Community and Public Sector Union

Lisa Newman - CPSU Deputy National President

30 May 2014

Committee Secretary
Sentate Education and Employment Committees
PO Box 6100 Parliament House
Canberra ACT 2600

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Dear Committee Secretariat,

Re: Safety, Rehabilitation and Compensation Amendment Bill 2014

On May 15 2014, the Senate Referred the Safety, Rehabilitation and Compensation Amendment Bill 2014 to the Senate Education and Employment Legislation Committee for inquiry and report. Please find attached the CPSU submission to the aforementioned committee for your consideration.

It is the view of the CPSU that the changes outlined in this Bill will not only reduce entitlements for those already in the scheme, but enable many employers to move into a workers' compensation scheme which provides on balance, lower entitlements to injured workers than currently provided in other schemes.

The Explanatory Memorandum to the Bill focuses almost exclusively on the potential benefits of the amendments to employers. Indeed whilst there is extensive commentary on the removal of regulatory burden and potential for cost reduction for employers, there is little to no focus on the Bill's impact on employees.

Changing the system to restrict compensation or add significant additional hurdles is not consistent with the fundamental principle underpinning the existence of workers' compensation – that is, to protect injured workers and assist them in returning to work.

As such, the CPSU is opposed to the changes proposed in the Bill.

I look forward to the results of the Committee's inquiry.

Yours sincerely

Lisa Newman
Deputy National President
Community and Public Sector Union

CPSU (PSU) Submission to the Senate Standing Committee on Education and Employment Inquiry into the *Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014*

May 2014

About the CPSU

The PSU Group of the Community and Public Sector Union (CPSU) is an active and progressive union with approximately 55,000 members. The CPSU represents employees in Commonwealth government employment including the Australian Public Service (APS), the ACT Public Service, the Northern Territory Public Service, CSIRO, the telecommunications sector, call centres, employment services and broadcasting.

As the principal union representing APS and federal public sector employees, the CPSU is extremely concerned about the impact of the proposed changes to the *Safety, Rehabilitation and Compensation Act 1988* and *Work Health and Safety Act 2011* and welcomes the opportunity to provide a submission.

The CPSU notes the ACTU is making a submission to this Inquiry. The CPSU supports and endorses that submission.

Background

The Bill proposes a range of amendments to the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act) and *Work Health and Safety Act 2011* (WHS Act). Significantly, this includes:

- removing coverage for injuries sustained on recess breaks away from an employer's premises;
- excluding coverage for injuries that lead to death or permanent incapacity that are self-inflicted or arise as a result of serious and wilful misconduct; and
- expanding the coverage of the federal workers' compensation scheme, including by lifting the moratorium on new entrants to the schemes.

The CPSU is opposed to the changes proposed by the Bill.

The Explanatory Memorandum to the Bill focuses almost exclusively on the potential benefits of the amendments to employers. Indeed whilst there is extensive commentary on the removal of regulatory burden and potential for cost reduction for employers, there is little to no focus on the Bill's impact on employees.

The current system is not broken or mired in 'red tape'. One or two salacious cases do not make it so. Indeed, where these workers have claimed compensation, the circumstances of which there has been much public discussion, higher courts have rejected such claims.

It is the view of the CPSU that the changes outlined in this Bill will not only reduce entitlements for those already in the scheme, but enable many employers to move into a workers' compensation scheme which provides on balance, lower entitlements to injured workers than currently provided in other schemes.

Changing the system to restrict compensation or add significant additional hurdles is not consistent with the fundamental principle underpinning the existence of workers' compensation – that is, to protect injured workers and assist them in returning to work.

Removal of coverage for injuries that occur during recess breaks away from an employer's premises

The Bill proposes to remove coverage for injuries that occur during recess breaks away from an employer's premises.

The proposed change would result in different coverage for workers depending on whether they leave the employers premises during their break or not. This will lead to a situation where employees who don't bring their lunch or otherwise happen to venture outside during their break have different treatment than those who remain on their employer's premises at all times.

