Lawyers for the People

AUSTRALIAN LAWYERS ALLIANCE

Inquiry into the Workplace Injury Rehabilitation and Compensation Amendment (WorkCover Scheme Modernisation) Bill 2023

Submission to the Legislative Council Economy and Infrastructure Committee

4 January 2024

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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.

In Victoria, the ALA has over 400 members, the vast majority of which act for individuals who have suffered serious injuries, including injuries sustain in the workplace.

More information about us is available on our website.[1]

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

[1] www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input to the Legislative Council's Economy and Infrastructure Committee ('Committee') regarding the Workplace Injury Rehabilitation and Compensation Amendment (WorkCover Scheme Modernisation) Bill 2023 ('Bill').

2. The Victorian workers' compensation system ("WorkCover") is designed to ensure that appropriate compensation is paid to injured workers in the most socially and economically appropriate manner and as efficiently as possible. There are four types of compensation available to injured workers:

    a. Weekly payments for periods of incapacity for work;

    b. Reimbursement of medical and like expenses;

    c. An impairment benefit lump sum;

    d. A common law damages lump sum.

3. The Government faces a serious and urgent funding problem that threatens the sustainability of the WorkCover scheme. We appreciate there has been significant engagement by Government with groups like the ALA to explain the extent of the problem. However, ALA is yet to receive financial modelling to justify the extent of these amendments. We call for the Government to provide the financial modelling in relation to this Bill.

4. The ALA supports a financially sound workers' compensation system, that adequately provides for those injured at work, including those suffering lifelong injuries who need extensive support and the right to bring a claim for common law damages. However, the Bill substantially reduces the rights of injured workers in Victoria.

Mental Health Injury

5. The Bill's proposed reduction in workers' compensation rights for workers suffering from mental health injuries will have a substantial impact on injured workers in Victoria.

6. There are two major reforms proposed by the Bill.

7. Firstly, the bill inserts a new definition of mental injury into principal legislation. The new definition requires that for all mental injury claims (including if a worker is exposed to a

traumatic event at work) a worker must be suffering an injury that *causes significant behavioural, cognitive or psychological dysfunction"* that is diagnosable under relevant psychiatric injury guidelines.

8. The ALA has a number of concerns with this definition –

    a. The term "significant" is a subjective test that will result in a great deal of disputation between injured workers and insurers. The term is not easily understood by us. We suspect that it will require interpretation by superior Courts in Victoria for several years to ascertain what level of mental injury is required to meet the test.

    b. This new definition of mental injury will have a drastic impact on the types of claims which are proposed to not be included in these reforms, that is injuries caused by exposure to trauma at work. Many workers who suffer mental injury due to cumulative exposure to traumatic events at work are slow to understand the injury they are suffering. We suspect that under this new definition of mental injury many will not be entitled to workers' compensation benefits.

    c. The new definition will require treating health practitioners to provide detailed evidence to Insurers and then Courts as to the level of symptoms they observed in consultation if a WorkCover insurer disputes that a worker is suffering the requisite level of injury. The new definition will also require the treating health practitioner, usually a general practitioner, to have regard to the Diagnostic and Statistical Manual of Mental Disorders ("DSM) when examining their patient. Both of these changes have the potential to further discourage general practitioners from treating injured workers.

9. Secondly, the Bill proposes to exclude many workers who suffer mental injury at work *"if the injury is a mental injury predominantly caused by work related stress or burnout that has arisen from events that may be considered usual or typical and reasonably expected to occur in the course of the worker's duties"*.

10. The ALA believes that this clause will clearly have a substantial effect on injured workers in Victoria. Whilst the term 'predominantly'[2] has been considered by the Supreme Court and is

[2] See *Pulling v Yarra Ranges Shire Council* [2018] VSC 248

understood in workers compensation claims, the practical effect of this provision will clearly reduce workers receiving benefits.

11. We anticipate that many injured workers will be in a state of flux whilst insurers make determinations about whether an injury has been caused by a worker's typical duties. This provision should only be introduced along with the proposed Return to Work reforms. We are yet to see any details about those proposed reforms.

12. We anticipate women will be more impacted by the changes to eligibility criteria because female workers are 1.9 times more likely to have a claim for a mental health injury.[3]

Other Opportunities

13. Improved return to work initiatives are likely to lead to the best outcomes for those suffering from mental health injuries caused by work. Currently the total cost of a claim for a worker suffering from mental health injury is significant because so few of those injured workers make it back to work. Our members regularly see disingenuous efforts by employers to actively help injured workers to break down barriers to get back to their pre-injury work. We see so many injured workers who are further injured by the failure to get back to their role, which increases the costs of each claim.

