

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[2] Ministerial Statement, *Amendment to the Workers Rehabilitation and Compensation Act*, delivered by the Hon John Elferink MLA, the then Leader of Government Business on behalf of the then Chief Minister, the Hon Adam Giles MLA, *Debates – Day 2 -Wednesday 26 November 2014*, http://hdl.handle.net/10070/268313, p. 5668.
NT Work Safe, *Government Response: Review into the Northern Territory Workers Compensation Scheme, November 2014,* Tabled paper 1161, 26 November 2014, 12th Assembly, http://hdl.handle.net/10070/274060, p. 2.

[4] A summary of the key changes in these two amendment Bills is available on the NT WorkSafe website: https://worksafe.nt.gov.au/laws-and-compliance/workers-compensation-laws/changes-to-the-workers-compensation-legislation

[5] Ministerial Statement, *Amendment to the Workers Rehabilitation and Compensation Act*, delivered by the Hon John Elferink MLA, the then Leader of Government Business on behalf of the then Chief Minister, the Hon Adam Giles MLA, *Debates – Day 2 -Wednesday 26 November 2014*, http://hdl.handle.net/10070/268313, p. 5668.

[6] Ministerial Statement, *Amendment to the Workers Rehabilitation and Compensation Act*, delivered by the Hon John Elferink MLA, the then Leader of Government Business on behalf of the then Chief Minister, the Hon Adam Giles MLA, *Debates – Day 2 -Wednesday 26 November 2014*, http://hdl.handle.net/10070/268313, p. 5668.

[7] A summary of the key changes in these two amendment Bills is available on the NT WorkSafe website: https://worksafe.nt.gov.au/laws-and-compliance/workers-compensation-laws/changes-to-the-workers-compensation-legislation

2.4 During the lead up to the 2016 Northern Territory General Election the current Labour Government made a commitment to reverse a number of elements of the 2015 amendments that removed or altered workers' entitlements. The amendments proposed in this Bill are informed by the findings of a working group, comprised of government representatives and industry professionals, which was "tasked with providing the government with advice and options on potential changes to the *Return to Work Act*".[8] Consultation undertaken by the working group included key stakeholders such as the Workers Compensation and Rehabilitation Advisory Council, the Insurance Council of Australia and Unions NT.[9]

Purpose of the Bill

2.5 As noted in the Explanatory Statement, the purpose of this Bill is to:

> amend the *Return to Work Act 1986* and *Return to Work Regulations 1986*. The Bill reverses a number of changes made to the legislation in 2015 and improves the operation of the NT workers' compensation scheme. Along with numerous administrative and technical changes, the main changes are:
>
> - revision to the definition of a worker;
> - provision that post-traumatic stress disorder for first responder police officers, firefighters and ambulance officers be a deemed disease;
> - expansion of the number of diseases under the fire fighters presumptive legislation;
> - removal of the cap on normal weekly earnings for payments made after 26 weeks of incapacity; and
> - provision that the legislation covers injuries incurred on the way to or from work.[10]

[8] Hon Natasha Fyles MLA, Attorney-General and Minister for Justice, *Draft – Daily Hansard – Day 5 – 19 February 2020*, http://hdl.handle.net/10070/756095, p. 1.
[9] Hon Natasha Fyles MLA, Attorney-General and Minister for Justice, *Draft – Daily Hansard – Day 5 – 19 February 2020*, http://hdl.handle.net/10070/756095, p. 1.
[10] Explanatory Statement, *Return to Work Legislation Amendment Bill 2020*, *(Serial 123),* https://parliament.nt.gov.au/committees/LSC/123-2020, p. 1.

3 Examination of the Bill

Introduction

3.1 Responses to the Bill varied considerably. Submissions from industry expressed concern that some amendments could increase premiums and adversely affect the financial viability of the scheme while submissions from the legal profession raised concerns about the design and appropriateness of the current scheme as established by the Act.[11] While the majority of submissions recommended amendments to specific sections of the Bill, the Insurance Council of Australia (ICA) also commented that the:

> Bill should not be passed until the scheme actuary has been provided with the opportunity to undertake appropriate modelling to ascertain and report on the full financial and premium impact the proposed amendments will have on the Scheme.[12]

3.2 Key issues were raised in relation to: journey to and from work; removal of the weekly benefits cap for long-term incapacity; removal of requirement that rehabilitation or workplace based return to work program be provided by an accredited vocational rehabilitation provider; settlement by agreement of entitlement to compensation; definition of first responder; and issues related to prescribed diseases and qualifying periods for fire fighters. In addition, the Committee's legal counsel, Professor Ned Aughterson, raised issues with three of the amendments regarding the extent to which they meet the Committee's terms of reference in relation to clear and precise drafting - (4)(c)(iii)(K).

Clause 5, Section 3B inserted – Meaning of worker

3.3 Proposed s 3B replaces the definition of "worker" in s 3 with a new definition and clarifies that a person is a worker if they are an employee for PAYG withholding purposes and that an Australian Business Number is not a determinant factor in establishing whether a person is a worker. It includes individuals employed under a labour hire arrangement for whom PAYG withholding payments are required to be made. It also "aligns the Act with the minimum benchmarks of the National Injury Insurance Scheme that relate to a person catastrophically injured in a workplace accident, by expanding the definition of a worker who is an immediate family member and by expanding the definition of a domestic worker".[13]

Status of family members as 'workers' – proposed s 3B

3.4 Professor Aughterson, commented that:

> the existing s 3(2) provides that a prescribed member of the immediate family of an employer whose specified details are disclosed to the employer's insurer is a

[11] Submission 1 – Housing Industry Association (HIA), p. 4; Submission 2 – Motor Trade Association of SA/NT (MTA SA/NT), p. 1; Submission 3 – Insurance Council of Australia (ICA), p. 2; Submission 7 – Law Society, pp. 1-2; Submission 8 – Ward Keller, p. 2.
[12] Submission 3 – ICA, p. 2.
[13] Explanatory Statement, *Return to Work Legislation Amendment Bill 2020 (Serial 123)*, https://parliament.nt.gov.au/committees/LSC/123-2020#kd, p. 3.

> worker for the purposes of the Act. Proposed s 3B(3) provides that, subject to subsection (4), an immediate member of the family of the employer who lives with the employer is not a worker. Subsection (4) then qualifies this by providing that a 'prescribed member' of the immediate family is a worker if specified details are disclosed to the employer's insurer. That begs the question of why, where all relevantly employed members of the family are disclosed to the insurer, their status as a 'worker' depends on whether or not they are prescribed under the regulations.[14]

3.5 The Committee sought clarification from the Department regarding Professor Aughterson's concerns and was advised that:

> The construct of new subsections 3B(3) and (4) other than narrowing it to a family member who lives with the employer, has not changed markedly from the existing wording. The intent of the change is to align with the minimum benchmarks of the National Injury Insurance Scheme.
>
> The prescription is for definitional purposes, has been in the legislation for over 25 years and has worked well.[15]

Committee's comments

3.6 The Committee notes that the purpose of Regulation 4, which lists the family relationships that qualify a person as a "prescribed" immediate family member, is to provide a definition of "immediate family" for legal purposes, thereby eliminating confusion in the event that an attempt is made to extend the meaning to include others, such as sister-in-laws or brother-in-laws. However, as currently drafted, proposed sections 3B(3) and (4) could be interpreted as providing two categories of persons when referring to family – "immediate family member" and "prescribed immediate family member", with this potentially excluding an immediate family worker who is not "prescribed" from being a worker under the Act, regardless of disclosure to the insurer.

