

2024 Review of the Dust Diseases Scheme

Submission to the Standing Committee on Law and
Justice, Legislative Council, Parliament of NSW

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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 people of the Eora Nation.

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input to the Parliament of NSW Legislative Council's Standing Committee on Law and Justice ('Committee') as part of the 2024 Review of the Dust Diseases Scheme ('2024 Review').
2. We note that the Committee's focus for the 2024 Review is on support available to younger workers within the Dust Diseases Scheme ('Scheme'), as well as risk areas for silicosis. The ALA's submission will address both these focus areas for the Committee's consideration.
3. ALA members report that the specific compensation scheme established under the *Workers' Compensation (Dust Diseases) Act 1942* (NSW) ('the Act') primarily suits older workers who have ceased working prior to the onset of their dust diseases.
4. This has not posed many problems historically, as most beneficiaries under the Scheme have suffered from asbestos-related diseases, such as mesothelioma, lung cancer, asbestosis, and asbestos-related pleural disease. These diseases typically have long latency periods – on average 40 or more years – which means that affected individuals were usually already retired by the time their conditions manifested.
5. The unfortunately terminal nature of many asbestos-related diseases has also meant that even younger workers who may have developed a disease have died in a relatively short period. Those workers, therefore, have not required long-term care or support.
6. However, the ALA submits that the Scheme is ill-suited to address the needs of younger workers diagnosed with accelerated forms of silicosis in the stonemasonry and tunnelling industries.
7. Our submission will elaborate on these matters, including recommendations for reform.

The definition of 'dust disease'

8. The definition of 'dust disease' in the Act is confined to a "pathological condition of the lungs, pleura or peritoneum",² plus the diseases listed in Schedule 1 of the Act.

² *Workers' Compensation (Dust Diseases) Act 1942* (NSW) s 3.

9. This narrow definition was established when medical science only recognised that inhaling toxic dusts affected the lungs and associated tissues.
10. However, over the years, exposure to toxic dusts has been linked to numerous diseases affecting various organs, tissues and systems throughout the human body.
11. This narrow definition has disqualified many of our clients who are suffering from non-lung related silica diseases, including rheumatoid arthritis, sarcoidosis, chronic obstructive pulmonary disease (COPD), mixed connective tissue disease (MCTD), and chronic renal disease.
12. Such diseases can cause significant disability and loss of life expectancy, yet workers are precluded from accessing the financial support and medical treatment they need, as demonstrated by the following client case study:

Case study: Client A

Client A, with silicosis and MCTD, was assessed by iCare as 1% disabled for silicosis.

The MCTD affects the worker's mobility, and ability to work with his hands, to bend and to squat.

Client A's whole person impairment is much greater than 1% due to the MCTD. The disability arising from his MCTD is not taken into account by iCare as it is not a "pathological condition of the lungs" under the Act.

On a case-by-case basis, iCare *may* review these claims; however, the worker is required to obtain, (and pay for) a report from a rheumatologist, commenting on the causal link between the workplace exposure and autoimmune diagnosis, as well as any impairment this causes the worker.

Recommendations

- **That the definition of ‘dust disease’ should be broadened in the Act to “any other pathological condition of any organs, tissues or systems of the human body caused by dust”, to capture emerging silica and other dust-related diseases, including autoimmune and inflammatory diseases.**
- **Alternatively, that Schedule 1 of the Act should be updated to include dust-related respiratory diseases, dust-related autoimmune conditions, dust-related inflammatory diseases and dust-related renal disease.**
- **That, given the emerging silica-related autoimmune diseases, the Committee recommends the addition to iCare’s medical panel of a rheumatologist, who can assess causal links between workplace exposure and silica induced autoimmune diseases, and to determine any additional impairment this is causing workers.**

Testing and misdiagnoses

13. ALA members report that clients have been misdiagnosed as having diseases other than silicosis, in part because insufficient testing is being performed by respiratory physicians. For example, physicians have conducted tests or made referrals for tests to be conducted via an X-Ray or CT, rather than a high-resolution computed tomography.
14. Once those misdiagnosed workers have been assessed by iCare as 1% disabled for silicosis, they are not reassessed for several years. This compromises those workers’ access to comprehensive medical treatment and support.
15. Further, ALA members reflect that there can often be a disconnect between iCare’s decision and the view of a worker’s respiratory physicians. This again, compromises access to comprehensive medical treatment and support for workers in NSW.

