

25 September 2020

Our ref: KS-ACTLC

Committee Secretary
Education, Employment and Small Business Committee
Parliament House
George Street
Brisbane Qld 4000

By email: [REDACTED]

Dear Committee Secretary

Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2020

Thank you for the opportunity to provide feedback on the Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2020 (**the Bill**). The Queensland Law Society (**QLS**) appreciates being consulted on this important piece of legislation.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been compiled with the assistance of the QLS Accident Compensation and Tort Law Committee, whose members have substantial expertise in this area.

QLS holds significant reservations about the broad scope of the presumptive legislation in the Bill. In particular we have fundamental concerns with respect to the following:

- The presumption of injury provision which reverses the onus of proof. The onus of proof is a fundamental principle upon which the efficient and effective administration of justice has been founded. It is a cornerstone legal principle and should not be breached without appropriate justification;
- Our concerns about the reversal of the onus are compounded by the breadth of the Bill which in our view, is not sufficiently supported by evidence, to justify a need for presumptive legislation across the broad range of workers and persons proposed;
- Finally, we are concerned about the impact on the viability of the Queensland WorkCover scheme (**the Scheme**) including the potential "flood gates" which may be opened by the broad definition of 'first responder' and 'eligible employee' currently proposed.

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It is important to emphasise that QLS agrees without reservation that workers with work caused psychiatric and psychological injuries should be entitled to workers' compensation and support. However, broad legislative changes which are not supported by empirical evidence risk negatively impacting the Scheme and must be carefully considered to ensure that the public interest in preserving the viability of the Scheme is balanced against the issue being addressed.

Policy intent

We note from the Explanatory material that the Bill seeks to introduce presumptive workers' compensation laws for first responders with PTSD. QLS supports the development of laws which are evidence-based and not reactionary. We recognise the body of evidence which demonstrates the prevalence of PTSD in the first responder occupational group.

In particular, we acknowledge the findings of the Senate Education and Employment References Committee, 2019 report "The people behind 000: mental health of our first responders"¹ (**the Senate Committee report**) and Beyond Blue's 2019 report "Answering the call; national survey"² (**the Beyond blue report**) which in relation to employees in ambulance, fire and rescue, police and state emergency service agencies found:

- *'one in three employees experience high or very high psychological distress; much higher than just over one in eight among all adults in Australia (Australian Bureau of Statistics, 2015)³; and*
- *'one in four surveyed former employees experience probable PTSD (compared to one in 10 current employees), and one in five experience very high psychological distress'.⁴*

The Senate Committee report refers to evidence from the Royal Australian and New Zealand College of Psychiatrists that "emergency service personnel have a significant risk of developing PTSD in the course of their working career"⁵ and that:

'It is now widely thought that first responders [emphasis added] are at an increased risk of experiencing serious, ongoing stress which if left untreated may develop into mental health conditions including anxiety, depression or post-traumatic stress disorder (PTSD)'⁶;

Of interest, the Senate Committee report provides the following definition:

*'The term 'first responder' most commonly refers to professionals such as **paramedics, police officers, fire fighters** and other **emergency personnel** trained to provide assistance in **time-critical, often life-threatening situations**. It may also refer to*

¹ Education and Employment References Committee, February 2019, "The people behind 000: mental health of our first responders", available at https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024252/toc_pdf/Thepeoplebehind000mentalhealthofourfirstresponders.pdf;fileType=application%2Fpdf.

² Beyond Blue Ltd. (2018). Answering the call national survey, National Mental Health and Wellbeing Study of Police and Emergency Services – Final report.

³ Note 2 at 17.

⁴ Ibid.

⁵ https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024252/toc_pdf/Thepeoplebehind000mentalhealthofourfirstresponders.pdf;fileType=application%2Fpdf at p 14.

⁶ https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024252/toc_pdf/Thepeoplebehind000mentalhealthofourfirstresponders.pdf;fileType=application%2Fpdf at pp 3-4.

