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# Safety, Rehabilitation and Compensation Act Review

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## Department of Education, Employment and Workplace Relations

**Submission by the *Personal Injuries and Compensation  
Committee, Legal Practice Section, and Commonwealth  
Compensation and Employment Law Committee, Federal  
Litigation Section, Law Council of Australia***

**7 May 2013**

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1. This submission provides comment on:
    - the *Safety, Rehabilitation and Compensation Act 1988 Review Report* ('*Review Report*')<sup>1</sup> and the
    - *Review of the Performance, Governance and Financial Framework of the Comcare Scheme* ('*Hawke Report*')<sup>2</sup>
  2. It has been prepared for the Law Council of Australia by the Personal Injuries and Compensation Committee of the Legal Practice Section, and the Commonwealth Compensation and Employment Law Committee of the Federal Litigation Section.
  3. The Law Council welcomes the opportunity to supplement the comments made orally by Section representatives during the consultation meeting in Canberra on 23 April 2013.

## Introduction

4. There is much to commend in the *Review Report* recommendations. The Law Council applauds the Minister's stated aim to 'create a best practice compensation scheme in the Commonwealth jurisdiction.'<sup>3</sup>
5. This submission focuses on those recommendations in relation to which the Law Council has some concerns.
6. Regrettably, the structure of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (SRC Act) means that it cannot be best practice. Since the 1980s, industry experience demonstrates that 'long-tail' schemes inevitably lead to an accumulation of long term liability that threatens the viability of the scheme itself. The worst performing workers' compensation scheme, in South Australia, is a long-tail scheme. The NSW workers compensation scheme has also had a reduction in commutations, producing a drastic curtailing of benefits.
7. The history of amendments to the SRC Act, since its inception, has been one in which each new series of reforms has sought to reduce eligibility and entitlement, whether through tightening definitions or by introducing a more restricted Permanent Impairment Guide.
8. A best practice scheme would have eligibility to long term benefits, but 'safety valves' to reduce its long term liability and administrative costs. This means not only redemptions, but access to common law. It is the Law Council's view that a properly managed common law regime can produce both long term savings and a more just outcome for workers injured in negligent circumstances. Unless such an approach is adopted, the Law Council fears it may be making submissions to the next review of the Act which will seek to further restrict entitlements.

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<sup>1</sup> P Hanks QC, *Safety, Rehabilitation and Compensation Act Review Report* (Australian Government 2013) <[http://foi.deewr.gov.au/system/files/doc/other/src\\_act\\_review\\_report.pdf](http://foi.deewr.gov.au/system/files/doc/other/src_act_review_report.pdf)>

<sup>2</sup> Dr A Hawke AC, *Review of the Performance, Governance and Financial Framework of the Comcare Scheme* (Australian Government 2013) <<http://deewr.gov.au/safety-rehabilitation-and-compensation-act-review-0>>

<sup>3</sup> The Hon Bill Shorten MP, 'Next steps in modernising Federal Workers' Compensation Scheme' *Media Release* Thursday 30 March 2013 <<http://www.ministers.deewr.gov.au/shorten/government-plan-make-comcare-best-practice-model>>

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## The structure of the Act

9. The Law Council agrees, in principle, with Recommendation 3.3:

*... that the SRC Act be re-designed with a more rational structure that reflects the priority to be given to rehabilitation, follows the typical course of a claim and then deals with structural aspects – or scheme governance.*

10. However the proposed structure, as outlined at p27 of the report, does not follow the typical course of a claim, as Part 4–Compensation should come before Part 3–Rehabilitation, in such a scheme.
11. Such a change does not reduce the emphasis on rehabilitation. It simply notes that time off (incapacity) and medical treatment, predate the need for rehabilitation.

## The Hawke Report recommendations

12. The recommendations in the *Hawke Report*, which form part of the *Review Report*, are largely of an administrative, mechanisms-of-government nature. The two following recommendations in the *Hawke Report* are of concern:

*Recommendation 4.6*

*I recommend that a new paragraph be inserted in s104(2), immediately after s104(2)(d), as follows:*

*(e) the applicant is a national employer.*

*I recommend that the term ‘national employer’ be defined in simple and direct terms, with the content of that definition a Government policy decision.*

13. The Law Council agrees that the competition test (s100 of the SRC Act) is somewhat artificial. Nevertheless, the adoption of a ‘national employer’ test has the potential to significantly affect state/territory based schemes.
14. The Law Council does not support this new test without consultation with the heads of other workers compensation schemes and the provision of an analysis of actuarial data of the effects such a change would have on the schemes.

