

EXPLANATORY STATEMENT

Return to Work Legislation Amendment Bill 2020

SERIAL NO. 123

LEGISLATIVE ASSEMBLY OF THE
NORTHERN TERRITORY

ATTORNEY-GENERAL AND MINISTER FOR JUSTICE

GENERAL OUTLINE

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.

NOTES ON CLAUSES

Part 1 **Preliminary matters**

Clause 1. **Short Title**

This is a formal clause which provides for the citation of the Bill. When passed, the Bill may be cited as the *Return to Work Legislation Amendment Act 2020*.

Clause 2. Commencement

This is a formal clause which provides when the Act will commence. The Act will commence on a day fixed by the Administrator by Gazette notice.

Part 2 Amendment of *Return to Work Act 1986*

Clause 3. Act Amended

This is a formal clause which provides that amendments are made to the *Return to Work Act 1986* (the Act').

Clause 4. Section 3 amended (Interpretation)

This clause amends section 3 by moving the current definition of 'worker' to section 3B. The amended section 4 will insert a new definition for the terms 'attendant care services' for Part 5, Division 4 to be as set in section 74A; and 'catastrophic injury' to be as set out in section 78A(6). The amended section 4 also removes the definition of 'statement of fitness for work' and replaces it with the new definition of 'medical certificate of capacity'.

Clause 5. Section 3B inserted

This clause replaces the definition of 'worker' in section 3 with a new definition. The new definition adds to previous definition by clarifying that a person is a worker if they should be an employee for PAYG withholding purposes even if the employer is not withholding income tax; and to clarify that an Australian Business Number is not a determinant factor in establishing whether or not a person is a worker.

This clause also sets out an additional definition of workers – that an individual who, under a labour hire arrangement, is engaged by a provider of labour hire services to perform work or services for someone other than the provider and, in relation to whom, under the PAYG provisions, withholding payments are required to be made, is a worker of the provider for this Act.

This clause also aligns the Act with the minimum benchmarks of the National Injury Insurance Scheme (NIIS) 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.

Clause 6. Section 4 amended (Out of or in course of employment)

This clause reinstates the setting that workers' compensation cover includes for injuries sustained on a journey to or from work (journey claims). It also extends this coverage to workers who are traveling from home to work as a result of a call out by an employer even if the worker is not paid for the time taken for the travel.

This clause also reaffirms the other scenarios where journey claims can be made:

- to and from work or home and an educational facility as part of their training as expected by their employer; or
- from the workplace of one employer to the workplace of another if the claimant works for both and the travel is during the same working day as they worked for both employers; or
- for the purposes of a workers compensation claim.

Clause 7. Sections 4A and 4B inserted

This clause provides the new definitions of 'Labour Hire Arrangement' and 'Provider of labour hire services' which are terms needed in section 3B to ensure individuals under a labour hire arrangement are workers for the purposes of this Act.

It basically sets out that a labour hire arrangement is a contract or an arrangement under which an individual is engaged by a labour hire provider to work for someone other than the provider (a client); as long as there is no contract to perform the work or service between the individual and the client, and the individual personally performs the work.

It also sets out that the use of agents (intermediaries) by either the client or the provider does not alter the individual's status as a worker as long as there is a contract in place (between individual and provider, or between provider and client) and that the individual is a worker regardless of who may have operational control of the individual.

Clause 8. Section 61 amended (Settling of journey claims)

Section 61(5) references 'accident' as having the same meaning as in the *Motor Accidents (Compensation) Act 2014* (the MAC Act). As there is no definition in the MAC Act of 'accident', this clause amends the reference at section 61(5) to 'motor accident' (as defined by the MAC Act).

Clause 9. Section 65 amended (Long-term incapacity)

Sub Clause 9(1) changes the word 'within' to the phrase 'less than' to clarify, without changing the intent, the period during which benefits should be paid if the injured worker is approaching (less than 2 years from) their 'future pension age' and / or their 'normal retiring age'.

Sub Clause 9(1) basically removes subsection 65(3)(b) of the Act that imposed a cap on weekly benefits paid of 250 per cent of average weekly earnings.