3.7 The Committee understands that this problem can be rectified by using the term "prescribed" to describe "immediate family member" in proposed section 3B(3) as well as in (3B)(4) and has made a recommendation accordingly.

Recommendation 2

The Committee recommends that proposed section 3B of the Bill be amended so that the persons included in "member of the immediate family" are the same in both subsections (3) and (4), such as by inserting in section 3B(3) the word "prescribed" immediately before the phrase "member of the immediate family".

Objection to working directors being eligible for workers' compensation

3.8 Although the majority of submitters supported the amended definition of worker, the Housing Industry Association (HIA) opposed proposed s 3B(6) which expands coverage of workers' compensation to include working directors. The HIA considered that persons running their own business should pay for their own insurance and that

[14] Professor Aughterson, *Legal advice on the Return to Work Legislation Amendment Bill 2020*, p. 1.
[15] Hon Natasha Fyles MLA, Attorney-General and Minister for Justice, *Responses to Written Questions,* 8 April 2020, https://parliament.nt.gov.au/committees/LSC/123-2020#Tabled%20Papers, p. 1.

treating them as "workers" would adversely affect premiums.[16] The United Workers' Union (UWU), while broadly supportive of the proposed amendments, considered the "broad based, results-based definition which was contained in the legislation prior to the 2015 amendments" to be "fairer and more encompassing than the PAYG focused definition" proposed in the Bill.[17] The previous definition defined a worker as all persons who perform work or a service for another person subject to a number of exceptions.[18]

Committee's comments

3.9 The Committee notes that directors of body corporates are not always self-employed as they can enter into a contract with a company in which the terms of the contract make them an employee. The Committee further notes that, under proposed s 3B(6), directors can only be considered a "worker" if an amount is withheld under the PAYG provisions.

3.10 The Committee considers that the current method of defining a worker in relation to whether they are an employee under PAYG provisions is satisfactory and considers no amendment to be necessary.

Cl 6 – Proposed sections 4(1A), (1B) and (2) – Journey to work

3.11 This clause reinstates the setting that workers' compensation cover includes injuries sustained on a journey to or from work (journey claims).

Concerns regarding costs to the scheme of re-instating journey claims

3.12 The ICA, HIA, Northern Territory Cattlemen's Association (NTCA) and the Motor Trades Association (MTA SA/NT) generally opposed the reinstatement of journey claims due to the potential impact on premiums and the viability of the Northern Territory scheme, with several of these submitters commenting on the importance of undertaking cost/benefit analyses or modelling of the impacts of the reinstatement of journey claims.[19]

3.13 Whilst acknowledging that the reinstatement of journey claims will be a cost to the Scheme, and is likely to result in an increase in claims of more than 1 per cent, the Department advised that the intent of the change is provide fairness for all workers, noting that:

> This change recognises that how, when and why workers travel to and from work and home can be directly affected by the employer. There are a number of court cases around Australia where the linkage has been proven (see Namoi Cotton Co-Operative Ltd v Easterman (as Administrator of Estate of Easterman), Singh t/as Krambach Service Station v Wickenden, and Field v Dept of Education and Communities).

[16] Submission 1 – HIA, p. 5.
[17] Submission 9 – United Workers Union (UWU), p. 1.
[18] *Return to Work Act* (NT), section 3, https://legislation.nt.gov.au/Pages/~/link.aspx?_id=42DD2C455BCD467290F54889F590FABE&_z=z
[19] Submission 1 – HIA, p. 5; Submission 3 – ICA, p. 1; Submission 2 –MCA SA/NT, p. 1; Submission 11 – Northern Territory Cattlemen's Association (NTCA), pp. 2-3.

> This change will assign the costs of an incident to the instigator of the travel (the employer) rather than the traveller (the worker) and the public health system (if the traveller cannot afford to pay for health care).
>
> The other underlying intent is creating fairness for all workers, as workers driving to work are covered under the Motor Accidents Compensation scheme, while currently those walking to work or riding a push bike currently have no scheme coverage (unless they are hit by a motor vehicle).[20]

3.14 The HIA and MTA SA/NT considered motor vehicle accidents to be adequately covered through the Motor Accidents Compensation Scheme but were willing to consider exceptions where an injury occurring through a journey to work showed a direct correlation between employment and the injury.[21] No clarification was provided regarding what would constitute a "direct correlation". Provisions of this nature are included in comparable legislation in Tasmania, New South Wales (NSW) and South Australia (SA).[22] By contrast, legislation in both Queensland (Qld) and the Australian Capital Territory (ACT) provides similar coverage to that proposed in this Bill while in Western Australia (WA) and Victoria no coverage is provided for journey to work.[23]

3.15 The ICA commented that the proposed provision on journey claims is unsuitable for the NT due to the large number of fly-in fly-out (FIFO) workers who have other personal injury insurance coverage.[24]

3.16 The Committee sought clarification from the Department regarding the status of FIFO workers under the Bill and was advised that:

> FIFO workers are not covered by a particular insurance scheme other than workers compensation (or for journey involving a motor vehicle, MAC) unless the individual chooses to take out their own personal insurance. Such insurance is usually accident and/or illness income replacement insurance. Such coverage is different to workers compensation in that it is only for income replacement and has restrictive time limitations on coverage compared to workers compensation with more generous and longer term income replacement benefits as well as all reasonable medical hospital surgical rehabilitation and associated treatment costs.
>
> If a FIFO worker (or any other worker) did have such personal insurance, it would not affect their workers compensation entitlement. Quite often personal insurance coverage explicitly disallows claims where alternative insurance is available. As such it is unlikely that this issue would arise when determining premium costs. It should also be noted that FIFO workers who take such coverage are not likely the norm but rather the exception.
>
> FlFO workers would be covered for workers compensation when transported to and from their workplace by air. However the carrier would have a legal liability (damages) if an accident occurred. In this regard there are provisions under the *Return to Work Act* enabling recovery by the employer/insurer from a liable third party.

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[20] Hon Natasha Fyles MLA, Attorney-General and Minister for Justice, *Responses to Written Questions,* 8 April 2020, https://parliament.nt.gov.au/committees/LSC/123-2020#Tabled%20Papers, pp. 1-2.

