



HUMAN RIGHTS & DISCRIMINATION COMMISSION

ACT Human Rights Commission

Workers Compensation Bill: Consultation
Office of Industrial Relations
Chief Minister's Department
GPO Box 158
Canberra ACT 2601

Dear Sir/Madam

Thank you for the opportunity to comment on the Exposure Draft of the Workers Compensation Amendment Bill 2010 ('the Bill'). I note the officer-to-officer discussions that Commission staff have already had with staff from the Office of Industrial Relations prior to the release of the Exposure Draft. This submission elaborates further on those discussions.

Introduction

As a threshold issue, I am concerned about the proposed policy direction of Government to restrict those seeking workers compensation accessing common law damages. I am not advocating that this approach be adopted in other civil law areas, but the Bill will create an inequity of access based on the nature and location of injury, which is discriminatory. I note that many changes to the compulsory third party insurance scheme are also proposed, and have separately provided a submission to that consultation. Nonetheless, the Government is proposing to create a two-tiered system of access to the courts, with some barred from accessing common law relief based on the manner in which they sustained their injuries. For example, the legal profession has suggested that two people could slip over in a supermarket and arbitrarily have different rights of access to the courts on the basis one is an employee and the other customer. This is despite potentially the duty holder, insurer and circumstances and extent of injury being identical.

Such an approach appears to be inconsistent with the principles of equity and fairness paramount in our legal system, reflected particularly in the *Human Rights Act 2004* ('HR Act').

Access to Common Law Damages

Proposed sections 180A to 180C of the Bill limit access to common law claims to those with particular percentages of whole person impairment. Limiting access to have an individual's rights determined by a court on the basis of levels and types of disabilities may engage the rights to equality (s.8) and fair trial (s.21) under the HR Act.

Further, proposed s.180C of the Bill creates a different threshold for psychological injury (20% permanent impairment) as opposed to 15% for other injuries. The Explanatory Statement provides no justification for this differentiation. Requiring those with a psychological injury to reach a higher threshold to access common law relief also may engage the right to equality under the HR Act.

This higher threshold for psychological injury is compounded in proposed clause 49(1)(c)(ii), which requires that the minimum threshold for compensation is 20% for psychological injury rather than 1% for physical injury, which appears arbitrary. This seems contrary to the Government's desire to protect workers from occupational psychological injury as reflected in the recent passage of the *Work Safety Act 2008* which expressly identifies a duty on employers to prevent psychological injury¹. The proposed changes also place a significantly greater burden on those with psychological injury to access any compensation for their injuries, and therefore may also engage the right to equality.

Further, proposed new s. 54(2)(b) requires that in assessing whole person impairment the medical assessment must ignore any secondary psychological injury. It is unclear why this is the case and no justification is provided in the Explanatory Statement. Presumably, this could include severe depression caused by chronic severe back pain. Why this should not be included in an assessment of whole person impairment is unclear and appears again to discriminate against an individual because of the nature of their disability.

Subsection 8(1) of the HR Act states that 'everyone has the right to recognition as a person before the law', and under s. 8(3), 'everyone is equal before the law and is entitled to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination on any ground.' There are examples of attributes of discrimination provided under s.8 of the HR Act, explicitly including disability. The attribute of disability is generally interpreted to include short-term and long-term health including physical or psychological injury.² The proposed restrictions on access to common law remedies based on extent of injury have the potential to disproportionately impact on those with certain injuries or disabilities. This is particularly so for those with psychological injuries, who under the proposed changes, would in turn be treated less favourably than others with equal or even lesser physical injuries.

Section 21 of the HR Act states that everyone has the right to have rights and obligations recognised by law and decided by a competent, independent and impartial court or tribunal. Under s.31 of the HR Act, international law and the decisions of foreign courts and tribunals may be considered in interpreting rights. The equivalent right under the European Convention of Human Rights has been interpreted to include disputes concerning the rights and obligation of private individuals as between themselves, including in relation to the law of tort. The Court has suggested that a restriction on the right of access to the courts is not

¹ See s.6 of the *Work Safety Act 2008* which lists the objects of the Act as including to: promote a safe and healthy work environment for people at work that - is adapted to provide for their physical and psychological needs.