Recommendations

- **That iCare ensures that workers are receiving ongoing health and medical support.**
- **That iCare ensures doctors are organising the correct testing, to enable iCare to assess workers’ health more efficiently and effectively.**

Financial re-training support for younger workers

16. Historically, workers suffering from silicosis usually developed the disease late in their careers, or more often in their retirement years. However, the type of ‘accelerated silicosis’ seen in workers such as stonemasons and tunnellers is often manifesting at much younger ages. Most of our clients are in their 20s, 30s and 40s – still in the prime of their working lives, with young families to support.
17. Improved medical screening is leading to workers being diagnosed much earlier in the diseases process, when they are suffering little to no physical symptoms resulting from their diagnosis. Many of these workers are, therefore, healthy enough to continue working for many years. However, they cannot return to work in any job where they risk further exposure to crystalline silica dust, as this puts them at risk of disease progression.
18. Unfortunately, industries such as stonemasonry and tunnelling are highly specialised, and the qualifications, skills, and experience that workers have acquired do not easily translate to other jobs, especially jobs free from the risk of silica exposure. Accordingly, most workers will need to undergo significant re-training or further education to find new career paths.
19. Currently, iCare offers insufficient re-training and rehabilitation programs for workers who have developed silica-related diseases and who are looking to leave the industry (and their dusty working environment). Clients of ALA members have reported that the assistance offered by iCare is inconsistent, with many clients not receiving any assistance at all.
20. Even when assistance has been provided to our clients, it has usually been limited to facilitating interviews with Vocational Assessors. Clients have reported that the job options provided to them during these interviews are usually limited to unskilled roles – such as becoming a truck driver, courier or forklift driver. Without proper re-training or re-education opportunities, these workers may be forced into low-paid and/or unskilled jobs, resulting in significant loss of earning capacity, as well significant mental pain and suffering.
21. The ALA contends that the Act does not establish a clear framework for supporting and guiding suitable workers back into the workforce. We submit that a more effective system would encourage and support workers to engage in further studies or re-training, with a view to completing vocational certificates, diplomas and university degrees, and then providing direct assistance to those workers for finding jobs in the relevant industries. The ALA notes that iCare

would not have to bear the financial cost of re-training or further education for the most part, since most workers will be eligible for Commonwealth-funded schemes (FEE-HELP and HECS).

22. However, these workers will not only need assistance with re-training and further education They will also require sufficient financial support while they reskill and find new jobs. These workers should continue to receive their full pre-injury income whilst undertaking iCare's rehabilitation program.
23. Under the current Scheme, the entitlement to certain statutory benefits under the Act, most notably a fortnightly pension, is determined by reference to a worker's level of whole-person impairment attributable to their disease. For workers suffering only mild impairment, they are only entitled to receive a fortnightly pension at a rate equivalent to their pre-injury income (subject to a statutory cap) for a total of 26 weeks (six months). If they have not found work in that time, they may qualify for a further pension at a lower statutory rate, subject to their level of incapacity.³
24. Further, many of these workers, particularly stonemasons, regularly perform overtime, which iCare does not consider "income" for the purposes of their income assessment to determine a worker's pre-injury wage. So, when workers receive the initial 26 weeks of pay, it is usually already at a much lower rate than the workers were receiving whilst employed in the industry.
25. The ALA submits, therefore, that 26 weeks of pay at pre-injury income rates is not a significant amount of time for young workers, who are grappling with a life-changing diagnosis as well as the prospect of finding a new career, to retrain and rehabilitate.

Case study: Client B

Client B is suffering impairment due to silicosis. He has limited English and was working as an employee for 20% of his overall exposure to silica, whilst working as a subcontractor to stone companies for 80% of his overall exposure to silica.

Client B was deemed 20% disabled for silicosis by iCare, with only 20% of his exposure falling under the Act. He was advised to leave the industry; however, Client B experienced great hardship doing so. As Client B was only entitled to 20% of his pre-injury pay, there was significant financial pressure on Client B and his family, who lived on well below minimum wages while he looked for a new job.

³ *Workers Compensation (Dust Diseases) Act 1942 (NSW) s 8(2)(a).*

26. Without sufficient financial support, our clients have felt “trapped” into staying in jobs where they remain exposed to high levels of crystalline silica, putting them at high risk of disease progression. They cannot afford to be unemployed, to re-train or to work in lower-paying jobs.

Recommendations

- **That iCare should support and provide the following services for affected workers wishing to explore alternative study and employment opportunities:**
 - **Career counselling, designed to help young workers especially to identify suitable alternative careers;**
 - **Educational advice services to assist workers in navigating the application processes for training and educational courses (including applying for special consideration, or disability services) and sourcing education funding; and**
 - **Job-seeking assistance, whereby personalised support is provided to assist workers in seeking jobs once they have completed their further training or education, including coaching on resume writing, conducting interviews, confidence building and networking.**
- **That iCare should pay workers who have been told to leave or who have had to leave their jobs a fortnightly pension at a rate equal to 100% of their pre-injury income:**
 - **For workers who are not undertaking re-training, for a minimum period of 52 weeks; or**
 - **For workers who are engaged in re-training by way of vocational or tertiary education, for the entire duration of their training/study, plus a period of 26 weeks once their training/study concludes (to support the worker while they find employment in their new career field).**

Access to psychiatric and psychological services

27. ALA members report that workers diagnosed with silicosis often develop secondary psychiatric injuries.

28. These psychiatric diseases are a result of not only the shock of being diagnosed with a chronic (sometimes terminal) disease, but also due to career loss and the stresses associated with unemployment and financial instability. ALA members reflect that their clients have suffered

severe psychological symptoms, including severe anxiety, depression, anger management issues, social withdrawal, relationship breakdowns and suicidal thoughts. In clients suffering from diseases which cause them low levels of physical impairment, their psychiatric injury can often be more debilitating than their silica-related disease.

