

Workers' Compensation and Rehabilitation and Other Legislation Bill 2020

Explanatory Notes

Short title

The short title of the Bill is the *Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2020*.

Policy objectives and the reasons for them

First responders play an important role in protecting and serving the community; however, due to the nature of their duties they are often exposed to traumatic, life-threatening incidents.

There is increasing awareness of the impact on mental health from acute and cumulative trauma exposure experienced by many first responders and the importance of supporting their mental health and wellbeing.

In 2018, the Queensland Government engaged Phoenix Australia, Centre of Posttraumatic Mental Health, to independently review and benchmark the workers' compensation claims process for first responders claiming for psychological injuries. This review noted many commendable practices and made administrative recommendations for improving the workers' compensation experience for first responders across the areas of communication, education, health literacy, claims management and rehabilitation and return to work. Many of these recommendations have been implemented and complement legislative amendments made in 2019 which ensure all workers can access early intervention treatment and support once they lodge a claim for any psychological injury.

In 2018, Beyond Blue's report, *Answering the Call*, revealed substantially higher rates of psychological distress, mental health conditions and suicidal thinking and planning among first responders compared to the general population. The survey also reported claims rates related to mental health conditions or psychological injuries for first responders were 10 times higher than the Australian workforce. In 2019, the Commonwealth Senate inquiry into first responder health, *The people behind 000: mental health of our first responders*, recognised the need for early intervention mental health support and made recommendations across the areas of prevalence, reporting and management of first responder psychological injuries, workers' compensation, return to work and post-retirement support. Both reviews suggested presumptive laws may improve a first responder's claims experience.

Subsequent to these reviews, in 2019, the then Minister for Education and Minister for Industrial Relations established a stakeholder reference group to consider Phoenix Australia's findings, as well as the national reviews, to develop an action plan for improving the workers' compensation experience and mental health outcomes of Queensland's first responders. The stakeholder reference group included representatives from:

- Queensland Ambulance Service;

- Queensland Fire and Emergency Services;
- Queensland Police Commissioned Officers' Union of Employees;
- Queensland Police Service;
- Queensland Police Union;
- The Department of the Premier and Cabinet;
- Together Queensland Union;
- United Firefighters' Union of Queensland;
- United Workers' Union; and
- WorkCover Queensland.

The stakeholder reference group found that, despite a range of employer and insurer initiatives, there are still barriers and gaps that impact a first responder's experience. Areas of concern included stigma, workplace culture, the claims determination process and return to work opportunities. The group recognised that while trauma-related injuries such as Post Traumatic Stress Disorder (PTSD) from single or cumulative trauma are compensable under the scheme, presumptive workers' compensation laws were an option to assist overcoming barriers to accessing compensation, such as difficulties in proving the legislative test for 'injury'. This is because many first responders are unable to identify one particular incident causing their decompensation due to their cumulative exposure to trauma.

Presumptive laws do not change workers' compensation entitlements but instead provide a different pathway for certain claims to access the scheme by reversing the onus of proof. Under presumptive laws, a specified injury (e.g. PTSD) is deemed to be work-related, unless there is evidence to the contrary. Presumptive laws are not new to workers' compensation schemes for first responders with PTSD, with Tasmania and the Northern Territory passing similar laws.

The *Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2020* (the Bill) introduces presumptive workers' compensation laws for first responders diagnosed with PTSD. The objective of the Bill is to provide an alternative claims pathway for first responders who are struggling to cope with PTSD that presumes they have a work-related injury, unless it is proved their injury was not caused by work.

PTSD describes a severe and persistent stress reaction after exposure to a traumatic incident or a series of traumatic incidents. A diagnosis of PTSD is generally undertaken with reference to the *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)* where PTSD is defined as:

'...exposure to actual or threatened death, serious injury, 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). Note: Criterion A4 does not apply to exposure through electronic media, television, movies or pictures, unless this exposure is work related.'*

The Bill introduces presumptive workers' compensation for first responders, and others who work in roles alongside first responders, who are exposed to traumatic incidents due to the nature of their roles.

