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THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

PUBLIC SECTOR WORKERS COMPENSATION FUND AMENDMENT BILL 2022

EXPLANATORY STATEMENT

Circulated by
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OVERVIEW OF THE BILL

The Bill amends the *Public Sector Workers Compensation Fund Act 2018* (the Fund Act) to provide for fair and transparent claims management for all public sector workers; including frontline workers who incur a mental injury.

SUMMARY OF AMENDMENTS

The Bill would:

- require the Minister to make a code (a ***claims code***) that sets out certain requirements in relation to claims management of workers compensation claims by public sector workers, including frontline workers. The claims code would be binding on any claims manager engaged to manage claims on behalf of Territory.

- require the existing advisory committee under the Fund Act to report periodically to the Minister on the effectiveness and transparency of claims management in relation to mental injury claims by frontline workers. The Minister would be required to present any report to the Legislative Assembly.

THE ACT'S PUBLIC SECTOR WORKERS COMPENSATION SCHEME

The Territory's public sector workers compensation arrangements are unique amongst the states and territories.

Prior to self-government, and from the start of self-government until the commencement of the *Australian Capital Territory Government Service (Consequential Provisions) Act 1994* (Cth) on 1 July 1994, the Territory was required to participate in the Comcare scheme established by the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (SRC Act).

From 1 July 1994, however, the ACT has had a choice about whether it remained within the Comcare scheme. Specifically, section 4A of the SRC Act provides that, if the Chief Minister so requests, the Commonwealth Minister may declare the Territory to be a "Commonwealth authority" for the purposes of the SRC Act, thereby causing it to be covered by the SRC Act. On 30 June 1994, the Commonwealth Assistant Minister for Industrial Relations declared the ACT to be a Commonwealth authority (see Safety, Rehabilitation and Compensation Act 1988 - Notice of Declaration (Notice No. ACT1 of 1994)).

Until March 2018, the Territory continued to participate in the Comcare scheme under the SRC Act as if it was a part of the Commonwealth.

Since March 2018, the Territory has held a licence under the SRC Act that allows the Territory to self-insure (see Notice of Variation of Licence – Australian Capital Territory (No 6 of 2021)). Notably, the Territory did not choose to exit the Comcare scheme entirely and establish its own public sector workers compensation scheme; rather, it chose to self-insure under the SRC Act.

Under its licence under the SRC Act, the Territory can both:

- accept financial liabilities in relation to public sector workers compensation claims (fund its own liability); and
- manage, via an externally contracted claims manager, its own claims.

Employers Mutual Limited (EML) has been contracted to undertake the Territory's claims management.

The Safety, Rehabilitation and Compensation Act 1988

The SRC Act provides an entitlement to compensation for employees who have an injury or disease that has arisen during their employment.

Section 14 in Division 1 of Part II of the SRC Act establishes an entitlement to compensation for injuries, which includes a disease and the aggravation of an existing physical or mental injury (SRC Act, subs 5(1)) that has arisen out of or in the course of one's employment (SRC Act, s 6).

While the SRC Act allows for general law claims, such as a claim for negligence, to coexist with the entitlement to compensation under the SRC Act, the main entitlement to compensation does not turn upon establishing fault in the same way general law claims do. All that is required to obtain compensation under the SCR Act is to establish that an injury exists and has arisen out of, or in the course of, one's employment.

Frontline workers and post-traumatic stress injury

Post-traumatic Stress Injury (PTSI), also known as Post-traumatic Stress Disorder (PTSD), is a recognised mental injury that is caused by exposure to highly stressful events.

The *Diagnostic And Statistical Manual Of Mental Disorders, Fifth Edition* provides the following overview of the causes of PTSI:

A. Exposure to actual or threatened death, serious injury, or sexual violence in one (or more) of the following ways:
   1. Directly experiencing the traumatic event(s).
   2. Witnessing, in person, the event(s) as it occurred to others.
   3. Learning that the traumatic event(s) occurred to a close family member or close friend. In cases of actual or threatened death of a family member or friend, the event(s) must have been violent or accidental.
   4. **Experiencing repeated or extreme exposure to aversive details of the traumatic event(s) (e.g., first responders collecting human remains; police officers repeatedly exposed to details of child abuse).** (emphasis added)

Anecdotally, frontline workers who incur PTSI face difficulty in accessing compensation because the claims process requires them to identify one specific event (out of potentially hundreds that they may have experienced over their career) as the cause of their injury.