[21] Submission 1 – HIA, p. 5; Submission 2 – MCA SA/NT, p. 1;

[22] *Workers Rehabilitation and Compensation Act 1988,* s 25; *Workers Compensation Act 1987*, s 10; *Return to Work Act 2014,* s 7.

[23] *Workers' Compensation and Rehabilitation Act 2003,* sections 35 and 36*; Workers Compensation Act 1951,* s 36*; Workers Compensation and Injury Management Act 1981,* s 19*; Workplace Injury Rehabilitation and Compensation Act 2013,* sections 39 and 46.

[24] Submission 3 – ICA, p. 3.

> The other incidents for FIFO workers that would require workers compensation coverage are for journeys to and from work **where the injury does not involve the use of a motor vehicle** (if they were driving then MAC would cover the accident), such as walking or riding (a pushbike) to a collection or departure point. A FIFO worker would be covered as per all workers under these new provisions.[25]

Committee's comments

3.17 Whilst acknowledging submitters' concerns regarding the increase in costs to the Scheme, the Committee is satisfied with the Department's advice regarding the reasons for the re-instatement of the Scheme.

Drafting issue – "shortest convenient route"

3.18 Professor Aughterson raised concerns regarding the wording of proposed s 4(1A)(b) noting that:

> by this provision, an injury to a worker is taken to be related to employment if the injury occurs while the worker is travelling 'by the shortest convenient route' between residence and workplace. There is a question of what 'the shortest convenient route' means. Is it a subjective or objective test? The same criterion was removed from the equivalent Queensland legislation through the *Workcover Amendment Bill 1999*. The Explanatory Note to that Bill states that this was because 'there was concern regarding the strict interpretation and application of the provision'. Section 36(2)(b) of the Qld Workers Compensation and Rehabilitation Act now provides that the injury is taken not to be related to employment if the injury occurs during or after:
>
> (i) a substantial delay before the worker starts the journey; or
>
> (ii) a substantial interruption of, or deviation from, the journey.

3.19 The Committee notes that s 36(3) of the Queensland *Workers Compensation and Rehabilitation Act 2003* provides additional clarification regarding delays, deviations or interruptions to a journey by stating that where these are connected to the worker's employment, or to circumstances beyond the worker's control, injuries arising from a journey to work will be covered.

3.20 The Committee sought comment from the Department regarding Professor Aughterson's concerns and was advised that:

> The test for *'by the shortest convenient route'* is subjective. That is, the individual worker may deviate to do shopping, fuel the vehicle etc, on the way home. If that is normal practice or reasonable for that worker to do, then the particular deviation would be convenient.
>
> With regard to counsel's suggestion re the Queensland wording, part (ii) of that wording is already included. In this regard subsection 4(2) qualifies coverage for the journey by saying: *'Subsection (1 A) does not apply if an injury sustained while travelling is sustained during or after a substantial interruption of or substantial deviation from the workers journey made for reason unconnected with the worker's employment or* ....'
>
> NT WorkSafe does not recommend the use of part (i) of the Queensland wording as the phrase 'substantial delay' can be strictly interpreted to mean that if a worker leaves for work late or stays back at work but is not working, then a claim may be

[25] Hon Natasha Fyles MLA, Attorney-General and Minister for Justice, *Responses to Written Questions, 8 April 2020*, https://parliament.nt.gov.au/committees/LSC/123-2020#Tabled%20Papers, pp. 2-3.

> disallowed. The conditions set down in s 4(2) cover unreasonable delays in travel and have not been the cause of undue disputation since their adoption over 25 years ago.[26]

Committee's comments

3.21 The Committee is satisfied with the Department's advice. While acknowledging counsel's concerns regarding the strict interpretation of the term "shortest convenient route" by the courts in Queensland, the Committee notes that this term has been a feature of workers' compensation Acts in the NT since the adoption of the *Work Health Act* in 1986, and that there have been few, if any, issues with its interpretation by the Courts in the NT.

Cl 9 – Proposed section 65 – Long-term incapacity – Removal of cap on weekly benefits

3.22 The Bill removes s 65(3)(b) which introduces a cap of 250% of average weekly earnings after 26 weeks of paid incapacity.

3.23 Both the HIA and the ICA opposed this amendment, with HIA expressing concern that it would adversely impact on premiums and the ICA commenting that it would reduce the incentive to return to work.[27] The ICA further commented that due to the high number of FIFO workers in the NT, the removal of the cap would result in NT employers subsidising other states.

3.24 The Committee sought clarification from the Department as to whether any analyses had been undertaken to assess how the removal of the cap might impact on premiums and was advised that:

> During the first 26 weeks after claiming compensation, when a worker is unable to work, their compensation payments are paid at their normal weekly earnings. After 26 weeks, compensation payments are paid at 75 per cent of their normal weekly earnings.
>
> The 2015 changes placed a cap on a worker's normal weekly earnings after 26 weeks of 250 per cent of the average weekly earnings. This change affected very high income earners (over $219 000 per year). It is possible that one claimant was affected by the 2015 change. As such, the reversal of the 2015 change will have little or no impact on NT businesses or the Scheme.[28]

3.25 The Department further advised that:

> The status of FIFO workers is unchanged by this proposal. The ability to also claim noncash benefits which was removed in 2015 has not been reinstated by this Bill.[29]

[26] Hon Natasha Fyles MLA, Attorney-General and Minister for Justice, *Responses to Written Questions,* 8 April 2020, https://parliament.nt.gov.au/committees/LSC/123-2020#Tabled%20Papers, p. 3.
[27] Submission 1 – HIA, p. 5; Submission 3 – ICA, p. 2.
[28] Hon Natasha Fyles MLA, Attorney-General and Minister for Justice, *Responses to Written Questions,* 8 April 2020, https://parliament.nt.gov.au/committees/LSC/123-2020#Tabled%20Papers, p. 4.
[29] Hon Natasha Fyles MLA, Attorney-General and Minister for Justice, *Responses to Written Questions,* 8 April 2020, https://parliament.nt.gov.au/committees/LSC/123-2020#Tabled%20Papers, p. 4.

Committee comments

3.26 The Committee is satisfied with the Department's response.

Cl 10 – Proposed s 73(4) – Disputes about costs incurred

3.27 Section 74(4) is currently premised on the basis of "costs incurred" with this making it possible for an employer or insurer "to argue that future or imminent treatment has not been 'incurred' ".[30]

3.28 The ICA objected to this amendment on the basis that it would adversely impact on the costs of the scheme and would affect insurers' ability to monitor or deny treatment and care where appropriate, thereby potentially impacting on scheme costs".[31]

Committee's comments

3.29 The Committee notes that this is a technical amendment which aims to clarify that employers have liability for "proposed treatment" as well as treatment already incurred. The fundamental premise, that medical treatment should be paid for unless medical evidence is provided that the treatment is not linked to the injury, is equally applicable to incurred treatment or treatment which is proposed to be incurred. The Committee is satisfied with the rationale for this amendment.[32]

Cl 11 – Proposed s 74 – Recovery of overpayments from the worker

3.30 Proposed s 74 provides that, unless ordered by the Court, an overpayment cannot be recovered from a worker if the benefit payable was incorrectly calculated by the employer or insurer who made the payment or the payment was made in a period more than six months before the date on which recovery of the overpaid amount was sought.