The presumption of injury will apply to defined first responders and other eligible employees which are prescribed in the *Workers' Compensation and Rehabilitation Regulation 2014* to include:

- traditional first responders who respond to life-threatening, otherwise traumatic incidents, where time may be critical to prevent actual or potential death or injury to persons, or to prevent or minimise damage to property or the environment. The occupations or professions captured are:
 - a police officer or police recruit under the *Police Service Administration Act 1990*;
 - an ambulance officer under the *Ambulance Service Act 1991*;
 - an authorised officer under the *Child Protection Act 1999*;
 - a corrective services officer under the *Corrective Services Act 2006*;
 - a youth justice staff member under the *Youth Justice Act 1992*;
 - a fire service officer, member of the State Emergency Service, member of the rural fire brigade, volunteer firefighter or volunteer fire warden under the *Fire and Emergency Services Act 1990*; and
 - a doctor or nurse employed in any of the following areas—(i) emergency and trauma care; (ii) acute care; (iii) critical care; (iv) high-dependency care.
- eligible employees in certain first responder departments whose employment requires them to experience repeated or extreme exposure to graphic details of traumatic incidents as they attend the scene of traumatic incidents (e.g. a person whose employment involves collecting human remains) or experience the traumatic incident as they happen (e.g. fire communications officers responding to and providing information in response to emergencies, or corrective services officers observing disturbing footage via CCTV) or investigate, review or assess traumatic incidents that have happened to other persons (e.g. workers who are exposed to graphic details as part of investigating complaints of child sexual abuse).

The first responder roles and other eligible employees listed in the Bill represent the cohort of workers where there is evidence of a strong causal connection between employment and PTSD. It is recognised there are many roles across the public and private sectors which may be exposed to traumatic incidents or who regularly work in times of crisis. If the presumption does not apply, workers are still entitled to lodge a claim for a work-related injury under the scheme's existing decision-making pathway. Under the prescribed head of power, the Bill provides the ability to include additional occupations where there is a strong evidence base of the prevalence between these occupations and PTSD.

As the symptoms of PTSD may present differently in first responders due to a gradual build-up of trauma over a prolonged period of time, the presumption requires a robust diagnosis by a registered psychiatrist (as opposed to a doctor) in accordance with the DSM-5. The need for an experienced clinician is supported by Australian guidelines for diagnosis and assessment of PTSD, such as the Black Dog Institute's *Expert Guidelines: Diagnosis and Treatment of Post-Traumatic Stress Disorder in Emergency Service Workers* which recommends, where possible, health professionals trained in psychopathology and experienced in mental health assessments should conduct a mental health assessment of any first responder suspected of suffering PTSD.

First responders continue to be encouraged to lodge their claim as early as possible, particularly to access existing early intervention treatment and support through the workers' compensation scheme. Where a first responder does not have a psychiatrist's diagnosis to support their claim, this will be arranged and funded by the relevant insurer. It is also open to the insurer to accept the claim under the existing decision-making pathway on the basis of a doctor's diagnosis if the insurer is satisfied the person has sustained a work-related injury.

The presumption can be rebutted if it is proved the first responder's injury did not arise out of, or in the course of, their employment or if the first responder's employment is not a significant contributing factor. However, the presumption cannot be rebutted on the basis the first responder's injury arose out of reasonable management action taken in a reasonable way. Excluding reasonable management action as a basis for rebuttal is appropriate as a psychiatric diagnosis of PTSD requires exposure to specific traumatic incidents which cannot arise from reasonable management action taken in a reasonable way.

First responders and employers aggrieved by a decision of the insurer have access to existing safeguards in the *Workers' Compensation and Rehabilitation Act 2003* (the Act) of an administrative review by the Workers' Compensation Regulator, which is at no cost. If dissatisfied with the review outcome, parties are able to lodge an appeal with the Queensland Industrial Relations Commission.

Claims which do not meet the presumption may still be compensable and will be determined by the relevant insurer following the existing process under the Act, ensuring no workers are disadvantaged by the amendments.

The presumption will apply to applications for compensation lodged on or after commencement of the Bill.

Achievement of policy objectives

The Bill achieves its objectives by amending the Act and the *Workers' Compensation and Rehabilitation Regulation 2014* to introduce presumptive workers' compensation for first responders and eligible employees who are diagnosed with PTSD by a psychiatrist.

Alternative ways of achieving policy objectives

There are no alternative means of achieving the policy objectives other than by legislative amendment.