² See for example the definition of disability in s.5AA of the *ACT Discrimination Act 1991*, which defines it as including 'total or partial loss of a part of the body', 'total or partial loss of a bodily function', 'a condition which impairs a person's thought process, perception of reality, emotions or judgement or which results in disturbed behaviour', and 'an intellectual disability'.

absolute, but will be unreasonable in some situations. For example in *Kijewska v Poland*³, the Court found that excessive court fees to access a civil remedy were an unjustifiable limitation on the right to a fair trial. Similarly, in *Materials Fabrication Pty Ltd v Boulderstone Pty Ltd*,⁴ the Victorian Supreme Court found that a contractual restriction on commencing civil proceedings was not consistent with the Victorian Charter.

Locally, ACAT Presidential Member Spender in *Thompson v ACTPLA*, when looking at UK and European authority on Article 6 of the European Convention, stated:

'Article 6(1) of the European Convention implies a right of access to court, so a claim need not be well-founded under domestic law, provided that the claim is sufficiently tenable. It is well established that disputes determining the applicability or capacity of the applicant to enjoy the rights and freedoms in the European Convention itself concern "civil rights and obligations" within Article 6(1). Moreover, procedural bars which prevent or limit the possibility of bringing potential claims, together with substantive content, may be relevant to the operation of Article 6(1).'

However, these rights are not absolute. Section 28 of the HR Act states that rights may be limited, provided that limitation is reasonable and proportionate. In the recent ACT Supreme Court decision *In the Matter of an Application for Bail by Isa Islam*⁵, Justice Penfold confirmed that the person seeking to rely on a limitation bears the onus of showing that limitation is reasonable and proportionate. In *Islam*, Penfold J endorsed the following four step test in accessing whether a limitation is reasonable and proportionate:

- (a) Is the purpose of the limitation of sufficient importance to warrant overriding the recognised human right?
- (b) Is the challenged provision rationally connected to its purpose? That is, does it achieve the relevant purpose without having an arbitrary or unfair operation and without relying on irrational considerations?
- (c) Does the challenged provision limit the human right concerned no more than is reasonably necessary?
- (d) Is the limit imposed on the human right proportional to the importance of the purpose?

If all four questions can be answered "yes", then the challenged provision may be found to be justified. If any of the questions is answered "no", then the limitation effected by the challenged provision would generally not be justified.

It appears that there is little justification given for these proposed changes in the Bill. There appear to be a range of factual situations in which individuals would suffer detriment because of the nature of their injury or disability. For example:

³ [2007] ECHR Application No 73002/01 (6 September 2007)

⁴ [2009] VSC 405 (8 September 2009)

⁵ [2010] ACTSC 147

- Someone who sustains an injury of less than 15% impairment would not be compensated for damage outside the parameters of their primary employment. For example, a person who loses two fingers at full-time work and can no longer work as a part-time professional musician outside of work hours.
- I note the impairment must also be 'permanent'. This would appear to disadvantage those that may be injured for a long time (but not the rest of their lives) and may also prevent those in constant pain, but who are not considered 'impaired' from accessing the courts.
- A person who suffers 19% whole person impairment because of psychological damage caused by persistent and severe bullying at work.

In light of these issues, and the lack of adequate discussion justifying these limitations on rights, in my view that the proposals may represent an unreasonable limitation under s.28 of the HR Act.

Cap on NEL Damages

Proposed section 59 of the Bill would cap compensation at \$220,000, and less where the whole person impairment is below 75%. By definition, this has the potential to disadvantage those most impaired by an injury and therefore also engages the right to equality. Anecdotally, non-economic damages make up a larger proportion only for life-long injuries to children, the long-term unemployed and the elderly. This proposed change is likely to disproportionately impact on those with long term disabilities, children, the unemployed and elderly members of the community.