Clause 10. Section 73 amended (Compensation for medical, surgical and rehabilitation treatment, family counselling and other costs)

Section 73(4) is currently premised on the basis of 'costs incurred', leaving it open for an employer / insurer to argue that future or imminent treatment has not been 'incurred'. This clause will clarify that insurers have liability for 'proposed treatment' (unless they have supporting opinion otherwise) by adding the phrase 'or proposed to be incurred' to that section.

Clause 11. Part 5, Division 3, Subdivision E inserted

This clause sets out that if an overpayment is made under the Act, unless otherwise ordered by the Court, overpayments cannot be recovered from the worker to whom the overpayments were made if:

- (a) the benefit payable was incorrectly calculated by the employer or insurer who made the payment; or

- (b) the payment was made in respect of a period more than six months before the date on which recovery of the overpaid amount was sought.

Clause 12. Section 74A inserted

This clause moves the current definition of ‘attendant care services’ to new section 74A and makes it relevant to the entirety of Part 5, Division 3. There is no change to the definition.

Clause 13. Section 75B amended (Worker to undertake reasonable treatment and training, or assessment)

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.

Clause 14. Section 78 amended (Other rehabilitation)

This clause removes the definition of ‘attendant care services’ as clause 12 has moved that definition to Section 74A. The clause then creates a new section 78(4) that expands what is allowed under reasonable and necessary household services to include the reasonable costs of childcare in certain circumstances.

Clause 15. Section 78A amended (Settlement by agreement)

This clause sets out:

- by replacing section 78A(1) that a settlement agreed to under the Act cannot be negated by a Regulation as is currently allowed;
- by creating section 78A(1A) the criteria under which such a settlement would be void. Those criteria meet the minimum benchmarks of the NIIS ensuring that the Territory would not be liable under the NDIS agreement with the Commonwealth for workplace injury compensation; and
- by amending section 78A(3) that a settlement reached before a court is valid even though it would not have been reached under Part 5, Division 4A of the Act.

The clause also clarifies by amending section 78A(4) and creating section 78(4A) that an injured worker must receive legal advice before entering into an agreement to settle and that any agreement only becomes enforceable once the employer has paid the

legal fees with the employer liable for legal fees regardless of whether an agreement is reached.

The clause also clarifies the settlement arrangements for disputed claims by amending section 78A(5) to ensure that the 'cooling-off' period (six months from settlement day) allowed under the Act for settlements is also allowed where liability is disputed by the employer.

The clause also:

- by adding section 78(5A) then sets out that a settlement of a disputed claim is made 'without prejudice' and is not an admission of fault or acceptance of further liability;
- by adding section 78(5B) sets out that if the claimant withdraws from a settlement during the cooling off period then any payment made by the employer is repayable by the claimant; and
- by adding section 78(5C) sets out the methods by which the employer may seek repayment.

The clause also establishes the definition of 'catastrophic injury' at section 78A(6), that will be located in the Regulations, to allow further alignment with the NIIS.

Clause 16. Section 78B amended (Lump sum agreement for particular period)

This clause amends section 78B to ensure that on settlement a lump sum is not required to be for 'all amounts otherwise payable'. The intention is that the employer should be able (by agreement with the claimant) to make a lump sum payment for part of a claim in advance to allow the claimant to self-manage certain aspects, such as treatment or retraining, workplace modifications or payment of carers.

Clause 17. Section 103FA amended (Legal representation or legal advice)

This clause amends section 103F(5)(a) to clarify that the amount payable (not to exceed the amount of average weekly earnings) for legal representation and legal advice to a claimant during a mediation of a dispute is a combined total, not a separate amount for each component.

Clause 18. Section 164 amended (Annual estimates, determinations etc.)

The Nominal Insurer is established under the Act to manage and pay for claims from workers who are injured whilst working for an uninsured employer. The cost of these claims is funded by annual levies upon insurers and self-insurers income and via occasional additional levies.

This clause moves the current methodology set out in section 164(1)(d) and section 164A of the Act into Regulation to make it easier to change the methodology to allow for more flexible funding arrangements for the future.