Estimated cost for government implementation

Claims in scope of the presumption are already compensable in the worker's compensation scheme. The Bill does not change or increase the entitlements available, but instead provides an alternative pathway for decision-making by reversing the onus of proof to promote early claims acceptance. This may potentially result in behaviour changes which, in turn, may increase the number of workers' compensation claims lodged and accepted for claims within the scope of this Bill.

The potential claims cost due to behavioural change will be borne by employers of first responders through their workers' compensation insurance premiums. These employers are primarily government agencies, including the Queensland Police Service, Queensland Ambulance Service, Queensland Fire and Emergency Services, Queensland Corrective Services, the Department of Youth Justice, the Department of Child Safety, Youth and Women and Queensland Health.

The cost impact to private sector employers is expected to be negligible due to low claims experience and the size of these employers compared to the government agencies within scope.

Consistency with fundamental legislative principles

The Bill is generally consistent with fundamental legislative principles (FLP) and gives sufficient regard to these principles. Any provisions which potentially breach FLP are considered justifiable to achieve the Government's objective to provide a new claims pathway for first responders who are struggling to cope with PTSD to be presumed to have a work-related injury, unless there is evidence to the contrary.

The Bill raises one potential issue which may infringe the FLP of allowing the delegation of legislative power only in appropriate cases and to appropriate persons under section 4(4)(a) of the *Legislative Standards Act 1992*. In particular, the Bill deems the class of workers, or other persons entitled to compensation, who will be able to access the alternative pathway to be prescribed by regulation. While this is a delegation of legislative power, it is considered appropriate and justifiable that the specific persons deemed to be first responders and eligible employees be prescribed by regulation under a suitable and defined head of power in the substantive legislation. The Bill is also considered beneficial in nature as it entitles deemed first responders and eligible employees to compensation without the need for a potentially lengthy claim determination process. Prescribing first responders and eligible employees by regulation recognises the complexity in defining who is a first responder as the nature of the duties performed, job titles or employers change over time and ensures continued presumptive coverage to the intended classes of workers and persons entitled to compensation.

Consultation

The stakeholder reference group met on 28 January, 20 February, 26 March, 21 May, 25 June, 29 July and 31 July 2020 to develop initiatives to improve the workers' compensation experience of first responders. The stakeholder reference group also gave out-of-session consideration to the scope and policy objectives underpinning the Bill.

In addition to the stakeholder reference group, the Office of Industrial Relations extended invitations for consultation on the scope and policy objectives of the Bill to impacted employers in the private sector; Australian Industry Group; Australian Lawyers Association; Chamber of Commerce and Industry Queensland; Department of Child Safety, Youth and Women; Department of Youth Justice; the Royal Australian and New Zealand College of Psychiatrists; Queensland Bar Association; Queensland Corrective Services; Queensland Council of Unions; Queensland Health; Queensland Law Society; and Queensland Nurses and Midwives' Union.

The Office of Best Practice Regulation was consulted on the Bill and advised it appears unlikely to add to the burden of regulation or result in significant adverse impacts and no further regulatory impact analysis was required.

Consistency with legislation of other jurisdictions

The Bill is comparable with similar approaches taken in Tasmania and the Northern Territory to introduce presumptive legislation for certain classes of workers, including first responders, with PTSD.

Tasmania first introduced presumptive legislation, but with wide coverage across all public sector workers, including first responders, diagnosed with PTSD. The Northern Territory has classified PTSD as a prescribed disease for first responders, such as police officers, firefighters, ambulance officers (including volunteers), but have limited presumptive coverage to instances where the first responder attended in person at an emergency situation or incident. Both jurisdictions remain silent on the matter of who should undertake the PTSD diagnosis and to what diagnostic criteria or standard.

Internationally, the majority of provinces and territories of Canada have adopted presumptive workers' compensation laws for first responders with PTSD (and, in some instances, this applies to a broader cohort of workers or psychological injuries). Canadian jurisdictions have adopted specific diagnostic requirements for a psychiatrist or psychologist to have made the diagnosis and for this diagnosis to be made in accordance with the current edition of the DSM.

Notes on provisions

Part 1 Preliminary

Clause 1 states that, when enacted, the Bill will be cited as the *Workers' Compensation and Rehabilitation and Other Legislation Amendment Act 2020*.