3.31 The ICA commented that while due care is taken when processing payments it is not possible to eliminate all mistakes. They also noted that errors, or evidence of fraud can take longer than six months to detect. They recommended that "a less expensive and more efficient alternative workers compensation payments recovery and dispute resolution process be considered, rather than the court pathway".[33]

3.32 The Committee sought clarification from the Department as to whether any consideration has been given to implementing alternative methods of dispute resolution and was advised that:

> While the Department has no data on the number of times this occurs, it does receive a few complaints each year about insurers attempting to recover overpayments. However, incidents of overpayments have been significantly reduced since 2015 when the legislation was amended to provide for 14 days'

[30] Explanatory Statement, *Return to Work Legislation Amendment Bill 2020 (Serial 123)*, https://parliament.nt.gov.au/committees/LSC/123-2020#kd, p. 4.
[31] Submission 3 – ICA, p. 2.
[32] Explanatory Statement, *Return to Work Legislation Amendment Bill 2020 (Serial 123)*, https://parliament.nt.gov.au/committees/LSC/123-2020#kd, p. 4.
[33] Submission 3 – ICA, p. 2.

> notice before a legislated stepdown took effect. If the notice of the stepdown is not issued at least 14 days before it takes effect, then it is deemed not to take effect until 14 days after the notice is issued. This effectively eliminated overpayments because of missed step-downs. This has been an incentive for insurers to improve on this aspect of claims management.
>
> With respect to other overpayments, what has been happening is that the insurer was realising there had been an error made, often well into the life of a claim, and has commenced recovering overpayments by reducing the amount of further payments.
>
> They have often been doing this contrary to s 69 of the Act which requires that any cancellation or reduction in payments needs to be notified in writing to the claimant prior to action.
>
> When either a reduction is noticed or a notification received, the claimant more often than not seeks mediation. Mediation is an expensive process for the insurer with each case costing $1.5-3k.
>
> While enforcement of s 69 is now high on the Department's agenda, the financial and social cost of attempting to recover overpayments is high in comparison to the amount of debt owed (often less than $10k and usually less than $2k)
>
> This new provision will remove the ability of insurers to make claims where they have clearly made an error or the overpayment is more than 6 months prior. This will not only reduce costs by removing the ability to recover overpayments in most cases but will also encourage insurers to improve their systems (most of the time this is human error when calculating payments or accepting claims costs - which is fixable with improved training) so that overpayments do not occur - which will be a net saving to the insurers in the long-term.[34]

Committee's comments

3.33 The Committee is satisfied with the Department's response.

Cl 13 – Section 75B – Removal of requirement to use an accredited vocational rehabilitation provider

3.34 This clause "removes section 75B(1A) to clarify that Return to Work Plans may be completed by a vocational rehabilitation provider if the employer requires that assistance but it is not mandatory".[35]

3.35 Ward Keller considered that s 75B(1A) should be retained to ensure that provision of accredited vocational rehabilitation remains mandatory under the Act. They raised a concern that in the absence of such a requirement employers will have "free reign" to use any programs without regard for the level of service they offer.[36]

3.36 The Committee requested clarification from the Department as to the reason for removing s 75B(1A) and was advised that the operation of this amendment is the result of a drafting error. The Department explained that:

> The drafting instructions set out that in 2015 a change was made to improve return to work outcomes by imposing an obligation on an employer to develop a

[34] Hon Natasha Fyles MLA, Attorney-General and Minister for Justice, *Responses to Written Questions,* 8 April 2020, https://parliament.nt.gov.au/committees/LSC/123-2020#Tabled%20Papers, p. 5.
[35] Explanatory Statement, *Return to Work Legislation Amendment Bill 2020 (Serial 123)*, https://parliament.nt.gov.au/committees/LSC/123-2020#kd, p. 5.
[36] Submission 8 – Ward Keller, p. 1.

proposal for a return to work plan if the worker was likely to be incapacitated for more than 28 days. Section 75B(1A) should have been amended to allow for this plan to be developed by employers without the exclusive use of vocational rehabilitation providers.

Vocational rehabilitation providers are routinely used for more complex cases but are not used exclusively and it is impracticable and too costly for the Northern Territory scheme for this to be the case. The intention is that it should be clear that proposals for return to work plans may be completed by a vocational rehabilitation provider if the employer requires that assistance but it is not mandatory.

The drafting instructions provided that an amendment to section 75B(1A) may be appropriate. However, section 75A is the section that should have been identified, given this is where the requirement for employers to give a proposal in writing for a return to work plan currently exists.

The intent was to make it clear that an accredited vocational rehabilitation provider was not required to be used for section 75A(c) and this is not achieved through the amendment (or omitting) of section 75B(1 A). That subsection supports section 50(7) which requires that a person, agency or body must not provide vocational rehabilitation services to an injured worker under the Return to Work Act 1986 unless the services are provided by an accredited vocational rehabilitation provider.

To reiterate, the intention is to make it clear that proposals for return to work plans may be completed by an approved vocational rehabilitation provider if the employer requires that assistance but it is not mandatory, remembering that section 75A(1)(c) is that an employer give a proposal in writing for a return to work plan to the worker.

To achieve this intent, a suggested insertion into section 75A(1) would be appropriate to make it clear, for example:

d) Notwithstanding section 50 and section 75B an employer may, but is not required, to use an accredited vocational rehabilitation provider for the purpose of section 75A(1)(c).

Section 75B(1A) should remain without amendment as removing this could inadvertently remove the requirement for the use of approved vocational rehabilitation providers in providing vocational rehabilitation services to an injured worker.

It is important that this be rectified to ensure the intent of the amendment as outlined in the drafting instructions is met and that the use of approved vocational rehabilitation providers pursuant to s75B in providing vocational rehabilitation services to an injured worker is still required.[37]

Committee's comments

3.37 The Committee is satisfied with the Department's response and has made a recommendation accordingly.

Recommendation 3

The Committee recommends that the Bill be amended to:

- **Retain existing section 75B(1A) without amendment.**

[37] Explanatory Statement, *Return to Work Legislation Amendment Bill 2020 (Serial 123),* https://parliament.nt.gov.au/committees/LSC/123-2020#kd, pp. 5-6.

- **Insert a new subsection into section 75A(1) to the effect that, notwithstanding section 50 and section 75B, an employer may, but is not required, to use an accredited vocational rehabilitation provider for the purpose of section 75A(1)(c).**

Cl 15 – Proposed s 78A – Settlement by agreement

3.38 Proposed s 78A(5B) provides that if a claimant withdraws from a settlement during the cooling off period then any payment made by the employer is to be repaid by the claimant. Proposed s 78A(5C) provides that the employer may seek repayment from a claimant by setting off the unpaid amount against any further entitlement to compensation or by initiating legal proceedings to recover the amount remaining unpaid.