This is not an amendment that is supported by independent reviews of the legislation. A wide-ranging review of the federal legislation, the 2013 Safety, Rehabilitation and Compensation Act Review Report prepared by Peter Hanks QC (Hanks Report), did not recommend this change to recess coverage.

Regrettably there have been incidents where employees have been injured while on breaks as a direct result of their employment – for example CPSU members working in service roles for the Department of Human Services, and elsewhere as court officers have reported being abused or attacked while on breaks. Any injury resulting in these circumstances must be compensable.

Data on the number of workers injured during recess breaks and the types of injury is not easily available. In 2008, the CPSU conducted two surveys of Centrelink members. The report[1] found that of 330 CPSU members, fifty nine reported that they had a threatening experience involving a customer on their way to or from work. The most commonly reported threatening experience involved being followed or approached by a Centrelink customer (59.3%).

Members were asked to describe the threatening behaviour. Thirty five members said they had been followed or approached by a customer. Nine of these members reported that they had been physically assaulted on their way to/from work by a Centrelink customer and three reported being spat at or having had something thrown at them.

Where members lived near their work, particularly in non-metropolitan locations, there were reports of customers approaching them outside work with inquiries about their benefits. In one instance, a Centrelink client approached a member in her own backyard asking for advice. Another member reported having inappropriate calls from a customer at home.

Other experiences included being verbally abused and intimidated by customers in the street, at restaurants and while shopping. For example, one member reported that a particular customer knew what time she left the office and ran at her from across the road to intimidate her. Another member described a situation where a customer approached her in the supermarket, verbally abused her and demanded she pay for the customer's groceries. In another incident in a supermarket a customer ran a trolley at a CPSU member while the customer's child was sitting in the trolley. Yet another member described being followed to her car by a Centrelink customer who made comments of a sexual nature to her.

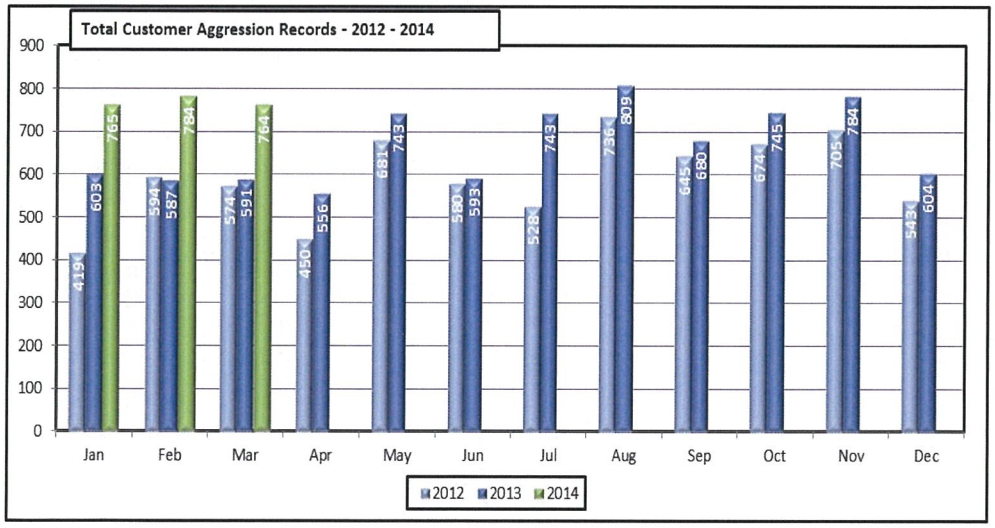
[1] CPSU (2008) Report: Customer Aggression at Centrelink, September.

Some members told of very serious instances of physical assault and attempted assault. One reported that a customer recognised him in the local pub. The customer was drunk and tried to pick a fight. Another member was bashed by a customer in a pub and also reported that he had been assaulted by a customer on the way home from work. One member was recognised by a client outside work who approached him and bit part of his ear off. Another had a customer approach him outside work and put him in a headlock. The customer scratched his face and injured his back and neck. The member stated that he no longer feels safe walking the streets.

