

Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2020

Statement of Compatibility

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 38 of the *Human Rights Act 2019*, I, Grace Grace, Minister for Education and Minister for Industrial Relations, make this statement of compatibility with respect to the Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2020 (the Bill).

In my opinion, the Bill is compatible with the human rights protected by the *Human Rights Act 2019*. I base my opinion on the reasons outlined in this statement.

Overview of the Bill

The Bill's purpose is to amend the *Workers' Compensation and Rehabilitation Act 2003* and the *Workers' Compensation and Rehabilitation Regulation 2014* to introduce presumptive workers' compensation legislation to improve the workers' compensation experience and mental health outcomes for first responders diagnosed with posttraumatic stress disorder (PTSD).

First responders play an important role protecting and serving the community; however, the nature of their duties providing frontline essential services means they are often exposed to traumatic, life-threatening incidents. As a result, first responders are overrepresented for psychological injuries, particularly PTSD, when compared to other workers across the Queensland workers' compensation scheme.

All Queensland workers are entitled to claim workers' compensation for psychological injuries caused by their work; this includes PTSD which is a compensable injury in the workers' compensation scheme. However, there is increasing awareness, both in Queensland and nationally, that certain barriers prevent many first responders from seeking assistance through the scheme, such as:

- difficulty identifying the cause of their mental health condition after many years of cumulative exposure to trauma;
- stigma associated with having a mental health condition and lodging a workers' compensation claim; and
- difficult, often stressful, workers' compensation claims processes.

To assist in overcoming these barriers, the amendments introduce a presumptive approach for first responders, and other eligible employees, diagnosed with PTSD by a psychiatrist. Presumptive workers' compensation laws do not create new, or alter existing, workers' compensation entitlements or access to treatment or benefits. Instead, they provide an alternative pathway to enter the scheme by reversing the onus of proof to ensure first responders (and other eligible employees) who are simultaneously struggling to cope with PTSD do not have to prove to the insurer that their injury is work-related. If the presumption applies, the first responder's PTSD will be presumed to be work-related, unless there is evidence to the contrary.

If the presumption does not apply, or it is rebutted through evidence to the contrary, the person's claim will be considered under the existing decision-making requirements of the *Workers' Compensation and Rehabilitation Act 2003*.

Human Rights Issues

Human rights relevant to the Bill (Part 2, Division 2 and 3 *Human Rights Act 2019*)

In my opinion, the Bill engages the following human rights:

- Recognition and equality before the law (section 15);
- Right to life (section 16);
- Privacy and reputation (section 25); and
- Right to health services (section 37).

Right to recognition and equality before the law

The Bill limits the right to recognition and equality before the law. All workers, irrespective of occupation, are currently entitled to seek compensation for a work-related injury. However, these amendments provide an alternative pathway for first responders and eligible employees diagnosed with PTSD by a psychiatrist that their injury will be presumed work-related based on the nature of their duties, unless there is evidence to the contrary. The limitation is two-fold in that it limits the rights of:

- persons other than defined first responders or eligible employees, irrespective of diagnosis, to access the alternative pathway; and
- first responders and eligible employees who have a diagnosis other than PTSD to access the alternative pathway (noting the amendments include safeguards for the qualifying diagnosis to be sought and funded by the relevant insurer after a claim is lodged).

Right to life

The Bill promotes the right to life. These amendments recognise the need to protect first responders who often place their own lives at risk or could suffer serious injury to either save people, property or the environment through encouraging and improving access to timely and appropriate treatment and support. In Beyond Blue's report *Answering the Call*, it was found first responders reported having suicidal thoughts over two times higher than adults in the general population and were more than three times more likely to have a suicide plan. Insurers in the scheme must already take all reasonable steps to provide reasonable support services to workers suffering from psychological injuries before their workers' compensation claim is decided to assist in reducing the severity, duration and recurrence of mental illness. These amendments provide additional assurance for first responders to access treatment and support crucial for managing their injury.

Right to privacy and reputation

The Bill promotes first responders' right to privacy and reputation. While insurers must be able to investigate and determine claims within the legislative framework, these amendments promote early acceptance of claims where a strong causal connection between employment and injury is already well established. Reversing the onus of proof decreases the possibility of damage to a first responder's reputation and privacy through unnecessary intrusion and investigation into the claim. It will also limit the need for first responders to recount traumatic incidents they have experienced in order to prove their claim where there is already clear medical evidence the claim is one for acceptance.

Right to health services

The Bill promotes the right to health services. All injured workers have access to health services through treatment and rehabilitation of their work-related injury in the scheme. However, first responders with cumulative exposure to trauma experience difficulties accessing compensation, which is compounded by the nature of the illness itself and by poor mental health literacy in this cohort of workers. A presumptive approach which considers the nature of a first responder's role is, of itself, sufficient to establish a causal connection to employment is anticipated to assist in reducing stigma about first responders experiencing mental health problems, encourage them to seek early assistance and ensure they can more easily access treatment and rehabilitation support necessary to recover from their injury.

If human rights may be subject to limitation if the Bill is enacted – consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 *Human Rights Act 2019*)

Recognition and equality before the law

(a) the nature of the right

The right to recognition and equality before the law encompasses the right to recognition as a person before the law and the right to enjoy human rights without discrimination. This right reflects the essence of human rights: that every person holds the same rights by virtue of being human and not because of some particular characteristic or membership of a particular group.