14. Any changes to workers entitlements for mental health injury ought only be done in combination with significant improvements to Return to Work supports and outcomes.

Impairment threshold for weekly payments post second entitlement period

15. The ALA does not support the Bill's proposal to introduce an impairment threshold of greater than 20% on injured workers post the second entitlement period (130 weeks).

[3] Berecki-Gisolf, J., Smith, P. M., Collie, A., & McClure, R. J. (2015). *Gender differences in occupational injury incidence*. Am J Ind Med, 58, 299-307, cited in Lane T, Collie A, Hassani-Mahmooei B. *Work-related injury and illness in Australia, 2004 to 2014. What is the incidence of work-related conditions and their impact on time lost from work by state and territory, age, gender and injury type?* Melbourne (AU): Monash University, ISCRR; 2016 Jun. 54p. Report No.: 118-0616-R02, at p 47

Policy Intent

16. Totally and permanently incapacitated workers have historically and currently been entitled to income support from Victoria's workers' compensation scheme until retirement age. This has been the situation for at least more than 60 years.[4]

17. Income support is currently paid to injured workers because of their *incapacity* for suitable work, and long-term (beyond 130 weeks) payments are presently made only to those assessed as having *no current work capacity likely to continue indefinitely.*

18. It is now proposed that people objectively having no capacity for employment due to work injury will receive compensation for lost income for only 130 weeks, unless they meet a most unlikely impairment threshold. This effectively removes the safety net that has been in place for so long for long term injured workers in Victoria.

19. This part of the Bill makes for the greatest reduction in support for injured workers in Victoria since the Kennett government's 1997 total and complete abolition of common law rights for anyone injured at work. By the addition of an impairment score criterion to the existing total incapacity requirement for ongoing income support, the proposal will eviscerate existing rights of a most vulnerable group targeted with precision – injured workers who have no work capacity but fail to meet an arbitrary and onerous test of so-called 'objective' medical impairment.

20. **We estimate that over 85% of injured workers** will not meet the proposed impairment test for ongoing weekly payments.

21. Our members have acted for injured workers in the pursuit of impairment benefits for over 25 years. It is estimated our members have assisted over 200,000 workers bring claims for impairment benefits under the AMA Guides 4th Edition ("the Guides") since they were first utilised in 1997.

22. We draw upon that collective experience when making these submissions regarding the Guides.

[4] See for a historical and comparative study of the ACA 1985 and the *Workers Compensation Act* 1958 Gordon L Hughes "The Industrial Accident Compensation System in Victoria", *Monash University Law Review*, vol 15, June 1986, p 438, accessed at https://www8.austlii.edu.au/au/journals/MelbULawRw/1986/2.pdf on 29 December 2023.

23. Workers are rarely assessed over 20%. We offer the following examples of injuries that are assessed under the Guides at less than or equal to 20% impairment. These injuries can be fairly described as severe, but the injured worker would have no ongoing entitlement to weekly payments beyond 130 weeks by reason of this Bill.

    a. Back injury with multiple spinal factures, with or without surgery (20%)

    b. Back injury with significant signs of radiculopathy in the legs, with loss of reflexes or muscle wasting (10%)

    c. Knee replacement with ongoing moderate pain and some loss of movement or joint instability (20%)

    d. Total shoulder replacement (18%)

    e. Total wrist joint replacement with implant (18%)

    f. Amputation of index, ring and little finger of one hand (20%)

    g. Amputation of all toes of both feet (17%)

24. Very often the level of impairment assessed under the Guides does not reflect the level of dysfunction, disability or loss of earning capacity experienced by an injured worker. The Guides do not consider a worker's age, transferrable skills or if they live in a remote location with few job opportunities.

25. The Guides themselves specifically discourage their use for such purposes:

    The Guides may help resolve such a situation, but it cannot provide complete and definitive answers. Each administrative or legal system that uses permanent impairment as a basis for disability ratings should define its own means for translating knowledge about an impairment into an estimate of the degree to which the impairment limits the individual's capacity to meet personal, social, occupational, and other demands or to meet statutory requirements.

It must be emphasised and clearly understood that impairment percentages derived according to Guides criteria should not be used to make direct financial awards or direct estimates of disabilities. [5]

26. We offer the following examples of workers with devastating injuries and features that commonly have a negative impact on employability. They would all fail the impairment test and therefore have no ongoing entitlement to weekly payments under the Bill, despite being severely hampered in their ability to return to work by their age, physical restrictions, lack of transferrable skills or limited English language skills.