*Recommendation 4.7*

*I recommend that the declaration of premium payers as determining authorities be considered as part of a legislative package together with the proposed reforms to the financial and regulatory framework of the SRC and Comcare.*

15. In its other recommendations (for example, 9.10), the *Review Report* is concerned with inconsistent decision making involving Comcare and the licensees.
16. The Law Council is concerned that allowing departments to become determinative authorities, should they wish to do so, may produce greater inconsistency as well as duplication.
17. The Law Council is concerned that a department is not necessarily in the best position to consider injuries within its own department, and may be almost in a conflict of interest when dealing with a compensation claim if it involves, for example, an admission that its administrative actions were anything but ‘reasonable’.

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18. The Law Council does not support such an approach, which would encourage inconsistency, and because it lacks objectivity.

## Eligibility for compensation

### *Recommendation 5.2*

*I recommend that the effect of the Federal Court's judgment in Wiegand v Comcare should be negated so that an employee's perception of a state of affairs will only provide a connection with employment where that perception has reasonable basis.*

19. The Law Council respectfully disagrees with the analysis of the *Wiegand v Comcare* decision at recommendation 5.2 and paragraph 5.64 (p.44) of the *Review Report*. The decision requires that there be some basis of reality of events in creating the injured employee's perception.
20. People perceive events in different ways and the *Wiegand* approach properly reflects the 'egg shell skull' principle. It is how the particular employee was affected by events not how a 'reasonable person' might have been affected in the same circumstances. The Law Council is opposed to an amendment of the *Wiegand* approach.

### *Recommendation 5.3*

*I recommend that the SRC Act be amended so that incidents that are a manifestation of an underlying disease (such as heart attacks, strokes, spinal disc ruptures caused by degenerative disease and similar phenomena) will be covered for workers compensation purposes on the same basis as a 'disease' – that is, where the incident was contributed to, to a significant degree, by the employee's employment.*

21. The Law Council agrees in principle with the approach in Recommendation 5.3 of the *Review Report*.
22. The Law Council's preference is approach (c) outlined in paragraph 5.70 (p.45) of the report. A more generalised approach as recommended by the Review might unintentionally capture injuries and lead to increased disputation regarding the significance of underlying elements to the development of that injury.

### *Recommendation 5.4*

*I recommend that DEEWR and DVA examine whether there is merit in allowing claims by ADF members under Part XI of the SRC Act to be determined by reference to the SoP regime.*

23. The Law Council does not share the enthusiasm of the Department of Veteran Affairs for establishing a Statement of Principles (SoP) regime. In our experience this has produced an overly bureaucratic and technical decision-making process.

### *Recommendation 5.5*

*I recommend that the SRC Act be amended so that the reasonable administrative action exclusion in s 5A(1) operates only where the reasonable administrative action taken in a reasonable manner in respect of the employee's employment has contributed, to a significant degree, to the disease, injury or aggravation.*

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24. The Law Council believes that Recommendation 5.5 is an important starting point. However our preference is for the test to be that the reasonable administration action is the dominant or the main contributing factor, similar to the *Workers Compensation Act 1958* (Vic).
25. The Law Council considers it would be an unfair outcome if the vast majority of the causes of a psychological injury were other work factors, but that a 'reasonable administrative action', as a more minor cause, would effectively operate to exclude entitlement.