Moreover, claims managers may seek to minimise financial costs associated with PTSI by requiring multiple medical reports and specific details of traumatic events, and this requirement both retraumatises injured workers and may cause them to not receive the compensation to which they are entitled.

Developments in other jurisdictions

Other jurisdictions have created, or have considered creating, a presumption in their workers compensation laws that, where a person who is or was a frontline worker (firefighter, paramedic, nurse) incurs PTSI, that injury is presumed to have been caused by their work as a frontline worker.

A presumption means that workers compensation entitlements automatically flow to the injured person without that person having to identify which specific event caused their injury.

Queensland

In Queensland, the *Workers' Compensation and Rehabilitation and Other Legislation Amendment Act 2021* (Qld) introduced a 'presumptive pathway' for first responders, which means that, if a first responder incurs PTSI, it is presumed that it was caused by their employment as a first responder.

Tasmania

In Tasmania, amendments to the *Workers Rehabilitation and Compensation Act 1988* (Tas) that created a presumption that certain cancers in firefighters were caused by their work as firefighters included a requirement to conduct a ministerial

review that would consider whether it was feasible to include a presumption that certain workers who incur PTSI have incurred that because of their employment.

That review was completed in June 2018; however, the review did not recommend that a presumptive path in relation to PTSI be introduced in Tasmania (see *Ministerial Review Relating to Establishing Entitlements under the Workers Rehabilitation and Compensation Act 1988 for Workers Suffering Post Traumatic Stress Disorder (PTSD)*, July 2018).

Approach used in this Bill

Because of the ACT's unique public sector workers compensation arrangements, the Territory cannot use the approach used in Queensland because it cannot amend the rules about the underlying entitlement to compensation in the SRC Act.

Instead, this Bill will alter the manner in which the claims manager administers the existing rules by requiring the Minister to give directions to the claims manager about certain matters, including the management of PTSI claims, via a claims code.

Moreover, the existing advisory committee will be given the additional function of monitoring the claims manager's practices and performance in relation to claims for mental injuries, such as PTSI, by frontline workers, and require the Minister to present those reports to the Legislative Assembly.

These two approaches are focused on using publicity and moral suasion to ensure that the Territory's claims manager behaves appropriately in relation to claims by frontline workers, not by altering the underlying entitlement to compensation under the SRC Act.

CONSISTENCY WITH HUMAN RIGHTS

The Bill does not limit any human rights.

The Bill engages and promotes the right to work in section 27B of the *Human Rights Act 2004*.

The right to work is promoted by this Bill by ensuring that all public sector workers, including frontline workers, have access to a fair and transparent claims management process if they incur an injury in the course of their work.

In doing so, this Bill promotes the right to the enjoyment of just and favourable conditions of work.

Interaction with Commonwealth law

Section 28 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) provides that an enactment of the Territory has no effect to the extent it is inconsistent with a Commonwealth law in force in the Territory. 'Law' includes an instrument made under a Commonwealth law.

The SRC Act is a Commonwealth law in force in the Territory and the Territory's licence under the SRC Act is an instrument made under that law.

The Bill has effect, therefore, only to the extent that is not inconsistent with the SRC Act or the Territory's licence under that Act.

CLAUSE NOTES

Clause 1 Name of Act

This clause is a formal provision setting out the name of the Act as the *Public Sector Workers Compensation Fund Amendment Act 2022* (the Act).

Clause 2 Commencement

This clause provides for the commencement of the Act. The Act will commence on the day after its notification on the ACT Legislation Register.

Clause 3 Legislation amended

This clause is a formal provision identifying that the Act amends is the *Public Sector Workers Compensation Fund Act 2018* (the Fund Act).

Clause 4 Long title

This clause amends the long title of the Fund Act to reflect that the Fund Act provides for fair and transparent claims management.

Clause 5 Section 6

This clause adds an additional object of the Fund Act about ensuring fairness and transparency in relation to any claims management done under that Act.

Clause 6 New section 17A

This clause inserts a definition of 'frontline community service provider' for the purpose of Part 3 of the Fund Act.

Included in that definition is a corrections officer within the meaning of the *Corrections Management Act 2007*.

Via the dictionary in the *Emergencies Act 2004*, also included in that definition is:

- a member of the ambulance service;
- a member of the fire and rescue service;
- a member of the rural fire service; and
- a member of the SES.

Another person may be included in the definition of a 'frontline community service provider' by regulation.