I have been advised by the legal profession that a figure of \$400,000 is often cited as the pain and suffering compensation amount for someone with quadriplegia. If the Bill were passed, someone with such profound disabilities would be significantly disadvantaged by these changes.

Again, absent any explicit justification for this limitation in the Explanatory Statement, this does not appear a reasonable limitation on the right to equality.

Assessment of Impairment

I believe the Bill's process for determining whole person impairment in proposed Part 4.4 also engages the right to a fair trial. I note that proposed s.58 would allow a person to apply to a court to have an assessment declared void 'if there is evidence of a denial of procedural fairness in relation to the assessment.' Whilst this is welcome, it is unclear what procedural fairness is factored into the process of developing such assessments. Section 54 provides a process for the Personal Injury Assessment Panel manager to finalise an assessment, however at no point does an injured worker obtain any review or appeal rights in relation to those findings. Arguably, this might result in every assessment constituting a denial of procedural fairness. Further, whilst an insurer is required to provide medical evidence, there appears to be no provision requiring, or even allowing, workers to provide assessors with medical evidence. This seems inconsistent with the current requirements in s.10(6) of the

Workers Compensation Regulation 2002, which requires all parties to provide a medical assessor with all medical evidence.

I note that under proposed s.56(6) a person may apply to the PI Assessment Panel for a further assessment, but only in circumstances where their condition has deteriorated or there is additional information about the impairment. In short, there appears no appeal or review right to the PI Assessment Panel or the courts in circumstances where a person feels their assessment has been incorrectly determined. Appeal rights may exist under *Administrative Decisions (Judicial Review) Act 1989* or under Part 3.10 of the *Court Procedures Rules 2006*. However, in the absence of a merit review process, for example to the low-cost ACT Civil and Administrative Tribunal, the right to fair trial may be arbitrarily limited.

In contrast, whilst not ideal, the proposed changes to the *Road Traffic (Third Party Insurance) Amendment Bill 2010* are preferable, as they allow a court to assess the level of injury itself, in circumstances where 'substantial injustice' would otherwise occur.

I note there is no explanation in the Explanatory Statement for why review rights are limited to matters of 'procedural fairness'.

Lump Sum Discount

I note proposed new s.184(2)(b) would apply a 5% discount to lump sum payments. This is justified in the Explanatory Statement as making the workers compensation scheme consistent with the existing provisions in the *Road Transport (Third-party Insurance) Act 2008*. My concern is that lump sum payments are generally only paid to those with long-term, serious injuries, so again the Bill proposes to treat individuals with disabilities on less favourable terms because of their level of injury. This would again appear to engage the right to equality.

I assume the figure of 5% is chosen as an estimate of the amount an individual might gain in investing the lump sum payment. However, the High Court in *Todorovic v Waller* found the appropriate discount would be 3%. There is no explanation given as to why a higher discount is chosen.⁶

Restriction on Advertising

The proposal to restrict legal advertising engages the right to freedom of expression protected in s.16 of the *Human Rights Act 2004*.

Proposed section 200B states:

'(1) A legal service provider must not advertise legal services in relation to a claim unless the advertising complies with a regulation made for this section.

⁶ (1981) 150 CLR 402

- (3) In this section:
claim means—
(a) a claim for compensation under this Act; or
(c) a damages claim in relation to a work-related injury'

[sic]

The UN Human Rights Committee has found that freedom of expression includes commercial advertising under Article 19 of the International Covenant on Civil and Political Rights, upon which the HR Act is based.