## Rehabilitation

### *Recommendation 6.1*

*I recommend that the SRC Act explicitly provide for early intervention as the primary form of rehabilitation, recognised in the injury management and rehabilitation code of practice proposed in Recommendation 6.9.*

26. The Law Council strongly supports the recommendations concerning early intervention and rehabilitation:

### *Recommendation 6.8*

*I recommend that the SRC Act be amended to provide Comcare with an ultimate power to commence and/or take over rehabilitation when the liable employer fails to meet its obligations or ceases to exist.*

27. The Law Council also strongly supports the recommendation that Comcare has the power to commence or take over rehabilitation as this has been a gap in the rehabilitation system under the Act:

### *Recommendation 6.13*

*I recommend that s 36 of the SRC Act be repealed.*

28. Although the Law Council agrees that under the proposed regime the existing s36 of the SRC Act is probably redundant, it had an important role in allowing an employee to request rehabilitation assessment.
29. The Law Council believes it is important that an employee has the capacity to request rehabilitation to seek to initiate a rehabilitation program and this should be reproduced in the substitute provisions.

### *Recommendation 6.18*

*I recommend that the SRC Act be amended to provide for the establishment of a scheme-wide job placement program appropriate to the unique attributes of the Comcare scheme, including a preference for placement with another scheme employer before looking outside the scheme.*

30. The Law Council is of the view that the standard rehabilitation model, namely that the first priority is to return a worker to the 'same duties, same employer' does not work well in the context of psychological injuries and such a scheme may well assist in returning injured employees to work.

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## Compensation for injuries and diseases

### *Recommendation 7.1*

*I recommend that the concept of NWE be renamed ‘average remuneration’, which is the average amount paid to the employee in each week of the relevant period and that ss 8(1)–(5) and (8) be replaced with a definition of ‘average remuneration’.*

31. It is important that the definition of remuneration in the SRC Act is clearer as to what is and what is not included in normal weekly earnings (NWE).
32. The Law Council is concerned is that the term ‘remuneration’ has been judicially defined as including superannuation.<sup>4</sup>

### *Recommendation 7.3*

*I recommend that the SRC Act be amended to provide for the annual indexation of an employee’s average remuneration subject to any changes that the determining authority makes on the basis of information provided by the employee or employer (or otherwise obtained by the determining authority).*

33. The Law Council’s preference is for the existing approach under s8, namely that wages for ongoing employees are indexed or otherwise increased by the certified agreement or award whilst those who are no longer employed should have any increase indexed to the Wage Price Index on the basis that this is relatively simple and is likely to reduce disputation by either employers or employees claiming this does not fairly reflect the situation.

### *Recommendation 7.5*

*I recommend that ss 20, 21 and 21A be repealed in their entirety. If those sections are repealed, ss 114A and 114B will no longer be relevant and should also be repealed.*

34. The Law Council strongly supports this approach and regards Recommendations 7.6-7.8 as very much a second best option.

### *Recommendation 7.13*

*I recommend that weekly compensation be paid at 100% of an employee’s NWE during the first 13 weeks of the employee’s incapacity work, at 90% of the employee’s NWE during weeks 14-26 of incapacity for work and thereafter at 80% of the employee’s NWE while the employee remains incapacitated for work.*

35. There is no justification for the Commonwealth to join a ‘rush to the bottom’ approach to entitlements and the Law Council recommends 100% NWE for the first 26 weeks followed by a step down of 90% for the weeks 24 to 45 before the entitlement of 80% is commenced.

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<sup>4</sup> *Kallouf v Middis* [2008] NSWCA 61; *Smith v Hastings Deering (Australia) Ltd* [2003] NTMC 029; *Condon v G James Extrusion Company*, 4 April 1997, 313/97 Print N9963

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36. Employees under the Commonwealth schemes of compensation have been entitled to a minimum of 26 weeks on full compensation since 1971. All but two jurisdictions provide for incapacity payments at this level for at least 26 weeks.
37. The material cited in the *Review Report* (particularly paragraphs 7.1 and 7.6) does not suggest that employees are abusing the period or that it is in any way discouraging return to work.
38. The average return to work time with respect of broken bones is 4.1 months which takes it to 13 weeks and this could place undue pressure to return to work before medically recommended, which could lead to less than optimal recovery (and thus long-term problems), as well as unfairness.

*Recommendation 7.18*

*I recommend that the SRC Act be amended so that an employee may redeem her or his compensation payments on a voluntary basis.*

39. The Law Council strongly supports this approach but says the ‘cap’ at three years is too limited and will make such an alternative unattractive to employees.
40. In most systems where redemption of payments is available, the period of time is a matter of negotiation between the parties on the basis that redemption is not possible without the agreement of both parties.
41. In the alternative, a cap of say ten years may be an appropriate mark whilst allowing the parties to negotiate what is reasonable in the circumstances.
42. The Law Council supports the safeguards proposed in relation to the redemption of entitlements.