Initiation of legal proceedings to recover unpaid amount – proposed subsections (5B); (5C)

3.39 Ward Keller commented that allowing the commencement of legal proceedings in such situations is "dangerous and unfair to an injured worker" noting that it will affect the worker's ability to pursue their entitlements after they have withdrawn from an agreement during the cooling off period.[38] They considered this to be a particular problem for:

> workers who have finalised their claim:
>
> a) early in their recovery;
>
> b) for a nominal amount; and
>
> c) during the cooling off period
>
> have suffered an exacerbation of their injury (not during any new/separate employment), no longer have the settlement sum funds and due to the exacerbation need to reopen their claim.[39]

3.40 Ward Keller recommended that the amendment be redrafted "so that the employer cannot initiate debt recovery proceedings while the worker maintains his/her claim".[40]

3.41 The Committee sought clarification from the Department regarding the effect on the operation of the Bill of redrafting the amendment as recommended by Ward Keller and was advised that:

> When a claimant withdraws from a settlement during the cooling-off stage, the claim still stands. During the settlement process, the claimant is made very aware through legal advice, and information provided by NT WorkSafe, that monies may need to be repaid if the settlement is cancelled.
>
> The scenario described by Ward Keller where, during the management of a claim, an insurer would in effect, provide a lump sum payment in lieu of future benefits and then be doubling up by providing financial support and fully-paid access to medical services without the ability to recover would appear very inequitable.
>
> This inequity was the basis of the advice to include this new provision in the Bill to allow legal proceedings to recover monies. This advice is contrary to the opinion provided by Ward Keller to the Committee.

[38] Submission 8 – Ward Keller, p. 2.
[39] Submission 8 – Ward Keller, p. 2.
[40] Submission 8 – Ward Keller, p. 2.

> To explicitly disallow such recovery removes an option from the insurers who will have to factor loss of recovery into premium costs. However in the overall standing of the Act and the Scheme, this clause can be removed without significant impact.[41]

Committee's comments

3.42 Whilst acknowledging Ward Keller's concerns, the Committee notes that a worker's claim may continue for an extended period of time. It therefore considers it to be inappropriate to expect insurers to continue to pay ongoing costs without also providing them with the ability to recover, within the timeframe provided under proposed s 78A(5C), a lump sum paid as part of a settlement from which the claimant has withdrawn.

Amendment may prevent claimant from enforcing an agreement – proposed s 78A(4B)

3.43 Professor Aughterson advised that, as currently drafted, proposed s 78(4B) could prevent a claimant from enforcing an agreement in circumstances where the employer refuses or fails to comply with their obligations under subsection (4A) noting that:

> Section 78A(1) of the Act allows a claimant to enter into an agreement with the employer for payment of a lump sum or structured settlement in relation to an injury. Before such an arrangement can be entered into, by proposed s 78A(4) the employer must invite the claimant to obtain independent legal and financial advice. Proposed s 78A(4A) provides that whether or not an agreement is entered into, the employer must pay the reasonable cost of that advice. Proposed s 78A(4B) then provides: 'Any agreement entered into is not enforceable until subsection (4A) is satisfied'. Should subsection (4B) state that it is not enforceable by the employer only? Otherwise, a claimant is unable to enforce the agreement in circumstances where the employer refuses or fails to comply with their obligations under subsection (4A).[42]

3.44 The Committee sought a response from the Department regarding Professor Aughterson's comments and was advised that:

> Section 78A of the Act reads in part:
>
> (4) Subject to subsection (5) [Cooling off period], an agreement under subsection (1) becomes enforceable when it is entered into if the following conditions are met before the agreement is entered into:
>
> (a) the employer invites the claimant to obtain independent legal advice and pays the reasonable costs of the legal practitioner chosen by the claimant to provide that advice;
>
> The language of the proposed section 78A(4B) has split [the current] section 78A(4) into two sub-sections without changing the intent. The operation of section 78a(4) has not been of issue to date - the change has been made to provide clarity about the requirement for the reasonable costs of legal advice (in regard to settlement negotiations) to the injured worker to always be covered by the employer regardless of outcome.[43]

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[41] Hon Natasha Fyles MLA, Attorney-General and Minister for Justice, *Responses to Written Questions,* 8 April 2020, https://parliament.nt.gov.au/committees/LSC/123-2020#Tabled%20Papers, pp. 7-8.
[42] Professor Aughterson, *Legal Advice on the Return to Work Legislation Amendment Bill 2020*,
[43] Hon Natasha Fyles MLA, Attorney-General and Minister for Justice, *Responses to Written Questions,* 8 April 2020, https://parliament.nt.gov.au/committees/LSC/123-2020#Tabled%20Papers, p. 7.

Committee's comments

3.45 The Committee is satisfied with the Department's advice.

Cl 24 – Regulation 3 – Definition of "first responder"

3.46 Proposed Regulation 3 defines "first-responder" for the purposes of making post-traumatic stress disorder (PTSD) a deemed disease. A first-responder is defined as a person with specialised training "who attends the site of an incident and provides assistance in time-critical and potentially life-threatening situations."[44]

3.47 The NT Police Association, UWU and St John's Ambulance NT support this amendment in principle but considered the definition should be broadened to include first-responders, such as emergency medical dispatchers, who do not physically attend the site of an incident but are never-the-less exposed to trauma through the aid they provide remotely.[45]

3.48 The Committee sought clarification from the Department regarding the reason for limiting PTSD as a deemed disease to first-responders and was advised that:

> The rationale for limiting post-traumatic stress disorder as a deemed disease to first responders comes from the Australian Senate report 'The people behind 000: mental health of our first responders' that was published in February 2019. While that report recognises and supports the mental issues faced by all emergency services personnel, it clearly identifies a need for the mental health of on-the-scene first responders to be prioritised.
>
> The report defines the term 'first responder' as most commonly referring to professionals such as paramedics, police officers, fire fighters and other emergency personnel trained to provide assistance in time-critical, often life-threatening situations. The report goes on to say that 'first responders' may also refer to individuals who perform those functions in a volunteer capacity and emergency control centre workers.
>
> The report further defines 'first responders' as highly skilled men and women who deliver the initial response in emergency situations, interacting with people and the forces of nature in extreme circumstances. It defines emergency situations as incidents requiring emergency response that often involve serious injury or death, or a threat to life, safety and property.
>
> The proposed definition of first responder and the incidents first responders need to attend to be eligible for claiming PTSD under the deemed disease provisions in this Bill utilises the definitions of the Senate report.[46]

3.49 Submitters provided substantial examples of the ways in which remote first responders, and certain types of workers more generally, are also exposed to significant trauma. The UWU and the NT Police Association recommended that the proposed amendments relating to PTSD should be broader, with the NT Police Association commenting that nearly all police officers are exposed to trauma.[47]

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[44] Explanatory Statement, *Return to Work Legislation Amendment Bill 2020 (Serial 123)*, https://parliament.nt.gov.au/committees/LSC/123-2020#kd, p. 8.