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*individuals who perform those functions in a **volunteer capacity** and **emergency control centre workers**.*⁷

QLS submits that any Bill for presumptive legislation must be justifiable on a scientific and epidemiological basis. For example, the 2015 deemed diseases provisions for firefighters with prescribed diseases introduced the presumption in section 36D of the *Workers Compensation and Rehabilitation Act (the WCRA)*. The basis for this initiative was a 2011 Senate inquiry which concluded that the science supported the position that this particular group were at higher risk of developing certain types of cancer.⁸

Whilst QLS acknowledges the significantly higher prevalence of PTSD in some of the first responder groups, the evidence does not support the extent of coverage proposed for each of the groups outlined in Schedules 6A and 6B.

We are concerned that the terms 'first responders' and 'eligible employees' in the Schedule are extremely broad. For example, as the Bill is currently drafted, not all workers in proposed 'Schedule 6B Eligible employees' need to be employed as first responders. Workers who may have incidental or indirect contact with a traumatic incident by file work or attending meetings yet develop symptoms and are potentially diagnosed with PTSD will be captured. These workers are likely to be captured by the presumptive legislation proposal.

Our concerns extend also to the broad scope of persons who may be covered by the proposed inclusion of "relevant volunteer" (Section 36EA).

Reversal of the onus of proof

The onus of proof is a cornerstone principle which underpins our legal system. It requires that any person bringing a claim must establish their entitlement. The commitment to uphold the onus of proof is a fundamental legal concept which should not be breached without appropriate justification.

In this regard, QLS understands in the order of 80% to 90% of PTSD Statutory Workcover claims are accepted. We are also aware of administrative and policy changes which are proposed to the claim process to better support first responders with a psychological injury throughout the claim journey. We also understand WorkCover Queensland is to conduct a pilot of a centralised claims management team to provide specialised support for first responders with trauma-related psychological injuries.

In these circumstances and notwithstanding the good intention of the proposed reform, QLS does not support reversing the onus of proof. This is particularly so given the available scientific and epidemiological evidence only supports a narrow definition of first responder.

The proposed broad application of the reversal of the onus undermines a fundamental tenet of our legal system. We consider other measures, including those outlined above, will achieve the policy intent without eroding established legal process which to date have provided a fair and balanced system.

⁷https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024252/toc_pdf/Thepeoplebehind00mentalhealthofourfirstresponders.pdf;fileType=application%2Fpdf at p 3.

⁸https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024252/toc_pdf/Thepeoplebehind00mentalhealthofourfirstresponders.pdf;fileType=application%2Fpdf at p 85.

Specific concerns with provision drafting

In addition to the strongly held general reservations expressed above, we have of the following concerns with the specific drafting of the Bill:

- We are concerned about the potential scope of 'first responders' and 'eligible employees' as it is proposed that these are to be prescribed by amendments to the *Workers' Compensation and Rehabilitation Regulation 2014*. These terms are central to the proposed legislation's operation and should be defined in the Act itself. Given the significant potential impact of any changes to these terms on the Scheme, the scope of these provisions must properly be the subject of scrutiny via the usual parliamentary process.
- As set out earlier in our submission (on pages 1-2) QLS has significant reservations about the potential "flood gates" which may be opened by the broad definition of 'first responder' and 'eligible employee' currently proposed.

For example, the meaning of 'eligible employees' in the Bill relates to persons who are a worker, or a relevant volunteer, employed by or in an entity prescribed by regulation. The proposed amendments to the *Workers' Compensation and Rehabilitation Regulation 2014* in Schedule 6B prescribe Eligible employees as employees from government departments including for those who administer:

- the *Ambulance Service Act 1991*;
- the *Child Protection Act 1999*;
- the *Corrective Services Act 2006*;
- the *Fire and Emergency Services Act 1990*;
- the *Police Service Administration Act 1990*; and
- the *Youth Justice Act 1992*