Currently, all Queensland workers are entitled to access compensation if they can prove they have sustained a work-related injury, and PTSD is already a compensable injury in the scheme. The Bill limits the right to recognition and equality before the law because the amendments are limited to a particular cohort of workers (i.e. first responders and eligible employees diagnosed with PTSD by a psychiatrist) who will be entitled to seek compensation through an alternative pathway that reverses the onus of proof.

By inserting a presumptive approach through the Bill, the rights of others in Queensland's workers' compensation scheme will not change; however, they will not be consistent to the extent that:

- other workers or persons entitled to compensation, irrespective of diagnosis, cannot access the alternative pathway; and
- first responders and eligible employees who have a diagnosis other than PTSD cannot access the alternative pathway (noting that the Bill provides safeguards that this diagnosis must be sought at the expense of the insurer for this cohort of workers).

(b) The nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the limitation is to provide an alternative pathway for claiming compensation which encourages first responders to seek support through the workers' compensation scheme and minimise barriers which prevent first responders from claiming compensation in the first instance.

First responders have a higher prevalence of PTSD due to the nature of their duties compared to other workers, and the adult Australian population. Beyond Blue's *Answering the Call*

highlighted higher rates of psychological distress, mental health conditions and suicidal thinking among police and emergency service workers, with one-in-three employees experiencing high or very high psychological distress. In the 2019 Senate inquiry into the mental health conditions experienced by first responders (*The people behind 000: mental health of our first responders*), many first responders reported having considerable difficulty accessing workers' compensation and encountering an adversarial system when attempting to do so and at the same time as suffering from a serious mental health condition. Consistent with this, the Beyond Blue report highlighted three-in-four first responders found current workers' compensation processes (nationally) to be detrimental to their recovery.

Safe Work Australia provides guidance about the criteria generally applied to determine the suitability of presumptive legislation for an injury:

- a strong causal link between the disease and occupational exposure supported by academic literature;
- clear diagnostic criteria; and
- a considerable proportion of the cases of that disease in the overall population or in an identifiable subset of the population are known to be due to occupational exposure.

These amendments limit the alternative pathway to first responders and eligible employees diagnosed with PTSD by a psychiatrist on the basis this scope most closely aligns with national criteria for presumptive legislation:

- There is a strong causal link between the nature of duties performed by first responders (i.e. being exposed to traumatic incidents) and the injury of PTSD which is supported through academic literature and Queensland workers' compensation data which clearly indicates this cohort of workers has a higher prevalence of PTSD when compared to other workers across the scheme; and
- PTSD has specific and rigorous diagnostic requirements as determined by a psychiatrist, with diagnosis being facilitated with an internationally recognised diagnostic tool, such as the current version of the Diagnostic and Statistical Manual for Mental Disorders.

(c) The relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

There is a connection between the limitation on the right to recognition and equality before the law and the purpose of the limitation.

The purpose of the Bill is to reverse the onus of proof through presumptive workers' compensation laws, with the aim of improving the workers' compensation experience and mental health outcomes for first responders diagnosed with PTSD. The limitation is appropriately focussed to achieve its purpose of providing earlier and simpler access to the scheme for first responders who are struggling with the impacts of PTSD and to provide an alternative to the traditional claims process which reportedly has a detrimental impact on their injury and recovery.

(d) Whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill.

The Queensland Government recognises the need to implement a range of administrative and claims management improvements to better support first responders with mental health injuries. Broader initiatives are underway across the scheme to promote collaboration between

workers, employers, insurers and medical providers to improve first responder workers' compensation experiences and outcomes. However, the only manner to reverse the onus of proof in this particular circumstance is through legislative amendment.

It is possible for the proposed amendments to be less restrictive i.e. apply to a larger cohort of workers or a broader type of injuries; however, this is not reasonable as the causal connection with other occupations or other psychological injuries (e.g. depression or anxiety) is less clear as these conditions can result from a multitude of factors other than exposure to trauma.

- (e) The balance between the importance of the purpose of the Bill, which if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

First responders are significantly impacted by their exposure to traumatic incidents in protecting and serving our community and have a higher prevalence of mental health injuries, particularly PTSD, when compared to other cohorts in the workers' compensation scheme. First responders with cumulative exposure to trauma experience difficulties accessing workers' compensation, which is compounded by the nature of the illness of PTSD itself and poor mental health literacy in this cohort of workers.

A presumptive approach which considers the nature of a first responder's role is, of itself, sufficient to establish a causal connection to employment is anticipated to assist in reducing stigma about first responders experiencing mental health problems, encourage them to seek early assistance and ensure they can more easily access treatment and rehabilitation support necessary to recover from their injury.

Providing an alternative pathway to access the scheme recognises the unique challenges faced by first responders, both in their duties and claiming compensation, and given the importance of supporting their ongoing mental health, the limitation to the right to recognition and equality before the law is justified.

- (f) Any other relevant factors

It is important to note these amendments provide an alternative pathway to access the scheme but do not provide new or alter existing entitlements. All workers, irrespective of their occupation, are entitled to claim workers' compensation for any work-related psychological injury. Therefore, the right to recognition and equality before the law is limited only to the extent that it impacts a person's ability to access the alternative pathway.

Conclusion

In my opinion, the Bill is compatible with human rights under the *Human Rights Act 2019* because it limits human rights only to the extent that is reasonably and demonstrably justifiable in accordance with section 13 of the *Human Rights Act 2019*.

GRACE GRACE
MINISTER FOR EDUCATION
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