27. Example 1

A 35-year-old woman born in India. She is a mother of two primary school age children. She came to Australia in 2009 as a student. She completed a pastry cook course and a diploma in business management. She worked for a large hardware business and was required to lift heavy plants, garden accessories and bags of fertiliser. She developed weakness in the legs, and scans showed a L4/5 disc prolapse. She had two spinal operations, including a lumbar fusion. She has not been able to return to work. She has constant back pain and now finds it hard to complete most household activities. Even sitting or standing for more than 15 minutes aggravates the pain.

She was assessed at 20% impairment. She would not have an ongoing entitlement to weekly payments under these new laws.

28. Example 2

A labourer for a gardening business sustained a severe cut to his wrist when using a chainsaw. There was nerve damage, and he needed several operations. He has been unable to return to work. He has only ever worked in manual jobs. He is dyslexic, struggles to read or write and has no computer skills. He left school at 15 and has no formal qualifications or certificates.

[5] American Medical Association Guides to Evaluation of Permanent Impairment 4th Edition, Chapter 1.5

He was assessed at 5% impairment. He would have no ongoing entitlement to weekly payments under these new laws.

29. Example 3

A 61-year-old man born in Sudan where he worked as a school teacher and on a farm. He arrived in Australia in 2005 and has since worked in heavy labouring jobs. He injured his back and shoulders from heavy lifting when working in a hide factory tanning leather. He now has constant daily pain, requiring medication, and limiting his mobility. His English skills, both written and verbal, are extremely limited. He is heavily reliant on an interpreter for most communication in English. He has limited understanding and ability to navigate technology, including basic emails and browsing the internet.

He was assessed at 5% whole person impairment. He would have no ongoing entitlement to weekly payments under these new laws.

30. Medical *impairment* and *incapacity* for work are entirely different concepts bearing no necessary or consistent relation to each other. Given that income support is paid to injured workers for their *incapacity* for suitable work, and that long-term (beyond 130 weeks) payments are presently made only to those assessed as having *no current work capacity indefinitely*, the inclusion of an additional impairment threshold can *only* be understood as a cost-saving measure. The conflation of the two concepts – incapacity and impairment - leads to predicable injustices. A paraplegic accountant has an enormous medical impairment but may retain full work capacity, while an illiterate shearer with a chronic back injury may score poorly on impairment but have no capacity at all for appropriate work.

31. Injured people with poor literacy, of non-English speaking backgrounds, those with years spent in labouring work leading to multiple work-related injuries, the computer-averse – these are among the categories of workers most likely to be adversely affected by the proposed change to the 130-week termination of payments test.

A Government announcement of this change says it is an "updated test" to "align with other states and territories"[6]. The Minister's Second Reading Speech similarly asserts that -

[6] See https://content.vic.gov.au/sites/default/files/2023-05/Factsheet-WorkCover-Scheme-modernisation-Overview.pdf accessed 29 December 2023.

The amendment will bring Victoria in line with other states and territories that have introduced impairment assessments, as a more objective determination of the impact of a work-related injury[7].

32. The ALA regards as inaccurate the assertion that the new test makes Victoria "align" with other local jurisdictions. In both New South Wales and the Northern Territory, while an impairment threshold exists for longer-term weekly payments claims (greater than 20% in the former; 15% or more in the latter), workers with no capacity for work but falling short of the threshold are eligible for payments for five years, or 260 weeks[8]. This is **double** the length of support offered in the Bill to comparable Victorian injured workers. Only South Australia's weekly payments system (and arguably Queensland's) would be harsher than Victoria's if the proposal becomes law.[9]

33. Another sting in the Bill for many workers is in its *retrospective* effect. It has potential rights-destroying effects on people injured many years ago. It will also affect workers who suffered devastating injuries within the last 130 weeks who would have predicted an ongoing entitlement to weekly payments prior to this proposed new law.

34. The new law *will not* apply to people who have already come to the end of the second entitlement period of 130 weeks by the time the Bill becomes law.

35. It *will* apply to all people with past and current accepted claims who have not yet been in receipt of weekly payments for 130 weeks upon the change being enacted, as it will to future claims.

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[7] See Hansard at https://hansard.parliament.vic.gov.au/search/?LDMS=Y&IW_DATABASE=*&IW_FIELD_ADVANCE_PHRASE=be+now+read+a+second+time&IW_FIELD_IN_SpeechTitle=Workplace+Injury+Rehabilitation+and+Compensation+Amendment+WorkCover+Scheme+Modernisation+Bill+2023&IW_FIELD_IN_HOUSENAME=ASSEMBLY&IW_FIELD_IN_ACTIVITYTYPE=Second+reading&IW_FIELD_IN_SittingYear=2023&IW_FIELD_IN_SittingMonth=November&IW_FIELD_IN_SittingDay=1 accessed 29 December 2023

[8] I*bid*.