In this regard, departmental annual reports indicate that these departments, and therefore, those employees who may be captured by the presumption comprise a significant workforce. In particular in the 2018-2019 period:

- Queensland Ambulance Service employed 4610 full-time equivalent (FTE) staff;⁹
- Department of Child Safety, Youth and Women employed 3486 FTE staff;¹⁰(which includes Youth Justice employees)
- Queensland Corrective Services employed 5054 FTE staff;¹¹

⁹ https://www.health.qld.gov.au/data/assets/pdf_file/0019/882010/190927-DoH-Annual-Report-2018-19.pdf at p 64.

¹⁰ <https://www.csyw.qld.gov.au/resources/dcsyw/about-us/publications/corporate/annual-report/2018-19.pdf> at p 48.

¹¹ <https://www.publications.qld.gov.au/dataset/qcs-annual-reports/resource/ac3ac1b4-6161-4859-a2e8-87e800c49331> at p 50.

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- Queensland Fire and Emergency Services employed 3337 FTE staff,¹² with the assistance of 38,500 volunteers who work across the state in the RFS, SES, Research and Scientific Branch Volunteer Scientific Officer network, Technical Rescue Unit (TRU) and Peer Support Officers (PSOs) and Chaplains;¹³ and
- Queensland Police Service employed 15,285 FTE staff.¹⁴

This is a workforce of at least 31,772 workers as well as thousands of volunteers, casuals and part-time workers. On our estimate, statutory claims for mental disorders cost (on average) \$47,480.31 according to the figures in the 2018 to 2019 WorkCover Queensland annual report.¹⁵ In addition, our members have advised that a large number of first responder Police, Ambulance Officers and Firefighters access income protection or total and permanent disability insurance for PTSD injuries currently.

Consideration must be given to the extremely broad scope of application of the proposed presumption to these cohorts to ensure that it is appropriately targeted and evidence based and that the impact on the Workers' Compensation Scheme can be properly understood and evaluated.

A further concern is the inherent unfairness in the proposed legislation's application drafted as the benefit of the presumption will be accessible to thousands of government employees but will not be accessible by non-government employees who may routinely encounter identical traumatic circumstances to that described by the Bill. This cannot be justified

- The distinction between private versus public sector roles in the Schedule relating to first responders and the drafting of eligible occupations means that there will be persons working in the same role, and responding to the same events with some covered and others not. It appears for example, 'civilian' police roles or legal professionals employed by government departments which deal with traumatic incident cases may not be covered.

There is also an anomaly in the legislative drafting of 'first responder' at Clause 3, which requires that a person's employment requires the person to respond to incidents for which time may be critical to prevent actual or potential death or injury to persons. There are however, numerous occupations including for example specialist cleaners and persons in the funeral industry whose duties do not "prevent" death or injury but which involve regularly dealing with the aftermath of distressing and violent circumstances of serious death and/or injury. This draft legislation does not assist those workers. It is difficult to understand why they would be excluded.

¹² <https://www.qfes.qld.gov.au/about/annualreport/Documents/2018-19/QFES-2018-19-Annual-Report.pdf> at p 86.

¹³ Note 12 at p 14.

¹⁴ <https://www.police.qld.gov.au/sites/default/files/2019-09/FINAL%20QPS%20AR%202018-19.pdf> at p 87.

¹⁵ https://www.worksafe.qld.gov.au/data/assets/pdf_file/0007/181483/Annual-report-2018-2019.pdf at p 13. *Calculated by dividing the financial year costs with the number of accepted claims in that financial year.

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This lack of parity in the Bill emphasises the inherent difficulties with the adoption of broad and arbitrary cut offs in legislation. It also adds weight to our submissions with respect to the reverse onus which enables acceptance of some claims but excludes others without good reason.