*'Article 19, paragraph 2, must be interpreted as encompassing every form of subjective ideas and opinions capable of transmission to others, which are compatible with article 20 of the Covenant, of news and information, of commercial expression and advertising, of works of art, etc.; it should not be confined to means of political, cultural or artistic expression.'*⁷

Section 16(2) of the HR Act essentially adopts Article 19 paragraph 2 of the Covenant. The freedom of expression has also been interpreted under the Canadian *Charter of Rights and Freedoms* as encompassing commercial speech and advertising.⁸ In particular, in *Rocket v Royal College of Dental Surgeons (Ontario)*,⁹ a restriction on dentists advertising was found to be an unjustifiable limitation on freedom of expression. Whilst noting that laws preventing misleading advertising would be more likely to be justifiable, McLaughlin J for the Court emphasised the need for such restrictions not to be heavy handed,

'I am satisfied that if the appropriate distinctions are borne in mind, it will not be impossible to draft regulations which prohibit advertising which is unverifiable and unprofessional while permitting advertising which serves a legitimate purpose in furnishing the public with relevant information.'

Arguably the European Court of Human Rights has allowed a lower threshold of justification for commercial expression than other subject areas, for example political communication.¹⁰ In contrast, it has been suggested the Canadian Supreme Court has elected to rely on the general limitation test to determine the reasonableness of limitations, rather than applying a lower threshold to all limitations on commercial expression.¹¹

In *Casado Coca v Spain*¹², the European Court did find that a ban on lawyers advertising was not a violation of the equivalent Article 10 of the European Convention. This was on the basis that while freedom of expression was engaged, the ban was reasonable given the

⁷ *Ballantyne, Davidson, McIntyre v. Canada* (Communications Nos. 359/1989 and 385/1989)

⁸ See for example *J.T.I. MacDonald Corp. v Canada* [2007] 2 S.C.R. 610, where a ban on tobacco advertising was found to engage freedom of expression, but was ultimately held to be a justified limitation on that right.

⁹ [1990] 2 S.C.R. 232

¹⁰ See comments of European Court of Human Rights in *X and Church of Scientology v Sweden*

¹¹ See Caroline Reid, 'Freedom of Expression, Commercial Expression And Tobacco In Canada', (2008) 39 VUWLR, Victoria University of Wellington, accessed at

[http://www.victoria.ac.nz/law/documentation/VUWLR%20PDFS/39\(2\)/reid.pdf](http://www.victoria.ac.nz/law/documentation/VUWLR%20PDFS/39(2)/reid.pdf)

¹² Matter 8/1993/403/481

unique duties and monopolistic nature of the legal profession. The Court paid particular attention to the 'margin of appreciation' in this case, and put considerable stock in the view of the Spanish courts, which had found the ban reasonable.

I note the assertion in the Explanatory Statement that,

'In some cases, the nature, tenor and messaging conveyed in the advertising is being used to convey misleading messages about an injured worker's access to statutory benefits.'

If this is the dominant justification for the amendments, I am concerned that they may not proportionate. Whilst this approach is somewhat consistent with the Canadian case law, it fails to acknowledge that laws already exist to regulate misleading advertising. For example, s.14(1)(k) of the ACT *Fair Trading Act 1992* states:

(1) A person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services—

(k) make a false or misleading representation about the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy.

Provisions of the Commonwealth *Trade Practices Act 1992* similarly make misleading and deceptive conduct unlawful.

It is difficult to assess the proportionality of the proposed restrictions without access to the proposed regulations and any potential negative impact on awareness of rights amongst potential plaintiffs, which could undermine access to justice for some vulnerable individuals. At a minimum, the Explanatory Statement should provide further justification for why the freedom of expression should be restricted in this manner, and in particular, why existing laws are insufficient to protect against misleading advertising.

Conclusion

The lack of human rights discussion in the Explanatory Memorandum, including justification for the limitation of rights, makes it difficult to assess the compatibility of the Bill. Prima facie, many of the changes it proposes limit rights and without sufficient justification, and therefore these changes may be unreasonable.

Yours sincerely



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