[9] Safe Work Australia 28th edition - Comparison of workers compensation arrangements in Australia and New Zealand, 2021, p 85 and at https://www.safeworkaustralia.gov.au/sites/default/files/2022-10/comparison_of_workers_compensation_arrangements_in_australia_and_new_zealand_2021_swa_edits.pdf at p 84, accessed 29 December 2023. .

36. There will be people injured many years ago who took little immediate time off, but more recently have deteriorated and/or have required surgery, such that they are now unable to return to work and are again in receipt of weekly payments.

37. Because the Bill's application is determined not by *injury date*, but by reference to the date of *expiration of the second entitlement period*, the proposed new law will apply to them. The determination, stoicism and keenness of such people to quickly return to and remain at work will potentially cost them hundreds of thousands of dollars in legislatively abolished entitlements.

Practical Application

38. The ALA has a number of concerns regarding the procedural requirements that implement the new impairment test.

39. Physical and mental impairments should be able to be combined because they both impact work capacity. Eligibility for weekly payments should be about a worker's capacity for suitable alternative employment. Artificially separating physical and psychological impairments means all injuries and impairments that bear upon that capacity are not being considered.

40. An impairment assessment for the new 130 week test will be the final assessment used for the worker's impairment benefit lump sum claim. This denies procedural fairness to injured workers. The impairment benefit lump sum claim might be brought long after 130 weeks. In that time, an injured worker might have developed a secondary injury that is causally related to the injury they sustained at work, such as stomach problems from long term medication use, or injury to the other knee caused by altered gait from the original knee injury. The changes in this Bill mean those subsequent injuries would not be assessed as part of the impairment benefit lump sum claim, removing rights currently available to injured workers. This would appear to be an unintended consequence of the Bill.

41. The Bill allows for a further impairment assessment to determine eligibility to weekly payments if the worker has surgery post 130 weeks. However, there is uncertainty as to how this applies to a worker who undergoes multiple operations over several years, and whether they can request a further impairment assessment after each operation.

42. The allowance for a further impairment assessment is restricted to workers who undergo surgery after 130 weeks. However, workers who undergo significant psychiatric treatment, such as Electroconvulsive Therapy, and sustain further impairment, would be denied the ability to have their impairment reassessed.

43. Workers should be permitted to have a further impairment assessment if there is a material change to their circumstances post 130 weeks. For example, the worker might have developed causally related secondary impairments (as considered above), or their condition may have deteriorated to such an extent that it now causes debilitating restrictions.

Other Opportunities

44. Seriously injured workers who have been injured by the negligence of their employer can seek damages. They are unable to commence a claim for common law damages until 18 months have passed from the date of injury. The average time taken to finalise a common law claim is approximately 1 year from the date of commencement, though they can take up to 3 years if litigation is required.

45. If most seriously injured workers are to lose their weekly payments due to the introduction of an impairment threshold then it is fair that they be able to commence their claim for damages earlier. Substantial financial hardship arises where injured workers have lost their entitlements to weekly payments whilst awaiting the outcome of their common law claim.

46. It is noted that injured motorists can commence a common law claim at any time after an accident (they will in practice wait to lodge the claim at the appropriate time, which can be as little as 6 months after an accident) and have an entitlement to income support for up to 3 years after an accident rather than 130 weeks for injured workers.

47. “Voluntary settlements” are an existing mechanism in the Workplace Injury Rehabilitation and Compensation Act that enable injured workers to apply to Worksafe for a lump sum redemption of their future entitlement to weekly payments. However, the formula that determines that redemption does not result in offers that are attractive to our clients. Reform of that formula could help address the current problem with “long tail claims” experienced by the WorkCover scheme.

Arbitration

48. The ALA supports the Bill with respect to Arbitration, in so far as it ensures that significant disputes between injured workers and workers' compensation insurers are considered by Courts rather than Arbitration. This will ensure the new definitions regarding eligibility are interpreted by Courts. The ALA supports that minor disputes still be capable of arbitration (though note most of these types of disputes can more readily be addressed by the Medical Panel).

Conclusion

49. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input on the Workplace Injury Rehabilitation and Compensation Amendment (WorkCover Scheme Modernisation) Bill 2023.

50. The ALA is available to provide further assistance to the Legislative Council Economy and Infrastructure Committee on the issues raised in this submission.

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