In May 2014, a CPSU survey of more than 5,000 APS employees revealed that recent cuts have led to reduced services, chronic understaffing, longer waiting times and frustration for members of the public. 46 per cent reported increased customer frustration and aggression. Specific results from the Human Services Department (DHS) were even starker, with 80 per cent of DHS respondents reporting increased waiting times and 78 per cent reporting increased customer aggression[2].

While there is no Departmental data available to show the number of incidents of customer aggression that occurred outside the workplace, internal data from the Department of Human Services confirms the increasing extent of customer aggression to which staff are exposed (Table 1).

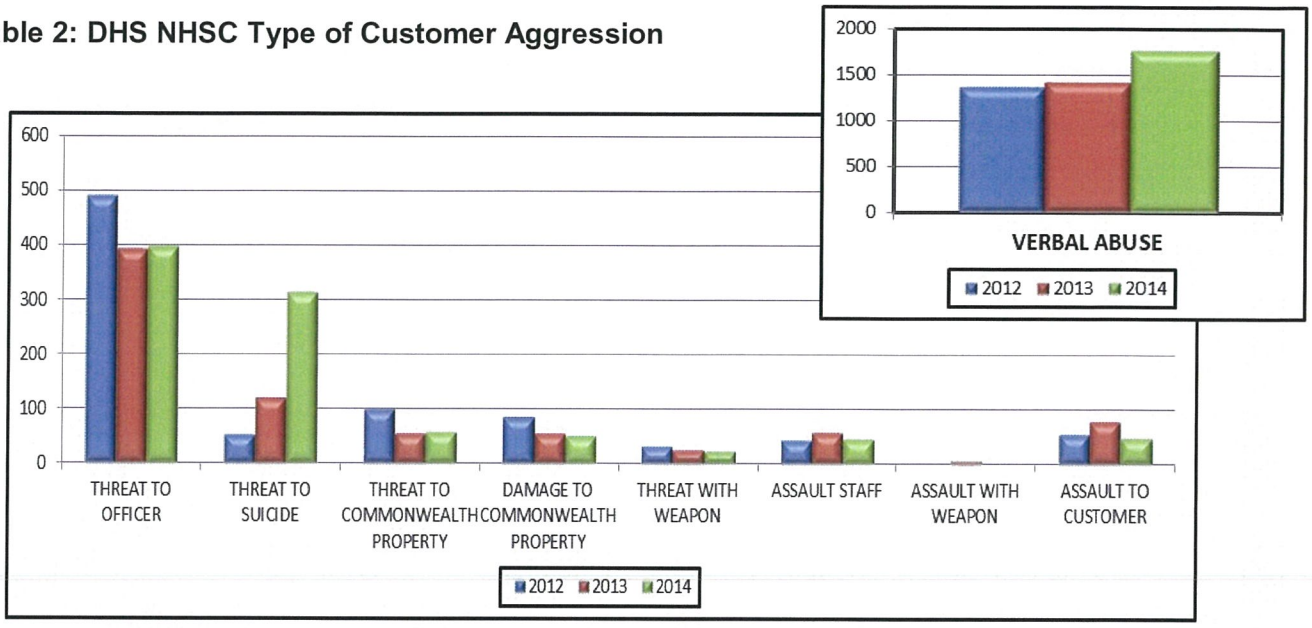
Table 1: DHS NHSC Customer Aggression Report: Number of reports



[2] CPSU (2014) *Public Service Running on Empty* http://www.cpsu.org.au/content/public-service-running-empty accessed 23 May.

Table 2 below shows the forms of aggression to which DHS staff are exposed.

Table 2: DHS NHSC Type of Customer Aggression



Reflecting the above data, in May 2014, the Herald Sun noted that there were 6,649 incidents reported across all DHS areas from January to October 2013. According to internal documents provided to the Herald Sun, police were called 760 times and 301 cases, such as threatened or actual assaults with weapons, were logged[3].

It is of significant concern that this Bill potentially limits workers' compensation coverage for employees who face these kinds of attacks - if it occurs outside the workplace during a recess break or even when the employee is at home. These types of injuries, whether they happen in the workplace or outside it, must not be excluded from workers' compensation.

