

# Work Health and Safety Act Review – Public consultation

## Submissions regarding Work Health Safety Act 2011

**23 September 2022**



## Contents

<b>Who we are .....</b>	<b>4</b>
<b>Introduction .....</b>	<b>5</b>
<b>Our submission .....</b>	<b>5</b>
<b>Conclusion .....</b>	<b>8</b>

## Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.<sup>1</sup>

The ALA office is located on the land of the Gadigal of the Eora Nation.

---

<sup>1</sup>[www.lawyersalliance.com.au](http://www.lawyersalliance.com.au).

## Introduction

The ALA welcomes the opportunity to provide this submission to the Office of Industrial Relations in relation to the *Industrial Relations Act Amendment Bill* February 2022

## Our Submission

The Australian Lawyers Alliance (“ALA”) welcomes the opportunity to provide some comments in relation to the public consultation in relation to the *Work Health Safety Act 2011* (“WHS Act”).

Strong workplace health and safety laws must be backed up by strong and fearless advocacy by health and safety representatives, investigation by the Regulator and enforcement activity. Every injury, every death is a real person and behind them, their family, who are being traumatised. The financial cost to the workers’ compensation system, health system, social security system and our society broadly is literally in the billions of dollars every year.

WorkCover Queensland in financial year 2021 saw 94,502 statutory claims at a cost of \$1,299,300,000.00 (that’s \$1.299 billion). In the same period there were regrettably 64 fatality claims. The ALA strongly believes these statistics and the real human impact behind them, can be improved through more effective health and safety measures in workplaces. However, the ALA does not profess expertise in the design and implementation of such measures and looks forward to other stakeholders with deeper expertise addressing same.

The ALA’s expertise lies in the steps taken following unfortunate workplace incidents, injuries and fatalities. These submissions provide an insight into our members’ experiences dealing with the workplace health and safety system in Queensland when they are representing individuals who are injured or who have lost loved ones in workplace incidents.

### Investigation and Prosecution Delays

The investigation of workplace incidents is often taking in excess of 12 months. Such delays are incredibly traumatising to injured people and their families, or to the loved ones of those deceased. They are unable to get closure and the lengthy investigation timeframes cause recurring trauma. For businesses, lengthy investigations create substantial risks to their business, and it is the workers (the colleagues of those who are injured or killed) who are impacted most by disruptions.

Lengthy investigations risk a loss of evidence and frail human memories (if statements are not collected quickly and soon after an incident), which significantly increases the risk of a failed prosecution. Injured workers or the families of deceased workers who are pursuing workers’ compensation or other compensation entitlements are also substantially prejudiced by delays.

### Workers’ compensation and other compensation entitlements

In Queensland, a common law workers’ compensation claim can often also involve a public liability claim component (called hybrid claims). Examples of this are commonly seen in the construction and health industries where labour hire is a common practice. A worker, employed by the labour hire agency, is contracted to work on a site and is injured. That injured worker then potentially is able to pursue a workers’ compensation claim against the labour hire agency and a public liability claim against the host employer

(i.e. the owner/control of the site at which they were injured). In these cases, it is not uncommon to have 3 or more potential respondents to a claim (for example on large construction sites with a head contractor, sub-contractor and many other contractors involved). In such cases, in particular, a workplace health and safety investigation may be critical to determine the roles and responsibilities of the various entities, which then determines the type of compensation claim to be pursued and the relevant respondents to such a claim.

The relevance and importance of proper and timely workplace incident investigations is not just for hybrid claims, it is equally critical for pure workers' compensation claims involving one a single entity, the employer.

A compensation claim must be commenced within 3 years of an injury or death, otherwise the injured worker or their surviving family lose their right to seek compensation. However, it is best to commence any claim as soon as possible following an incident, to avoid the risk of loss of evidence and fading memories of those who could provide statements or other evidence.

Further, in a common law claim the injured worker or the surviving family pursuing a fatality claim must prove that the employer was negligent. Essentially this means to establish the employer or other entity failed to take reasonable precautions to avoid a foreseeable risk of injury or death.

Before commencing a claim, it is important to have a sufficient understanding of the incident and the parties involved in order for an informed decision to be made about:

1. Whether to even commence a compensation claim; and
2. If so, against whom such a claim is to be commenced and under what legislative regime.