Part 2 Amendment of Workers' Compensation and Rehabilitation Act 2003

Clause 2 provides that Part 2 of the Bill amends the *Workers' Compensation and Rehabilitation Act 2003* (the Act).

Clause 3 inserts new chapter 1, part 4, division 6, subdivision 3BA of the Act to provide new presumptive provisions for *first responders*, and other *eligible employees*, who are diagnosed with PTSD by a psychiatrist.

The new subdivision provides the presumption for workers' compensation applies to workers, or relevant volunteers (as defined in new section 36EA), whose employment satisfies one of the following categories:

1. a *first responder* (new section 36EB) whose employment requires them to respond to incidents that:
 - are life-threatening or otherwise traumatic; and
 - for which time may be critical to prevent actual or potential death or injury to persons, or to prevent or minimise damage to property or the environment.

The list of occupations and professions are prescribed by regulation (see clauses 8-9).

2. *eligible employees* (new section 36EC) whose employment requires them to experience repeated or extreme exposure to the graphic details of traumatic incidents either by:
 - attending the scenes of traumatic incidents. For example, a person whose duties involve recovering human remains; or
 - experiencing traumatic incidents as they happen to other persons. For example, people responding to emergency calls, such as fire communications officers; corrective services officers observing disturbing footage via CCTV; or co-responders travelling with police officers who witness incidents involving young people at risk; or
 - Investigating, reviewing or assessing traumatic incidents that have happened to other persons. For example, people required to review child exploitation material for an investigation or court hearing.

For the purposes of new section 36EC, examples of traumatic incidents include exposure of a person to, or to the threat of, death, serious injury or sexual violence in accordance with the diagnostic requirements of PTSD in the DSM-5.

To be eligible under this category, a person must be employed by or in one of the entities prescribed by regulation (see clauses 8-9).

New section 36ED provides the presumption of injury. That is, if a first responder or an eligible employee is diagnosed by a psychiatrist as having PTSD in accordance with the DSM-5, their PTSD is taken to be an *injury* under the Act. New section 36ED clarifies the presumption of injury does not apply if it is proved:

- the person's PTSD did not arise out of, or in the course of, their employment as a first responder or an eligible occupation; or
- the person's employment as a first responder or in an eligible occupation was not a significant contributing factor to their PTSD.

New section 36ED clarifies that section 32(5) of the Act is not a relevant consideration for the insurer when determining whether the presumption of injury should apply.

Clause 4 inserts a new section 135A to clarify the insurer must arrange and pay for an examination by a psychiatrist, including reasonable travel costs, if a first responder or eligible employee makes a claim for PTSD without a psychiatrist's diagnosis. Subsection (3) of new section 135A confirms the insurer can accept the claim under section 134 of the Act without this examination.

Clause 5 inserts a new chapter 36 to provide a transitional arrangement which clarifies that new chapter 1, part 4, division 6 subdivision 3BA and section 135A apply only in relation to an application for compensation lodged on or after commencement of the *Workers' Compensation and Rehabilitation and Other Legislation Amendment Act 2020*.

Clause 6 inserts into the dictionary in Schedule 6 of the Act definitions for eligible employee, first responder, psychiatrist and relevant volunteer.

Part 3 Amendment of Workers' Compensation and Rehabilitation Regulation 2014

Clause 7 provides that Part 3 of the Bill amends the *Workers' Compensation and Rehabilitation Regulation 2014* (the Regulation).

Clause 8 inserts new sections 144A, 144B and 144C into the Regulation. New sections 144A and 144B support the insertion of new sections 36EB and 36EC (see clause 3) by prescribing the first responders and eligible occupations to which the presumption applies. New section 144C supports new section 36ED (see clause 3) by prescribing that PTSD must be diagnosed by a psychiatrist using the diagnostic criteria provided under DSM-5 for PTSD.

Clause 9 inserts new Schedule 6A and Schedule 6B into the Regulation. These new schedules respectively list the occupations or professions for determining if a person is a first responder, and the departments for determining if a person is an eligible employee to which the presumption applies.

Clause 10 inserts into the dictionary in Schedule 13 a new definition of nurse as a result of inserting new section 144A and Schedule 6A of the Regulation.