29. Secondary psychiatric injuries cause severe and lifelong suffering and may prevent young workers from returning to the workforce, even if their lung disease is otherwise stable.

30. The ALA submits that early intervention is crucial. However, many clients of ALA members report that they have trouble accessing psychiatric and psychological services, with iCare often slow to approve funding, or denying it completely. While navigating a life-changing diagnosis, medical treatment and a career change, the ALA contends that these workers must have access to psychiatric and psychological services.

Recommendations

- **That iCare provides and prioritises funding for these workers to access appropriate psychiatric and psychological services, as well as supporting access to those services for workers' immediate family members.**
- **That the relevant amendments are made to the Act and to iCare's processes such that:**
 - **there is a rebuttable assumption that any psychiatric/psychological condition in a client with a compensable 'dust disease' is reasonably attributable to their disease, allowing immediate funding for psychiatric and psychological services;**
 - **iCare will actively refer new clients to seek counselling and psychological support (this is especially important to protect young male workers, being a demographic traditionally averse to seeking mental health assistance);**
 - **disability caused by secondary psychiatric injuries must be considered when assessing a client's whole person impairment (for the purpose of assessing their entitlement to benefits under the Act); and**
 - **psychiatric/psychological support is available and is provided to culturally and linguistically diverse clients, including iCare creating a network of bilingual counsellors, psychologists, and psychiatrists experienced with diverse patients.**

Extending access to medical support to workers living overseas

31. The ALA notes that, historically, workers diagnosed with compensable dust diseases have predominantly resided in Australia and have received treatment from Australian-based doctors and at Australian healthcare institutions. However, the current silicosis epidemic has disproportionately affected workers from culturally and linguistically diverse backgrounds, many of whom are recent immigrants and non-permanent residents.
32. In the experience of ALA members, this trend is particularly pronounced among stonemasons, with many clients being recent immigrants from non-English speaking backgrounds, especially from South-East Asia and the Middle East.
33. After a silicosis diagnosis, some of these clients are forced to return to their country of origin, because cessation of work affects their visa status or because they now need family support to deal with their diseases.
34. However, currently iCare does not cover the cost of any medical care, allied healthcare, home care, pharmaceuticals or physical aids administered outside Australia.
35. This restriction has come about because the compensation scheme under the *Workers' Compensation Act 1987* (NSW) (the principal legislation to the Act) only requires that iCare pay medical and related expenses that have been administered or prescribed by a medical practitioner properly registered under the Health Practitioner Regulation National Law (which includes stringent criteria, such as registration requirements with the Medical Board of Australia).
36. Consequently, individuals suffering from otherwise compensable dust diseases are only entitled to be paid medical and related expenses administered or prescribed by 'Australian' medical practitioners.
37. This unfairly prejudices migrant workers who, through no fault of their own, develop chronic illnesses as a result of working in (and for the benefit of) NSW and Australia more broadly, and are now unable to access necessary medical treatment and support in their home countries – a disadvantage which is especially pronounced where they reside in a country without universal access to healthcare.

Recommendations

- **That the *Workers' Compensation Act 1987* (NSW) be amended to allow overseas clients with compensable dust diseases to access subsidised medical and related expenses in their home countries.**
- **That, where necessary healthcare is unavailable (or otherwise impractical) in those countries, iCare could provide support by:**
 - **setting up systems to refer and facilitate overseas clients to consult Australian-based doctors by audio-visual means; and**
 - **providing financial assistance for clients to travel to Australia to undergo major procedures and/or therapies.**

Risk areas for silicosis, including tunnelling and quarrying

38. In addition to the reflections and recommendations made throughout our submission, the ALA notes that thousands of Australian workers are exposed to silica dust on a daily basis when tunnelling and quarrying, as these workers drill through sandstone, which has a very high natural silica content.

39. The ALA contends that it must be ensured that these workers are being tested for silicosis regularly, and that workers already suffering from silica-related diseases are supported, compensated, and provided adequate retraining and rehabilitation services. Moreover, protections for workers in these high-silica roles need to be ensured.

Recommendations

- **That workers exposed to silica dust are regularly tested for silicosis.**
- **That clear and precise guidelines are produced for employers to follow regarding the suppression of dust and use of dust extraction systems and respirators.**
- **That more funding and training is invested in keeping workers safe, and that more accountability placed on employers to strictly follow guidelines.**

Conclusion

40. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input to the Parliament of NSW Legislative Council's Standing Committee on Law and Justice as part of the 2024 Review of the Dust Diseases Scheme.

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



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