The evidence to prove negligence is overwhelmingly not in the possession of those making the claim. In many claims, even the details of all potential respondents to a claim may not be known to a claimant. Access to relevant evidence is not easy, with the right to seek such evidence only enlivened when a claim is actually commenced. Therefore, Workplace Health and Safety investigations and prosecutions are critical piece in the decision-making process concerning compensation claims. Access to evidence gathered in investigations and prosecutions is not available until after the finalisation of same.

Thus, delays in investigations and prosecutions causes delays in injured workers or the families of deceased workers being able to make informed decisions about pursuing compensation claims. Again, the trauma of this and the need to perpetually relive the incident is highly distressing. The consequence of long delays is that claimants simply have no choice but to simply commence claims to protect a limitation period and seek to preserve evidence. Sometimes this may involve having to commence claims against multiple entities simply because it is unclear who may hold liability for an incident. Such a state of affairs is also unfair to these businesses.

It is also the overwhelming experience of ALA members that Workplace Health and Safety Officers have no understanding of workers' compensation or other compensation entitlements, rights, obligations and processes. Nor do they have a full appreciation of the impact of an injury or trauma and how this can influence the investigation.

ALA members have reported some examples:

- a. A worker, who was injured in December 2020, had no recall of the incident due to the nature of the injuries. The employer and the occupier of the premises where the worker was injured were investigated and ultimately prosecuted. Those proceedings did not finalise until mid-2022. It then took several months for to obtain the investigation file through a Right to Information application. Thus, in this case, it was only just months before the 3-year limitation period that there was

sufficient evidence for the worker to seek legal advice and make an informed decision to then pursue a compensation claim.

The ALA member representing this individual also reported that during the investigation and prosecution they were only able to obtain limited updates as to the progress of the matter. There was no proactive communication from the investigator or the prosecutor, which made providing advice to the injured worker on their rights difficult.

- b. An injured worker whose 3-year limitation period expires in January 2023, and again due to the nature of their injuries has no recollection of the incident, is still awaiting the finalisation of the workplace health and safety investigation. This injured worker will be in the unenviable and risky position of having to decide to pursue a compensation claim on incomplete information and evidence.
- c. In another instance a worker who suffered a head trauma and was suffering from post-traumatic amnesia was interviewed by Workplace Health and Safety whilst still in hospital. The worker subsequently had no recollection of even speaking with the Workplace Health and Safety Officer, nor of the contents of the interview that were recorded. The state of evidence collected in such circumstances could seriously prejudice a prosecution and also the individual's compensation claim, given the limited reliability of taking evidence from someone in such a state.
- d. An ongoing investigation in respect of the death of a worker some 10 months ago continues to hang, like a dark cloud, over their spouse who remains unaware of why this happened. A compensation claim was determined best to be commenced, though there was limited evidence of the events leading to the incident, but such claim cannot progress further until the investigation is finalised. It is possible that there is another party, yet unknown to the claimant, who may have had some involvement in the events leading up to the death. The emotional toll of not knowing why their loved one passed is exacerbated by the financial pressure from the loss of the spouse's vital income. This has caused a financial chain reaction which can only be remedied by the surviving spouse seeking compensation for the death, but such compensation can only successfully be sought once the workplace health and safety investigation finalises.

## **RECOMMENDATIONS**

In all, the ALA recommends:

1. Timely investigation, and prosecution if founded, is critical to minimising the trauma of injury or death;
2. Proper and timely investigations can reduce compensation claims costs to WorkCover, other insurers, businesses and claimants;
3. Workplace Health and Safety investigators ought to be provided some foundational training:
  - a. About compensation claims processes, timeframes, and interaction with their investigations; and
  - b. to better understand the real-life impact, on injured workers and their families, of investigations as it relates to pursuing compensation claims;
4. The government needs to review the resourcing of Workplace Health and Safety and the Regulator to ensure that the above recommendations can be implemented; and

5. The government needs to review the resourcing of the Department of Public Prosecutions and the Courts.

## Conclusion

The Australian Lawyers Alliance (ALA) welcomes the opportunity to provide this submission to the regarding the *Industrial Relations Act Amendment Bill* February 2022. The ALA is available to provide further assistance on the issues raised in this submission, should you consider that to be useful we welcome the opportunity to discuss further at your convenience.



**Sarah Grace**

**Queensland President**

**Australian Lawyers Alliance**