Definition of workplace

It is clear that issues around the parameters of one's workplace will be pivotal in determining workers compensation coverage.

Certainly, in many workplaces, employees are required to leave their workplace during breaks in order to get food or run basic errands. Is the workplace for a Customs worker at Sydney International Airport restricted to the Customs designated areas, or the whole of Sydney Airport. If their workplace is defined as the Customs designated areas, given the very nature of their workplace they would be required to leaving during breaks, for example to get food. Another example is the lack of facilities in the Parliamentary Triangle in Canberra. This means that many workers leave the area during breaks.

[3] Collier Karen (2014) 'Clampdown on aggressive behaviour by Centrelink and Child Support clients' http://www.heraldsun.com.au/news/victoria/clampdown-on-aggressive-behaviour-by-centrelink-and-child-support-clients/story-fni0fit3-1226896361559 accessed 23 May.

Definition of recess

The definition of recess is also likely to lead to uncertainty and litigation.

In some cases, work directions given by an employer might change in the course of the working day. For example, a case worker, travelling on the road visiting clients may well need to change their recess period when an appointment time changes or a client is not available. In this case, how is the workplace defined, and how is the recess period defined? In some industries, meal breaks are taken as part of paid work time – how is an injury occurring under these circumstances to be treated?

Paid meal break or not, the unfortunate reality for many is that, during the working day, the connection with work is never truly broken – even when the employee does leave the premises of their employer. For example, under the proposed changes, how would a circumstance be treated where an employee leaves the workplace to buy their lunch, but continues to work by answering emails on mobile devices, catching up on messages left on their mobile phone or even discussing work matters with a colleague?

While not contemplated by the current changes to the Bill, as well as breaks during formal work time, employees are increasingly responding to work issues outside of work time. This type of contact outside of work hours further blurs the distinction between work and non-work time. The CPSU conducts a regular survey[4], garnering more than 10,000 responses, which asks women about contact outside of work hours. Two in five (40.8%) women reported that they were contacted outside of work hours. This has been consistent over the last five years. Women were also asked whether they were *required* to be contactable outside of work hours. While 9.5 per cent said that it was a formal requirement of their job to be available for contact outside of work hours, the overwhelming majority of women (88.8%), responded to contact outside of work hours regardless of whether a requirement of their job or not, and this level of responses has been increasing over time. This suggests that there is an increasing blurring between work and non-work time and suggests that the complexity around determining liability for a work-related injury may well increase.

Employer sanctioned recess activities

In many cases, employers encourage employees to leave the workplace during breaks, even sponsoring sporting activities to assist in health and wellbeing. More detail is needed around how an injury that occurs during employer sanctioned activity would be treated.

Potential for alternative coverage

Employers may well argue, as they did with the abolition of journey coverage, that some recess injuries would be covered by motor vehicle third party insurance. However, motor vehicle injury is less likely to be relevant to recess breaks and as noted in the Hanks' report 'of course, that may not assist employees travelling … by other means (for example, walking or cycling), unless the injury results from interaction with a car, bus, tram or train'[5].

[4] CPSU What Women Want 2013/14 Survey Report, p.33.
[5] DEEWR (2013) Safety, Rehabilitation and Compensation Ac t Review, Report. Report prepared by Peter Hanks QC, February, p.44.

Limited saving for employers, but huge cost for affected employees

The Explanatory Memorandum to the Bill outlines the potential cost savings of reinstating recess coverage as approximately $1.7 million as at 2010/2011 for Comcare, and a further $0.85 million for licensees. Whilst the savings to employers in limiting this coverage are relatively modest, there would be significant costs for those employees injured in these circumstances.

Public Service Act obligations extend beyond the workplace

Finally, it is notable that the *Public Service Act* was amended in 2013 to provide a broader connection between the Code of Conduct and conduct occurring outside of the workplace. Those amendments allow an APS agency to take action against an employee for certain conduct that is in connection with their employment, even though it occurs outside the workplace and outside of working hours.