[45] Submission 6 – NT Police Association, p. 2; Submission 9 – United Worker's Union, pp. 2-3; Submission 12 – St John Ambulance Australia (NT) Inc., p. 1.

[46] Hon Natasha Fyles MLA, Attorney-General and Minister for Justice, *Responses to Written Questions,* 8 April 2020, https://parliament.nt.gov.au/committees/LSC/123-2020#Tabled%20Papers, p. 8.

[47] Submission 6 – NT Police Association, p. 2; Submission 9 – United Worker's Union, pp. 2-3;

3.50 Although many people may be exposed to some form of trauma as a result of their work this does not always result in a diagnosis of PTSD. In this respect, the Senate Education and Employment References Committee drew attention to the complexities associated with making an accurate PTSD diagnosis:

> In the initial weeks after trauma most people meet the criteria for PTSD, then over the next three months 50% recover, with recovery continuing over time. Full diagnostic criteria for the 10–15% who develop PTSD are not met until six months have elapsed, yet early intervention gives the best prospects for recovery.[48]

3.51 In addition, the extent to which work is the trigger for PTSD is not always clear. Drawing on a national review of deemed diseases conducted by Safe Work Australia in 2015, the Department noted that:

> The review acknowledges that PTSD appears to be more common (than in the general public) in military personnel and emergency service workers (police, ambulance officers and fire fighters) and in some areas of nursing, such as mental health nursing.
>
> The review highlighted that just like with general 'stress related diseases', the triggers for PTSD appear to be individual and often cross-over work and non-work. It also highlighted that the diagnosis is made largely on self-report of symptoms which leaves considerable room for measurement bias, making it difficult to be confident in diagnoses and makes the work-related component, contribution or cause difficult to establish with confidence.[49]

3.52 The Committee understands that when determining the kinds of employment that will be linked with a condition that is proposed to be added to Schedule 2 of the Regulations (Prescribed diseases and kinds of employment), consideration is given to types of employment that demonstrate a noticeable increase in the condition compared to the population in general. In this respect the Department advised that:

> Given the current lack of clear association in non-first responders, the decision was made to restrict eligibility. While the deemed disease eligibility makes it easier for those workers known to have increased risk of getting PTSD to make successful claims, it should be remembered that all workers can make a claim for work-related PTSD.[50]

3.53 Noting concerns expressed by the NT Police Association, that exposure to traumatic events is not limited to the scene of the incident itself but includes exposure to visual and audio evidence associated with those events before, during and after the event, the Committee sought clarification from the Department as to how the Act provides coverage for trauma arising from these types of exposures and was advised that:

> All workers can make a claim of PTSD. The data indicates that almost 70 per cent of all such claims are accepted.
>
> PTSD is defined by the American Psychiatric Association in the fifth edition (2015) of its Diagnostic and Statistical Manual of Mental Disorders (DSM-5) - which is the most widely used diagnostic system in Australia. DSM-5 now also recognises

[48] Commonwealth of Australia, Senate Education and Employment References Committee, *The people behind 000: mental health of our first responders*, 2019, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/Mentalhealth/Report, p. 26.

[49] Hon Natasha Fyles MLA, Attorney-General and Minister for Justice, *Responses to Written Questions, 8 April 2020*, https://parliament.nt.gov.au/committees/LSC/123-2020#Tabled%20Papers, p. 9.

[50] Hon Natasha Fyles MLA, Attorney-General and Minister for Justice, *Responses to Written Questions, 14 April 2020*, https://parliament.nt.gov.au/committees/LSC/123-2020#Tabled%20Papers, p. 9.

> traumatic stress conditions that can arise from indirect or vicarious exposure where the staff member is not under any direct personal threat but repeatedly experiences details of such exposures.
>
> The report 'When Helping Hurts: PTSD in First Responders' (http://australia21.org.au/product/when-helping-hurts-ptsd-in-first-responders/) discussed vicarious post-traumatic stress conditions and acknowledged that they are an emergent workplace psychological health and safety risk that can be as debilitating as traditional forms of post-traumatic stress disorder. Such a diagnosis for a police officer dealing with repeated exposure to such material as outlined by the NT Police Association would be grounds for a workers compensation claim without recourse to a PTSD claim as a first responder.[51]

3.54 In response to queries from St John's Ambulance Australia (NT) and UWU, the Committee sought clarification from the Department as to whether patient transport officers, correctional officers and remote Aboriginal health practitioners would be covered under the proposed amendment.[52] In regard to patient transport officers and Aboriginal health practitioners, the Department advised that:

> The St John Ambulance job description for the role of a Patient Transport Officer is to "provide safe patient transport of medically stable patients who require care and observation during transport from healthcare facilities, clinics and private residences". The training and expectations upon such individuals if they were tasked with attending an emergency scene is such that they would not meet the full scenario test to be a first respondent. It should be recalled that all workers can claim PTSD regard less of job description or training.
>
> Please note that while the initial intent of the Bill did not envisage remote clinic nurses/doctors to be included as eligible first responders, the final language of the amending Bill can be interpreted to include those workers. This is a social contract point that NT WorkSafe agrees with for those workers attending the site of an incident in the circumstances provided.
>
> However, the advice of the Department of Health is that Aboriginal Health Workers and Aboriginal Health Practitioners would not be expected to respond to emergency incidents; or if they did they would be driving the ambulance or health clinic vehicle and would not be providing assistance to the injured party. Which means they would not meet the full scenario test to be a first respondent.[53]

3.55 The Department advised that correctional officers would not be considered first responders under this legislation as:

> Even though they may attend an incident inside a correctional facility, there is no expectation that a corrections officer would have the skill or knowledge to provide expert life-saving care beyond that that any individual trained in first-aid could provide.[54]

Committee's comments

3.56 The Committee acknowledges submitters' concerns with regard to limiting PTSD as a deemed disease to first responders who physically attend at an emergency situation or incident. However, noting the complexities associated with diagnosing

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[51] Hon Natasha Fyles MLA, Attorney-General and Minister for Justice, *Responses to Written Questions, 14 April 2020*, https://parliament.nt.gov.au/committees/LSC/123-2020#Tabled%20Papers, p. 11.
[52] Submission 9 UWU, p. 2; Submission 12 – St John Ambulance Australia (NT) Inc., p. 1.
[53] Hon Natasha Fyles MLA, Attorney-General and Minister for Justice, *Responses to Written Questions, 8 April 2020*, https://parliament.nt.gov.au/committees/LSC/123-2020#Tabled%20Papers, p. 12.
[54] Hon Natasha Fyles MLA, Attorney-General and Minister for Justice, *Responses to Written Questions, 8 April 2020*, https://parliament.nt.gov.au/committees/LSC/123-2020#Tabled%20Papers, p. 8.