Clause 19. Section 164A amended (Contributions by approved insurers and self-insurers)

This clause continues the amendments made in clause 18.

Clause 20. Section 167 amended (Claims for payment against Nominal Insurer when employer dead, wound up, etc.)

This clause adds section 167(2) to the Act to ensure that an uninsured employer cannot self-manage a claim from an injured worker and that the Nominal Insurer has full rights to manage the claim. Currently the status of a claim under such circumstances is ambiguous as is the authority of the Nominal Insurer to step in and take-over management of a claim made in those circumstances.

Clause 21. Part 15 inserted

This clause sets out the transitional matters for the Return to Work Legislation Amendment Act 2020. The transitionals are:

- For sections 3B, 4 and 65 – the new legislation has affect only in relation to a person who suffers an injury after the commencement.
- For sections 4A and 4B – the new legislation applies to contracts or agreements in place at time of commencement with the proviso that current claims are not impacted.
- For section 73(4) – the new legislation applies only in relation to costs incurred, or proposed to be incurred, after the commencement.
- For section 74 – the new legislation applies only in relation an overpayment of benefits that occurs after the commencement.

- For section 78(4) – the new legislation applies only in relation to costs incurred after the commencement.
- For section 78A – the new legislation applies only in relation to an agreement entered into after the commencement.

Clause 22. Statement of fitness for work

Schedule 1 of the *Return to Work Legislation Amendment Act 2020* amends the name of the ‘medical certificate’ in the *Return to Work Act 1986* from ‘Statement of Fitness for Work’ to ‘Medical Certificate of Capacity’ to align with the new national certificate and to clarify that it is a medical certification.

Clause 23. Regulations amended

This clause identifies that the following clauses amend the *Return to Work Regulations 1986*.

Clause 24. Regulation 3 amended (Definitions)

This clause defines first responder, for the purposes of making Post-Traumatic Stress Disorder a deemed disease, as a person with specialized training (such as a paramedic, police officer, fire-fighter, a remote clinic nurse or doctor, or other emergency personnel including a volunteer), who attends the site of an incident and provides assistance in time-critical and potentially life-threatening situations.

Clause 25. Regulation 3A amended (Definition of worker)

This clause is consequential to the changes made to the definition of ‘worker’ in the Act.

Clause 26. Regulation 4 amended (Prescribed member of the family)

This clause is consequential to the changes made to the definition of ‘worker’ in the Act to align with NIIS as it relates to family members eligibility. It expands the eligibility of family members who are workers by not requiring them to be named on the insurance contract if they do not reside at the family home.

Clause 27. Regulation 4A replaced

This clause is consequential to the numbering changes made to the definition of ‘worker’ in the Act.

Clause 28. Regulation 5 amended (Prescribed amount)

This is a consequential change to the Regulations due to a numbering change in the Act.

Clause 29. Regulation 5B amended (Prescribed diseases and qualifying periods: firefighters)

This clause increases the number of diseases under the presumptive legislation for fire fighters. It does this by adding to regulation 5B the following diseases and qualifying periods:

- Asbestos related diseases – 15 years.
- Primary site liver cancer – 15 years.
- Primary site lung cancer – 15 years.
- Primary site skin cancer – 15 years.

Clause 30. Regulation 11A inserted

This clause sets out the detail of the definition of ‘Catastrophic Injury’ established in clause 15. It does this by referencing a new Schedule 2A which defines in great detail ‘Catastrophic Injury’ as any of the following:

- Spinal cord injury.
- Traumatic brain injury.
- Amputations.
- Burns.
- Permanent traumatic blindness.

Clause 31. Regulations 17B and 17C inserted

This clause is the consequential of clauses 18 and 19 where the mechanism for determining contributions to Nominal Insurer's Fund were moved from the Act to the Regulation.

Clause 32. Regulation 18 amended (Service on nominal insurer)

This clause makes editorial changes to the title of regulation 18 that have no impact upon its intent.

Clause 33. Schedule 2 amended (Prescribed diseases and kinds of employment)

This clause adds Post-Traumatic Stress Disorder to Schedule 2 of the Regulations to make it deemed disease for first responders with no qualifying period set.