The effect of the amendments proposed by this Bill would be that an employee could be subject to disciplinary conduct for incidences occurring outside of the workplace, but if an injury was sustained they may not be entitled to workers' compensation coverage. This contradictory position sets an unfair double standard.

Exclusion of coverage for certain serious injuries that lead to death or permanent incapacity

At present, the Act excludes compensation for an injury that is intentionally self-inflicted or an injury that is caused by the serious and wilful misconduct of the employee but is not intentionally self-inflicted, *unless the injury results in the death, or serious and permanent impairment*[6]. The Hanks Report notes that these provisions are working satisfactorily and consequently does not recommend any changes to them[7].

The Bill proposes to remove this exclusion, thereby removing the entitlement to compensation for injuries resulting in permanent impairment or death where the injury is self-inflicted or arises from serious and wilful misconduct. The only rationale provided for this amendment is changes in 'community expectations on relevance and personal accountability'.

The CPSU does not accept there is a strong case for the change proposed by the Bill and submits that the change will lead to significant disadvantage to employees who face permanent incapacity and to the families of employees where an injury has led to death. The effect of this amendment would be to change the character of the scheme in these rare situations which lead to permanent incapacity or death from a no fault scheme for employees to an 'at fault' scheme. The CPSU opposes this fundamental change to the rights of injured workers.

The Explanatory Memorandum acknowledges that there will be negligible cost savings by removing the exemption. Indeed the Explanatory Memorandum concludes that the number of claims made under these provisions is minimal. However, the amendment shifts the burden from the employer onto the employee. Accordingly, it would have very significant implications in the rare instances that it is used, while not realising any significant savings.

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[6] SRC Act 2008 Part II-Compensation, Division 1-Injuries, property loss or damage, medical expenses, s14(3)

[7] DEEWR (2013) Safety, Rehabilitation and Compensation Ac t Review, Report. Report prepared by Peter Hanks QC, February, p.58.

Expanding the coverage of the federal system

The Bill seeks to expand the coverage of the federal workers' compensation system by a number of means, including:

- enabling corporations operating under two or more workers' compensation systems to apply to join the scheme – thereby lifting the moratorium on new entrants to the scheme;
- allowing former Commonwealth authorities to apply to be a self-insurer in the Comcare scheme and be granted a group licence if it meets the national employer test;
- enabling group licences to be granted to related corporations; and
- extending coverage to corporations that are licensed to self-insure.

The CPSU notes the extensive submissions of the ACTU on this issue. The CPSU supports and endorses those submissions and reiterates a number of concerns about the potential expansion of the federal scheme.

Threshold of entry to federal scheme too low

Under the proposed changes, employers who are defined as 'national employers' will be able to apply directly for a licence. The test to be a 'national employer' is too low. It simply requires an employer to be required to meet workers' compensation requirements in more than one jurisdiction.

The scale of the proposed change is immense. The Explanatory Memorandum notes that there are currently 30 licensed corporations under the SRC Act. The proposed 'national employer' test would enable 1,959 large employers (each with more than 200 employees) to move into the Comcare system[8]. This does not take into account the myriad smaller business (fewer than 200 employees) also operating in two or more states who would be eligible to make application. Indeed, under such a test, should an employer wish to opt out of state/territory workers' compensation obligations that provided superior benefits to employees, it would simply need to open a front office in another state/territory with a single employee in order to meet the very low threshold to become a national employer.

The Bill will also allow entry to the scheme through group licences. This is simply a mechanism to enable small employers, who otherwise would not meet the national employer test, to opt out of contributing to the relevant premium pool of workers' compensation.

The Bill proposes to allow a former Commonwealth authority to apply to be a self-insurer in the Comcare scheme and be granted a group licence if it meets the national employer test. The CPSU is unsure which entities that were previously part of the APS could be eligible to move back into Comcare if this provision of the Bill was enacted. Entities including Telstra remain part of the Comcare scheme. Others may well be able to enter the scheme through meeting the national employer test proposed in the Bill. Regardless, more information about the impact of the amendment is required before its impact can be assessed.