PTSD, and the criteria used to determine whether an occupation is sufficiently strongly linked with a particular condition for it to be included on the schedule of prescribed diseases, the Committee considers the limitation to be appropriate.

Cl 29 – Regulation 5B – Prescribed diseases and qualifying periods: fire fighters

3.57 The proposed amendment to Regulation 5B adds four new diseases under the presumptive legislation for fire fighters.

3.58 While supporting this amendment, the UWU requested clarification regarding how the proposed qualifying periods were determined. They recommended a qualifying period of 5 rather than 15 years, particularly for primary site skin cancer which they consider to be a higher risk in the NT.[55] Comparable legislation in other Australian jurisdictions does not include the additional diseases that are proposed for inclusion in the Act by Regulation 5B of this Bill.[56]

3.59 The Committee sought clarification from the Department regarding the criteria used to determine the qualifying periods and was advised that:

> The qualifying periods were determined based mainly upon two reports:
>
> - 'Deemed Diseases in Australia' written by Dr Tim Driscoll (MBBS BSc (Med) MOHS PhD FAFOEM FAFPHM) (Professor of Public Health, University of Sydney) in August 2015. The report was commissioned and published by Safe Work Australia and can be found at https://www.safeworkaustralia.gov.au/doc/deemeddiseases-australia.
> - 'Final report of the Australian Firefighters' Health Study' which was a three-year national retrospective study of firefighters' mortality and cancer incidence conducted by Monash University and published in December 2014. That report can be found at https://www.monash.edu/__data/assets/pdf_file/0005/982355/finalreport2014.pdf
>
> In summary, those reports found that for all four conditions the common latency period was 15 to 20 years which is the reason all four diseases have qualifying periods of 15 years.[57]

3.60 More detailed information on the breakdown of the findings for each condition is included in the Department's *Responses to Written Questions*.[58]

Committee's comments

3.61 The Committee is satisfied with the clarification provided by the Department.

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[55] Submission 9 – UWU, p. 3.

[56] *Workers Compensation Act 1987* (NSW), Schedule 4; *Return to Work Act 2014* (SA), Schedule 3; *Workers Compensation and Injury Management Act 1981* (WA), Schedule 4A; *Workers Rehabilitation and Compensation Act 1988* (Tas), Schedule 5; *Workers Compensation and Rehabilitation Act 2003* (Qld), sections 36B, 36D, Schedule 4A.

[57] Hon Natasha Fyles MLA, Attorney-General and Minister for Justice, *Responses to Written Questions, 8 April 2020*, https://parliament.nt.gov.au/committees/LSC/123-2020#Tabled%20Papers, pp. 12-13.

[58] Hon Natasha Fyles MLA, Attorney-General and Minister for Justice, *Responses to Written Questions, 8 April 2020*, https://parliament.nt.gov.au/committees/LSC/123-2020#Tabled%20Papers, pp. 13-14.

Cl 33 – Schedule 2 amended – Prescribed diseases and kinds of employment

3.62 This amendment adds PTSD to Schedule 2 of the Regulations to make it a deemed disease for first responders.

3.63 Although no submitters recommended specific amendments to Schedule 2, both Maurice Blackburn and the ICA commented that it will be important for the NT Government to work collaboratively with other Australian jurisdictions to develop a consistent national action plan on first responder mental health in order to provide seamless care and service provision.[59]

3.64 The ICA noted that the Federal government supports a recommendation made by the Senate's Education and Employment Committee for a Commonwealth-led process involving federal, state and territory governments to design and implement a national action plan on first responder mental health.[60]

3.65 Maurice Blackburn noted that an increasing number of first responder claims for work-induced psychological injury have "fallen between the cracks" of compensation schemes:

> For example, someone working for a State or Territory police force (covered by one scheme) then goes to work for the Federal Police (covered by another scheme). In such cases, the claimant is generally receiving no income, no compensation, and has to rely on their own resources until such time as attribution can be made.[61]

Committee's comments

3.66 The Committee notes that the NT is a member of a national body, Heads of Workers Compensation Authorities (HWCA), with membership drawn from all Australian jurisdictions and New Zealand.

3.67 The HWCA established a national working group to implement the Commonwealth Government's response to recommendation 8 of the Senate Committee inquiry into the mental health of first responders. The NT has a senior representative on that working group which will be reporting to the relevant Ministers later in 2020.

Matters raised in submissions that are out of scope of the Bill

3.68 The Law Society NT, Maurice Blackburn, UWU and Ward Keller raised a number of other issues that are not addressed by the Bill, with the Law Society NT calling for more substantive reforms to the Act.[62] As previously noted, the primary purpose of the Bill is to reverse a number of the changes introduced in 2015, as such, many of the issues raised do not come within the scope of the Bill. In this respect, the Minister noted that:

[59] Submission 4 – Maurice Blackburn, p. 2; Submission 3 – ICA, p. 3.
[60] Submission 3 – ICA, p. 5.
[61] Submission 4 – Maurice Blackburn, p. 2.
[62] Submission 7 – Law Society NT, pp. 1-2.

> A working group comprised of government representatives and industry professionals was tasked with providing the Government with advice and options on potential changes to the *Return to Work Act*. The group focused on changes made in 2015 that removed or altered workers' entitlements, require further clarification and other emerging priority issues.
>
> The working group consulted with key stakeholders including the Workers Compensation and Rehabilitation Advisory Council, the Insurance Council of Australia and Unions NT.[63]

3.69 A key issue raised by the Law Society, Maurice Blackburn, Ward Keller and UWU concerns the 260 week limit (five year cap) on compensation for workers with injuries that have been assessed as below 15% permanent impairment which was introduced under the 2015 amendments. Several submitters recommended that these amendments be repealed or amended, with the Law Society NT noting that the Gunner Government, while in opposition, had committed to the repeal of this cap.[64] The 15% threshold is considered to be arbitrary and as having disproportionate impacts on workers who do not meet the threshold, with Maurice Blackburn commenting that the "vast majority of injured workers that we assist in the Territory do not meet this hurdle".[65] Ward Keller recommended that if the cap on compensation under s 65(1BA) is not repealed then it "ought to be amended to lower the threshold of 15% for a whole person impairment and/or section 65(13A)(b) of the Act ought to be repealed so that psychological sequela injuries are factored into the calculation of a worker's percentage of whole person impairment".[66]

Committee's comments

3.70 The Committee acknowledges submitters' comments and notes the inherent tensions involved in balancing the need to maintain the affordability of the scheme with justice for workers who, while not meeting the 15 percent threshold are never-the-less significantly disadvantaged by their injury over an extended period of time. The Committee is of the view that this issue should be further considered in future tranches of reforms to the *Return to Work Act 1986* (NT).