The definition of 'frontline community service provider' provided by section 17A only differs from the definition for the same term used in section 26A of the *Crimes*

Act 1900 (which creates an offence of assaulting a frontline community service provider) by omitting those workers who are not employed by the Territory and are not, therefore, covered by the Territory's SRC Act licence.

Specifically, the workers included in the equivalent definition in section 26A of the *Crimes Act 1900* but not included in this clause are police officers, protective service officers within the meaning of the *Australian Federal Police Act 1979* (Cth), and interstate escort officers within the meaning of the *Corrections Management Act 2007*.

Clause 7 Arrangements for Staff
New section 21 (2)

Clause 7 allows the advisory committee to use the services of a public servant or Territory facilities, including for the purpose of preparing a report under section 25A.

It is an equivalent clause to that which currently allows the Public Sector Workers Compensation Commissioner to also use public servants and Territory facilities.

Clause 8 New section 22A

Clause 8 creates a power in Part 3 of the Fund Act for the Minister to make a code (a ***claims code***) that sets out how any claims manager must deal with certain matters.

The Minister must make a claims code within 6 months of the commencement of the Act (subs 22A(1)), although the Minister may extend that time by up to 12 months (subs 22A(3)).

Paragraphs 22A(1)(a) to (d) list certain matters that the claims code must deal with, and paragraph 22A(1)(e) allows the regulations to prescribe additional matters that the claims code must deal with.

A claims code is a disallowable instrument (subs 22A(4)).

Subsection 22A(2) requires the Minister to, before making a claims code, consult with employee representatives. It allows the Minister to also consult with anyone else.

Matters that must be dealt with in the claims code

Decision making

The claims code must deal with decision-making in relation to claims (para 22A(1)(a)).

The Minister may use this power to require any claims manager to make timely decisions, or adhere to strict timeframes for decisions, when managing claims.

The Minister may also use this power to set out what material a claims manager may rely upon, or not rely upon, when making a decision.

Mental injury claims, including claims by frontline community service providers

The claims code must deal with claims for mental injury, including claims by frontline community service providers (para 22A(1)(b)).

The Minister may use this power to require any claims manager to establish special practices and procedures for dealing with claims involving mental injury, such as Post-traumatic Stress Injury (PTSI).

The specific reference to 'frontline community service providers' allows the Minister to establish specific requirements for claims involving those workers that differ to the rules that apply to other workers. For example, the Minister could use this power to require any claims manager to deal with claims by frontline community service workers is a specific way, such as by presuming that any mental injury was caused by the worker's work as a frontline worker.

Selection and use of independent medical practitioners

The claims code must deal with the use and selection of medical practitioners to ensure their independence (para 22A(1)(c)).

The Minister may use this power to require any claims manager to:

- allow the claimant to choose any independent medical practitioner; or
- not repeatedly rely on the same medical practitioner for notionally independent medical opinions.

Investigations and surveillance

The claims code must deal with undertaking any investigation or surveillance in relation to a claim (para 22A(1)(d)).

The Minister may use this power to impose limits on when and how any surveillance in relation to a claim may be carried out. Such limits could prevent surveillance in all but the most extraordinary of circumstances, such as when a claims manager has a genuine and well-founded belief that fraud is occurring, and prevent surveillance that is invasive, involves deception or trickery, or risks violating the right to privacy of another person (such as a child).

The Minister may also use this power to create protections for claimants during any investigation. Such protections could include:

- a right to be informed of the existence of any investigation about a claim, and the right to participate in that investigation;
- a right to be told of any adverse matters that will be put to a person in any interview before that interview; and
- a right to have a support person present during any interview.

Clause 9 Claim manager's functions
Section 23(2)

Clause 9 requires any claims manager to comply with the claims code made under section 22A.

Clause 10 New section 25A

Clause 10 provides additional functions to the existing advisory committee in relation to claims by frontline community service providers involving mental injury (defined as ***relevant claims*** (subs 25A(3)). These functions allow the advisory committee to monitor, investigate and periodically report on the performance of a claim manager in managing relevant claims (25A(1)).

A report by the advisory committee must be prepared and given to the Minister within 12 months of the commencement of the Act (para 25A(1)(c)), and subsequent reports must be prepared and given to the Minister every 3 years (para 25A(1)(d)).

Any report received by the Minister must be presented to the Legislative Assembly within 9 sitting days of being received by the Minister.

Clause 11 Dictionary, new definition of *frontline community service provider*

Clause 11 would incorporate the definition of frontline community service worker in clause 6 into the dictionary at the end of the Fund Act.