*Recommendation 7.25*

*I recommend that the definition of medical treatment’ in s 4(1) of the SRC Act be amended so that ‘medicines’ will be limited to those prescribed by a legally qualified medical practitioner or dentist and dispensed by a registered pharmacist, or provided to a patient at a hospital or resident in a nursing home.*

43. The Law Council is concerned that the definition inadvertently excludes ‘over the counter’ medication.

*Recommendation 7.26*

*I recommend that the SRC Act be amended to restrict compensation for Schedule 8 medications to those that are prescribed by the employee’s nominated qualified medical practitioner.*

*I further recommend that Division 1 or Part II of the SRC Act be amended to allow Comcare to prescribe a form in which an employee would nominate a legally qualified medical practitioner for the purpose of prescribing Schedule 8 medications.*

44. The Law Council agrees with this approach but believes that the claimant should be able to nominate one or more medical practitioners authorised to prescribe.

*Recommendation 7.32*

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*I recommend that a new term, 'severe injury', be defined in s 4(1) of the SRC Act.*

*Recommendation 7.33*

*I recommend that s 29 of the SRC Act be repealed and a new legislative model based on a tiered system of services and support provided in the home be implemented. The new model would provide for compensation for three types of services provided in the home:*

*(a) household services, payable for three years from the date of injury;*

*(b) post-acute care services, payable for three years from the date of injury and for six months after the specific events; and*

*(c) ongoing household and attendant care services for the severely injured.*

*Recommendation 7.34*

*I recommend that the amount payable for ongoing care services for the severely injured be capped at a maximum of 40 hours per week, up to a maximum cost of \$1,700 (indexed).*

45. The Law Council agrees that it is reasonable for household services and attendant care to be reviewed periodically and a more critical scrutiny placed on its provision but the Law Council does not support the proposed regime in this series of recommendations.
46. The definition of 'severe injury' is too limited and does not include, for example, psychological injuries that require such care.
47. The test does not take into account the injury circumstances of the employee and, the amount of non-paid, family assistance that may be available to them. This will vary and is a factor in assessing the reasonableness of household and attendant care services.
48. The Law Council is of the view that the problem has been the lack of regular review of these services rather than the model of delivery itself and the cut off point of three years seems arbitrary and without merit.
49. The Law Council has no issue with there being a cap for the hours per week or maximum cost as recommended in 7.34.

## **Compensation for permanent impairment**

*Recommendation 8.1*

*I recommend that Comcare adopt the proposed National Guide as the Approved Guide, and the proposed permanent impairment assessor document.*

50. The Law Council has been advocating a National Guide for the assessment of permanent impairment for some time and supports this proposal in principle.
51. We note that this guide has been developed without any public consultation and the Law Council has not seen it.

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*Recommendation 8.4*

*I recommend that the maximum benefit payable for permanent impairment (being the combined amount payable pursuant to s 24 and s 27) be the same amount as the lump sum compensation payable pursuant to s 17 for a death that results from an injury, with the maximum s 24 payment being 72.72% of the death benefit and the maximum s 27 payment being 27.27% of the death benefit.*

52. It is not clear how these figures were derived but the maximum payment for s24 should be 72.73% of the death benefit so that there is a total of 100% under s24 and s27.

*Recommendation 8.5*

*I recommend that an algorithmic model be introduced for calculating permanent impairment compensation, consistent with the model outlined in Figure 5.*

53. The Law Council is opposed to the adoption of an algorithmic method for the calculation of permanent impairment compensation.
54. Injuries attracting a 42% permanent impairment are few and far between and the effect of the algorithmic method is to reduce the differences in entitlements at a lower level.
55. The permanent impairment tables indicate a significant difference between impairments of 10% and 20% in most instances and a linear model more properly reflects those differences.
56. The Law Council believes that the model provides great equity between injured employees and is a simpler, preferable model.