[8] Explanatory Memorandum to the Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014, p.ix.

Lower standards under Comcare

The Comcare scheme was established to primarily cover workers who undertake low risk work in the Australian Public Service. It was not a scheme designed to cover other types of work – for example that done by blue collar workers in construction, manufacturing, or mining. The structure of the scheme and the funding and operation of Comcare simply does not reflect the risk profiles of this type of work. Consequently in some instances Comcare provides lower benefit levels compared to existing state and territory schemes. For example, only Western Australia and the ACT have 'lesser maximum permanent impairment benefits than Comcare'[9].

As well as lower benefits, Comcare effectively removes common law protection for injured workers. Under Comcare, common law compensation for lasting injuries caused by the negligence of an employer is by far the lowest in the country and capped at $110,000. The importance of this common law right cannot be overstated. As noted by Slater and Gordon, 'when regulators fail to protect workers from injury, the common law holds to account employers whose actions or failures have caused injury'[10].

At a very minimum, workers should not be adversely affected by any employer moving between jurisdictions in relation to workers' compensation entitlements.

Additional resourcing for Comcare

Comcare staff are dedicated to their jobs and provide effective management of issues of workers' compensation and occupational health and safety.

If the scheme is widened and many employers are granted licences, Comcare must be properly funded to ensure the safety of workers. Industry skills are incredibly important in ensuring safety and understanding the particularities of different occupations. This understanding is not gained overnight – it requires exposure to the issues.

In addition to funding for training, Comcare would also require additional funding to increase their number of inspectors.

Comcare will also need to be funded to ensure it can properly assess whether employers are assisting injured workers to return to work.

Unless this funding is provided, self-insurance will be open to abuse by employers who fail to meet return to work obligations.

The current self-insurance system is not operating effectively

Evidence suggests that the self-insurance system is not operating effectively.

Basic requirements for employers prior to seeking self-insurance have not been met. For example, in 2008, the ACTU pointed to the simple regulatory requirement for a licence applicant to provide evidence of 'consulting employees about the applicant's intention to

[9] ACTU (2009) Policy Review of Comcare's Permanent Impairment Guide, Submission of the ACTU, 24 April, p.2.
[10] Rachael James (2014) Media Alert 'Injured Workers Rights will be lost under Comcare', Slater and Gordon, 19 March.

apply for a licence'. The ACTU noted that this requirement was treated lightly, often manifesting itself 'as the mere exchange of information'[11].

It is concerning that organisations which failed at the first hurdle were still able to self insure. Should the Bill be enacted, any move by an employer into the Comcare scheme should not be able to occur until a genuine consultation process with workers and their representatives has been undertaken and agreement reached. This must include a process of public review, including public tribunal hearings.

Evidence also shows that self-insurers are more likely to take an aggressive approach to claim management. According to Comcare, in 2011/12, premium payers accepted 3,210 claims overall, and paid out $170.1 million to injured workers. Premium payers, in the same period, spent $77.8 million in legal administrative regulatory costs – less than half of what they paid out. Self insurers accepted 4,963 claims and paid out $57.9 million. It is concerning that self-insurers spent $59.2 million on legal administrative regulatory costs[12] – far more than they spent on paying claims to injured workers.

A similar story is repeated for the 2012/13 year when premium payers accepted 2,938 claims overall, and paid out $190.6 million to injured workers. Premium payers, in the same period, spent $87.7 million in legal administrative regulatory costs – again, less than half of what they paid out. Self insurers accepted 4,018 claims and paid out $71.8 million. It is concerning that self-insurers again spent huge amounts on legal administrative regulatory costs ($63.8 million)[13].

Concluding comments

The proposed amendments, if enacted, will significantly alter the workers' compensation scheme to the benefit of employers and detriment of employees. The CPSU opposes the passage of the Bill and recommends that it be withdrawn.

[11] ACTU submission to the 2008 Comcare Review, 29 February 2008.
[12] Comcare Annual Report 2012/13 p.65.
[13] Comcare Annual Report 2012/13 p.65.