Recommendation 4

The Committee recommends that, in any future reforms to the *Return to Work Act 1986* (NT), the Government review the limits on compensation that currently apply to workers who suffer a permanent impairment at a percentage of the whole person of less than 15%.

3.71 Other key Issues raised by submitters that are not within the scope of the Bill include:

- The Act should be comprehensively reviewed and consideration given to developing a statutory or no-fault safety-net which "maintains meaningful

[63] Explanatory Statement, *Return to Work Legislation Amendment Bill 2020 (Serial 123)*, https://parliament.nt.gov.au/committees/LSC/123-2020#kd, p. 1.
[64] Submission 4 – Maurice Blackburn, pp. 3-4; Submission 7 – Law Society NT, pp. 2-3; Submission 8 – Ward Keller, p. 2; Submission 9 – UWU, p. 4.
[65] Submission 4 – Maurice Blackburn, pp. 3-4; Submission 7 – Law Society NT, pp. 2-3; Submission 8 – Ward Keller, p. 2; Submission 9 – UWU, p. 4.
[66] Submission 8 – Ward Keller, p. 2.

access to common law benefits for those persons who are injured by negligence".[67] The UWU notes that workers' compensation schemes are generally either "short tail" or "long tail" schemes. Short tail schemes provide access to short term benefits and common law while long tail schemes provide a statutory scheme of benefits for all injured workers which provide support through to pension age but do not provide access to common law. The UWU commented that the NT scheme is neither a long tail nor a short tail scheme but a mixture of the two, delivering a no-fault scheme with a cap on benefits and no access to common law.[68] The Law Society considers access to common law benefits to be critical and their comments imply that a reform of the Act should include consideration of a short tail scheme. They comment that short-tail schemes have lower disputation rates than long-tail schemes and are more cost effective because they require fewer resources to administer while long-tail schemes improve their financial outcomes by engaging in a war of attrition with claimants.[69] By contrast, the UWU (assisted by Hall Payne Lawyers) recommend that a long tail scheme be implemented.[70]

- Recommendation by Ward Keller that s 65B(4) be redrafted to: reduce disputes about the meaning and application of the term "exceptional circumstances" or "other circumstances"; clarify the meaning of the phrase "totally and permanently incapacitated"; and clarify the interplay between subsections (4)(a)-(c) inclusive.[71]
- Recommendation by Ward Keller that the mediation provisions be simplified.[72]
- Issue raised by the Law Society NT regarding s 80 – notice of injury and claim for compensation. This section requires injured workers to give notice of their injury as soon as practicable and failure to give notice is a bar to the worker's entitlement to make a claim. They note that "The question of whether an injured worker has given proper notice of an injury is a central debate in a substantial majority of litigated Work Health Court matters" and that issues arise because of uncertainty around how a worker is to give notice of a secondary 'injury' that is related to a primary (accepted) injury.[73] The Law Society NT recommends that Parliament review the issue of secondary injuries and amend the Act to resolve this ongoing area of dispute. This "would reduce the number of technical legal disputes in the Work Health Court and facilitate clearer understanding of the worker's obligations by all interested parties".[74]

[67] Submission 7 - Law Society NT, p. 2.
[68] Submission 9 – UWU, p. 4.
[69] Submission 7 – Law Society NT, p. 2.
[70] Submission 9 – UWU, p. 4.
[71] Submission 8 – Ward Keller, p. 2.
[72] Submission 8 – Ward Keller, p. 2.
[73] Submission 7 – Law Society NT, pp. 3-4.
[74] Submission 7 – Law Society NT, p. 4.

Appendix 1: Submissions Received

Submissions Received

1. Housing Industry Association (HIA)
2. Motor Trade Association SA/NT (MTA SA/NT)
3. Insurance Council of Australia (ICA)
4. Maurice Blackburn Lawyers
5. Consolidated Pastoral Company
6. Northern Territory Police Association
7. Law Society NT
8. Ward Keller
9. United Workers' Union (UWA)
10. Hall Payne Lawyers
11. Northern Territory Cattlemen's Association (NTCA)
12. St Johns Ambulance Australia NT

Note

Copies of submissions are available at: https://parliament.nt.gov.au/committees/LSC/123-2020#Submissions

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Commonwealth of Australia, Senate Education and Employment References Committee, *The people behind 000: mental health of our first responders*, 2019, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/Mentalhealth/Report

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Hon Natasha Fyles MLA, Attorney-General and Minister for Justice, *Draft – Daily Hansard – Day 5 – 19 February 2020*, http://hdl.handle.net/10070/756095

Hon Natasha Fyles MLA, Attorney-General and Minister for Justice, *Responses to Written Questions,* 8 April 2020, https://parliament.nt.gov.au/committees/LSC/123-2020#Tabled%20Papers

Ministerial Statement, *Amendment to the Workers Rehabilitation and Compensation Act*, delivered by the Hon John Elferink MLA, the then Leader of Government Business on behalf of the then Chief Minister, the Hon Adam Giles MLA, *Debates – Day 2 -Wednesday 26 November 2014*, http://hdl.handle.net/10070/268313

NT WorkSafe, *Government Response: Review into the Northern Territory Workers Compensation Scheme, November 2014,* Tabled paper 1161, 26 November 2014, 12th Assembly, http://hdl.handle.net/10070/274060

NT WorkSafe, Return to Work Legislative Amendments 2015, *Summary of Key Changes*, https://worksafe.nt.gov.au/laws-and-compliance/workers-compensation-laws/changes-to-the-workers-compensation-legislation

Professor Aughterson, Committee's Legal Counsel, *Legal advice on the Return to Work Legislation Amendment Bill 2020*

Return to Work Act 1986 (NT)

Return to Work Act 2015 (NT)

Return to Work Act 2014 (SA)

Return to Work Regulations 1986 (NT)

Workers Compensation Act 1951 (ACT)

Workers Compensation Act 1987 (NSW)

Work Health and Safety Act 2011 (NSW)

Workers Compensation and Rehabilitation Act 2003 (QLD)

Workers Rehabilitation and Compensation Act 1988 (Tas)

Workers Compensation and Injury Management Act 1981 (WA)

Workplace and Injury Rehabilitation and Compensation Act 2013 (Vic)

Dissenting report by Mrs Finocchiaro

Return to Work Amendment Bill 2020

I dissent to the committee report on the basis that the Government did not adequately consult with all stakeholders during the development of this Bill.

It is clear that this Bill reverses legislative changes made in 2015, which stemmed from a review undertaken in 2013.

The Government needs to provide data and modelling on what the regulatory impact of this Bill will have, particularly in light of the financial hardship being suffered as a result of COVID-19.

I would be very happy to re-visit the Bill when Government have gone back to stakeholders with modelling on the financial impact of the reform, noting that other jurisdictions have in fact moved away from this model rather than towards it.

Lia Finocchiaro MLA

Member for Spillett

1 May 2020