## **Claim determination, reconsideration and review**

*Recommendation 9.10*

*I recommend that all determining authorities:*

*Be prohibited from making submissions against the wishes of Comcare;*

*Be obliged to advise Comcare of any proceedings brought against them; and*

*Upon request by Comcare, provide Comcare with any documents relating to those proceedings.*

57. The Law Council is of the view that there may be circumstances in which it is appropriate for a determining authority to make submissions against the wishes of Comcare.
58. The Law Council is of the view that there ought to be a process established to adjudicate what should occur in the circumstances.

*Recommendation 9.11*

*I recommend that Comcare apply to the Attorney-General for permission to settle cases involving Comcare as a determining authority in the AAT on a*

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*limited commercial basis, by the payment of an applicant's legal costs, without an admission of liability.*

59. The Law Council agrees with this approach but suggests that it can be done on a limited commercial basis such as the payment of the applicant's legal costs in order to give some greater flexibility to the resolution of matters, particularly in circumstances where the applicant is self-represented.

*Recommendation 9.15*

*I recommend that immediate consideration be given to defining a jurisdiction for the Fair Work Commission to review reviewable decision under the SRC Act that involve workplace issues, with a view to transferring that part of the AAT's review jurisdiction under the SRC Act to the Fair Work Commission and defining the relationship between Fair Work Commission's review jurisdiction and the AAT's review jurisdiction under the SRC Act.*

60. Although there is much to be commended about the use of Fair Work Australia Commissioner's expertise in employment related matters, this is overridden by the simplicity of insuring that the Administrative Appeals Tribunal remains a 'one stop shop'.
61. It may be possible to utilise such Commissioners to the Administrative Appeals Tribunal to assist in such matters but the Law Council's preference is for the AAT to retain sole jurisdiction in respect of disputes under the SRC Act.

## **Common law**

62. The Law Council agrees with the advantages of providing access to the common law as set out in the *Review Report* (paragraphs 10.18–10.22), but is of the view that the *Review Report* overstates the disadvantages associated with access to common law damages.
63. In respect of paragraph 10.12, there is no evidence that pursuing common law damages undermines early intervention, and return to work.<sup>5</sup>
64. In respect of paragraph 10.13, in many jurisdictions there are means for reducing or capping legal costs.
65. In respect of paragraph 10.14, this is rarely true in respect of injured employees who are continuing to receive workers compensation payments.
66. The Law Council agrees that the matters noted in paragraph 10.15 may be possible, although it submits that the benefit of resolving a claim once and for all outweighs this uncertainty.
67. The Law Council takes issue with paragraph 10.17, particularly that the costs of common law is likely to lead to increased costs.
68. The fact that Queensland has the lowest workers compensation premiums and has more than adequate reserves, but has full common law rights, demonstrates the benefits to the scheme in terms of preserving common law entitlements.

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<sup>5</sup> See for example Natalie M Spearing and Luke B Connolly, 'Whiplash and the Compensation Hypothesis' (2011) 36(25S) *Spine* S303–S308 <[http://www.acerh.edu.au/publications/Spearing\\_Spine\\_2011.pdf](http://www.acerh.edu.au/publications/Spearing_Spine_2011.pdf)>

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69. The Law Council accepts that there are strong views both for and against common law entitlements within the workers compensation authorities in different jurisdictions.
  70. The Law Council submits a compromise approach is to remove the preclusion from the common law entirely, but that common law entitlements (or lack thereof) would be determined by jurisdiction, with the Commonwealth adopting the national place of employment test.
  71. In this way, workers in the Australian Capital Territory, whether in the public or private sector, would enjoy the same rights to common law entitlements in the same way that public or private sector workers in South Australia do not.

## **Other issues**

72. The report recommends the establishment of offences attracting penalty provisions (for example Recommendation 9.18).
73. The Law Council does not oppose this initiative but takes issue that these should be strict liability offences.
74. Although it is not clear what defences might be raised, there are circumstances that might justify the failures of the injured worker, and workers ought not to be deprived of such a defence.

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## **Attachment A: Profile of the Law Council of Australia**

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The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the Constituent Bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2013 Executive are:

- Mr Joe Catanzariti, President
- Mr Michael Colbran QC, President-Elect
- Mr Duncan McConnel, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Ms Leanne Topfer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.