- The drafting of 'Meaning of eligible employee' requires that the person experiences 'repeated or extreme exposure to the graphic details of traumatic incidents...' The DSM-5 Diagnostic Criteria for PTSD utilises the language repeated or extreme exposure in the context of:

*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).*

The language used in the legislation must have a clear meaning. Whilst cumulative exposure may meet the criteria, we query whether there is also an intent to cover direct experiencing of or witnessing of a traumatic incident on a single occasion? What might encompass 'extreme exposure' in those circumstances? Definitions must be contained within the Bill and must provide sufficient clarity.

- The presumption of injury drafting refers to a person who in (b) 'at any time before the diagnosis', was employed as a first responder or an eligible employee.

Does this cover someone employed 20 twenty years ago who has spent the past 20 years working in another State/country in a similar role? If so, there will of course be significant evidentiary barriers for employers seeking to rebut the presumption.

We submit that there needs to be clarity around the timeframes proposed to be captured, noting also the timing connection contemplated by the diagnostic criteria for PTSD.

- We also have concerns about the exclusion of section 32(5) (a), (b) and (c) relating to reasonable management action taken in a reasonable way, particularly where an event or the person's work as a first responder occurred many years ago. We do not support the exclusion of section 32(5) in the Bill.

In an endeavour to address some of these concerns around definitions and clarity of the drafting, we note that the Explanatory notes have sought to provide additional guidance. For example, with respect to the scope of eligible employee in section 36EC.

It is preferable and achievable that Parliament make its intent clear in the wording of the legislation.¹⁶ The use of extrinsic material in interpretation of ambiguous legislative provisions is, as it should be, limited to those circumstances outlined in section 14B of the *Acts Interpretation Act 1954*. Explanatory notes should be consistent with the language of the legislation.

Potential impact on the Queensland Workers' compensation Scheme

¹⁶ https://www.legislation.qld.gov.au/file/Leg_Info_publications_FLP_Clear_meaning.pdf at p 22.

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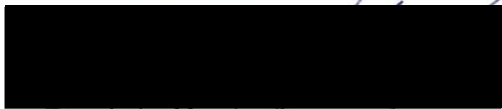
Legislative changes in 2019 to the WCRA now provide for insurers to take all reasonable steps to support workers with a psychological injury prior to claim determination¹⁷. The meaning of injury for a psychiatric or psychological disorder was amended by removing 'the major' as a qualifier for employment's 'significant contribution' to the injury. The anticipated beneficial impact of these recent changes have not yet had sufficient time to materialise and be assessed. The 2018/2019 WorkCover annual report also suggests there has been an increase in statutory claims including psychological injuries between 2018 and 2019.¹⁸

We are concerned about the potential pressure on the scheme if claims were to significantly increase as a result of the Bill which for the reasons stated above is a risk. We again acknowledge that first responders are entitled to compensation for all work-related injuries. However, QLS considers that the very broad scope of the Bill, coupled with the ability to further broaden the intended classes of workers and persons entitled to compensation by regulation without the usual parliamentary processes, may impact operating costs and the ability of employers to meet increases in premiums. This may have potential future adverse consequences for other injured workers.

QLS submits that further careful detailed consideration ought to be given to targeting the Bill by way of testing the impact of the proposed changes on the Scheme through a narrowly defined pilot program (e.g. just Police). Any legislative changes should also be supported by the administrative changes and pilot programs outlined on page 3 of this submission to ensure that first responders are supported to make a claim.

QLS agrees that first responders should be able to easily navigate the workers compensation system for support and compensation and that their occupational susceptibility reinforces the need for employers and Scheme providers to improve outcomes for these workers. However, legislative changes must be the subject of detailed and considered consultation and their scope and impact supported by evidence. This proposed legislative change does not satisfy either requirement.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.



Luke Murphy
President

¹⁷ Section 232AB *Workers' Compensation and Rehabilitation Act 2003* (Qld).

¹⁸ https://www.worksafe.qld.gov.au/data/assets/pdf_file/0007/181483/Annual-report-2018-2019.pdf at p 13.