Return to Work SA Scheme

Submission to the Select Committee on the Return to Work SA Scheme

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Level 7, 321 Kent Street, Sydney NSW 2000 I GPO Box 7052, Sydney NSW 2001 I **ABN** 96 086 880 499
T +61 2 (02) 9258 7700 I **E** enquiries@lawyersalliance.com.au I **W** www.lawyersalliance.com.au
Protecting and promoting justice, freedom and the rights of the individual.

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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.[1]

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

[1] www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input into the Legislative Council's Select Committee on the Return to Work SA Scheme ('the Committee') inquiry into matters concerning the Return to Work SA scheme ('the scheme').

2. This is a statutory scheme which has undergone a disproportionate amount of change in recent times. The motivation for such amendments, which all appear to have been instigated by the South Australian Labor Party, have in the ALA's view been at best unnecessary and at worst regressive.

3. The scheme in this jurisdiction was historically coined to compensate injured workers in circumstances where they are unable to work as a consequence of injuries sustained in the course of their employment. That is no longer the case. An injured worker, by virtue of the operation of the *Return to Work Act 2014* (SA) ('the Act') is only compensated for a maximum period of three years, the third year being an entitlement to reasonable medical expenses only. The ALA contends that it is manifestly unfair to those who have no capacity to return to pre-injury duties, or at all.

4. All of the members of the ALA are committed to the well-being of injured workers. Almost without exception, those who require our services as a result of accident or injury are not able to effect a miraculous recovery and return to work just because of an arbitrary time frame imposed by legislative change in 2014.

5. Those who are the worst of the worst are supposed to be supported as seriously injured workers and even that has been wound back by the recently introduced *Return to Work (Scheme Sustainability) Amendment Act 2022* (SA) ('the 2022 Act'). The ALA contends that this 2022 Act was clandestine in the sense that there was almost no consultation with stakeholders, not the least of whom are injured workers and the people who represent them.

6. In the ALA's view, the outcome of such hastily implemented changes will be more litigation in the South Australian Employment Tribunal, rather than less. Surely this means greater costs to the scheme in the final analysis.

7. Invariably this also means that more injured workers will experience higher instances of unjust outcomes, less access to procedural fairness, less access to affordable legal advice and representation, and ultimately poorer outcomes from the legal system. It appears that the

only parties with an interest in the scheme experiencing greater "sustainability" are the ones who can and should be supporting the people they employ.

8. When this scheme does not or cannot achieve its objectives, the inevitable outcome is that injured workers are simply shifted to alternative means of financial support such as Centrelink benefits.

The application of the *Return to Work Act* 2014

9. The *Return to Work Act 2014* (SA) is the newest manifestation of the statutory scheme in this State. Its predecessor, the *Workers Rehabilitation and Compensation Act 1986* (SA) was perhaps more aptly named. The ALA contends it is problematic that a new title was applied which seems very intentionally designed to change the focus of a no-fault insurance scheme that is intended to compensate individuals injured at work.

10. The ALA strongly believes that this is an Act that should be focused not only on return to work. There are far too many examples where the focus is on a return to work and where that is not achievable, or at least not to the pre-injury work or workplace. This has the undesirable consequence that injured workers feel bullied, misunderstood, anxious and unsupported by the very teams who are supposed to be facilitating appropriate solutions. This can result in re-injury and/or the development of further injury. It is very common for an injured worker who is not ready to return to his or her employment to find themselves psychologically impaired.

11. The Act is, by and large, applied by insurers. This is inherently flawed. Largely because it is a very complex piece of legislation, lawyers and members of the judiciary must spend an inordinate amount of time dissecting and interpreting. The "claims managers", "eligibility officers", "supporting independence specialists", "liability specialists", "WPI claims specialists", "team coordinators", "technical specialists", "impairment benefit specialists" and "medical and treatment team" are not qualified or trained sufficiently to apply the nuances of the Act.

12. There appears not to be sufficient guidance from Return to Work SA. There are, therefore, often nonsensical or commercially unsound decisions. These result in disputes with unknown cost implications for the scheme.

13. The recent changes have done nothing but compound the complex nature of the scheme. It has also placed a greater responsibility on those who act for injured workers to inform and advise about the changes.

The management and administration of the scheme

14. The ALA is aware of a great many people who work in this area and who are frustrated by the inconsistencies with the management and administration of the scheme. In particular, the contradiction between a scheme that purports to be focussed on return to work but which relies on an ineffective mechanism to do so – that is, section 18 of the Act.

15. Section 18, while intended to place some responsibility on employers to assist workers injured while at work, appears to operate in the opposite way. An employer, no matter the size or the profitability, will simply deny that there is suitable work available. A worker can then apply to the Tribunal to force the issue but not until one month after putting the employer on notice. In most instances, this scenario leaves workers with no choice but to find other work.

16. In other words, the employer is in the position of power and can maintain its position until the worker has to give up. They either cannot afford to continue the disputation without income and such disputation will rarely assist in the maintenance of the employer relationship.

The approach of self-insured employers to management of the scheme

17. Self-insurers have a number of benefits and dealing with them gives a far greater opportunity to resolve matters at an early stage.

18. Continuity of those involved with the management of the claim(s) is infinitely preferable rather than the "different teams and different stages" approach of the insurer agents.

19. A clear advantage to effective claims management and return to work goals is the relative familiarity of the individual managing the claim who often works within the business and has a far greater insight into the issues and the opportunities for resolution.

20. In the alternative, self-insurers often use resignation as a 'carrot' to encourage settlement. This can leave injured workers in a precarious situation financially and emotionally, particularly if their employment has been a part of their identity for a number of years.

21. There is also the capacity to side step the obligations arising from section 18 of the Act.

Psychological and psychiatric claims

22. A lot has been written about the incongruous and discriminatory nature of the provisions of the Act that govern mental illness.

23. There is a very significant gap between the entitlements of workers suffering from the effects of a physical injury as compared to those suffering from a mental one. The justification for this position remains unclear.

24. The scheme becomes even more convoluted when a person has sustained both physical and psychological injuries. How is such a scheme in any way consistent with the constant messages about the importance of understanding, promoting and addressing the issue of mental health in society generally and particularly in workplaces.

Preventative workplace measures

25. Another issue which appears fairly obvious by its absence in the Act is a total lack of the promotion of preventative workplace measures.

26. There is little to no promotion of the scheme as a way of rehabilitating injured workers, the benefits available to them, or the steps they can and should take when injured or if they witness someone else sustaining an injury.

Conclusion

27. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the Select Committee on the Return to Work SA Scheme's inquiry. The ALA hopes to see changes made to the scheme and the Act that will assist workers to return to work after injury and/or resume meaningful contributions to the community in South Australia.

28. The ALA is available to provide further assistance to the Committee on the issues raised in this submission.

Claire Eagle

Member, SA Branch Committee

Australian Lawyers Alliance