Clause 34. Schedule 2A inserted

This clause adds Schedule 2A to the Regulations to give the detail to the definition of 'Catastrophic Injury' as established by clause 30.

Clause 35. Schedule 3 replaced

This clause amends the Employers Indemnity or Workers' Compensation Insurance Policy as prescribed by the Return to Work Regulations, Schedule 3 to modernise language and to permit insurers to cancel a policy without the consent of the Work Health Authority, where the request for cancellation is made by the employer in the following circumstances:

- the employer is no longer employing a worker as defined by the Act;
- there are no Territory workers required to be covered by the Act; or
- the employer has another Policy with an Approved Insurer covering the same liability.

Clause 36. Statement of fitness for work

This clause replicates clause 22 except for the Regulations rather than the Act.

Part 4 **Repeal of Act**

Clause 37. **Repeal of Act**

This is a standard clause which provides that the *Return to Work Legislation Amendment Act 2020* is repealed on the day after it commences.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with the Thirteenth Assembly Sessional Orders (Part 12.3) as adopted on 24 August 2017.

Return to Work Legislation Amendment Bill 2020

PURPOSE OF BILL

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

OVERVIEW OF THE BILL

The purpose of this Bill is to amend the *Return to Work Act 1986* and Regulations (the legislation) to expand and improve 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;
- provision that the legislation covers injuries incurred on the way to or from work;
- provision for the nominal insurer to manage claims made against uninsured employers; and
- provision that alleged overpayments arising from an error of the employer or insurer or left unrecovered for more than six months can only be recovered by court order.

HUMAN RIGHTS IMPLICATIONS

The Bill positively engages the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR).

Article 6 of the ICESCR provides that State Parties must recognise the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right. Under Article 6(1), that right to work should be protected through ensuring workers have just and favourable conditions of work, including safe working conditions.

Article 7 of the ICESCR provides that State Parties must recognise the right of everyone to the enjoyment of just and favourable conditions of work. The right to just and favourable conditions of work under Article 7 encompasses a number of elements, including remuneration which provides all workers, as a minimum, with fair wages and equal remuneration for work of equal value without distinction of any kind (Article 7(a)(i)), and safe and healthy working conditions (Article 7(b)).

Article 9 of the ICESCR requires State Parties to establish a social security system within its maximum available resources, that ensures access to minimum essential levels of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education.

The right to social security under Article 9 extends to employment injury and illness and therefore establishes duties in relation to providing adequate and appropriate workers compensation and rehabilitation services where a person is injured or becomes ill through their employment.

Article 12 of the ICESCR establishes a right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health, which extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.

Article 12(2) of ICESCR provides that the steps to be taken by countries to achieve the full realisation of the right to health shall include those necessary for, amongst other things, the improvement of all aspects of environmental and industrial hygiene and the prevention, treatment and control of epidemic, endemic, occupational and other diseases. The term 'industrial hygiene' in Article 12(2)(b) refers to the minimisation, so far as is reasonably practicable, of the causes of health hazards inherent in the working environment.

The amendments contained in the Bill positively engages the ICESCR through extending the scope and application of the *Return to Work Act 1986* to workers, and the possible injuries and diseases that may be suffered by workers when carrying out their employment, including when the employer is uninsured.

In the context of statutory compensation schemes, such as that under the *Return to Work Act 1986*, it is important that workers are not unduly disadvantaged as a result of an administrative error that results in an overpayment. The Bill reflects this through inserting a requirement that an insurer may only seek recovery of overpayments arising from an error of the employer or insurer, or left unrecovered for more than six months, by court order. Article 14 of the ICCPR provides that everyone shall be entitled to fair and public hearings by a competent, independent and impartial tribunal. Requiring insurers and employers to apply to the court for recovery of overpayments provides a fair and reasonable approach to alleged overpayments to an injured worker arising from an error of the employer or insurer by instilling the Article 14(1) right to a fair hearing, thereby allowing the worker the opportunity of presenting their case under conditions that do not disadvantage them.

CONCLUSION

This Bill is compatible with human rights as it positively engages human rights and does not raise any negative human rights issues.