LEGISLATIVE COUNCIL
Question Without Notice

29 August 2023

Hon Ben Dawkins MLC to the Parliamentary Secretary representing the Minister for Industrial Relations:

I refer to Hansard on 15 August 2023 and comments made by Hon Matthew Swinbourn that it is not the government's intention to exclude any class of workers from coverage in the *Workers Compensation and Injury Management Bill 2023*. Intention is not relevant where the words of the amendment are clear, and it is clear and unambiguous that your proposed amendment at clause 12 will exclude a class of workers which we can loosely call contractors. This is confirmed by a letter dated 16 June 2023 from the Australian Lawyers Alliance (which I seek leave to table) and I ask:

1. is the mistaken explanation of the effect of clause 12 a mistake made by the parliamentary secretary or is it a mistake the Minister has made himself in understanding the effect of clause 12?

2. given, based on Barristers opinion, that it is without any doubt contractors; will be excluded from coverage of 'worker' in the new Bill, what steps will be taken to ensure this class of workers is made aware of their exclusion and take steps to get their own coverage?

Answer

Hon William (Bill) Johnston MLA
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By email: minister.johnston@dpc.wa.gov.au

Hon Dr Steven Thomas MLC
Shadow Minister for Energy; Treasury; Industrial Relations
By email: steve.thomas@mp.wa.gov.au

16 June 2023

Dear Mr Johnston and Mr Thomas

ONGOING CONCERNS IN RESPECT OF THE WORKERS' COMPENSATION AND INJURY MANAGEMENT BILL 2023 (WA).

We write to you as the Minister and Shadow Minister for Industrial Relations to raise our ongoing concerns with the *Workers Compensation and Injury Management Bill 2023* ('**Bill**').

We are aware that the WA Government introduced the Bill into Parliament on 22 February 2023, and without challenge, the legislation passed through the Legislative Assembly.

The second reading speech demonstrates that Mr Johnston, when introducing the bill to Parliament, claimed that the purpose of the legislation was to "modernise" workers' compensation laws and to implement the recommendations provided by way of WorkCover WA's 2014 legislative review report.

The Australian Lawyers Alliance have previously engaged in the consultation process made available in respect of the Bill and have made detailed submissions to both the Minister and to WorkCover WA. Our concerns as to the impact that the proposed changes will have on injured workers have been clearly expressed.

You may also recall that our Mr Morrissey and Mr Stewart met with Mr Johnston in person to raise our concerns and to emphasise that many of the proposed changes were likely to have a negative impact on injured workers.

You assured us that the intention of the legislation was to neither limit nor enhance the rights of the worker, and the Act had been re-written to "modernise" workers' compensation laws.

Having carefully reviewed the Bill as introduced into Parliament, the Australian Lawyers Alliance continue to have serious concerns with respect to many of the proposed changes and take the view that the Bill will restrict the rights of injured workers, whilst favouring the employer and insurer.

That is notwithstanding the fact the legislation was introduced by a Labor government, and contrary to the assertions made by Minister Johnston.

While some of the changes are subtle and their impact will be measured by the way they are interpreted by the Courts, other amendments are clearly prejudicial and will deny certain injured workers access to compensation.

We are firmly of the view that should the Bill pass the upper house in its current form, the WA Labor Government will have introduced legislation that severely impacts the rights of injured workers.

We therefore take the opportunity to bring to your attention the most significant of these concerns, outlined in detail below.

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Section 7 – Psychiatric Injury – Exclusion of injury for reasonable adminstrative action

1. An amendment of significant concern is the proposed expansion of the matters that will exclude a worker from accessing compensation when suffering a psychological injury.

2. These exclusions are contained within s 5(4) of the current Act, and include the following:

   (a) the worker's dismissal, retrenchment, demotion, discipline, transfer or redeployment; and

   (b) the worker's not being promoted, reclassified, transferred or granted leave of absence or any other benefit in relation to the employment; and

   (c) the worker's expectation of —

      (i) a matter; or
      (ii) a decision by the employer in relation to a matter,

      referred to in paragraph (a) or (b).

3. In contrast to the above, the Bill proposes to expand the exclusionary provisions to include all "adminstrative action" taken by an employer. By s. 7(1) of the Bill, the definition of "*adminstrative action*" for the purposes of excluding stress claims includes:

   (a) an ***appraisal*** of the worker's performance;

   (b) suspension action;

   (c) disciplinary action;

   (d) ***anything done*** in connection with an action described in paragraph (a), (b) or (c);

   (e) anything done in connection with the worker's demotion, dismissal or retrenchment, or the worker's failure to obtain a promotion, reclassification, transfer or other benefit, or to retain any benefit, in connection with the worker's employment.

4. The definition of "adminstrative action" is extremely broad and is likely to prevent a large swathe of workers' who have developed a pscyhological injury from accessing compensation benefits.

5. By including the "***appraisal***" of the workers' performance and "***anything***" done in connection with a worker's performance, suspension or discipline, the exclusionary provisions will incorporate "*informal counselling*" which was removed from the first draft of the Bill.

6. If section 7 is allowed in its present form it will have the effect of significantly reducing the number of stress claims which are compensable under the Western Australian workers' compensation system.

7. Importantly, the proposed amendment (recommended by the 2014 WorkCover WA review) is in almost identical terms to the exclusionary provisions contained within the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (**SRC Act**).

8. The provisions of the SRC Act have been applied in strict terms, with the High Court in ***Comcare v Martin*** (2016) 258 CLR 467 holding that adminstrative action taken by the employer (as defined) need not be the sole cause of the injury. Rather the claim will be excluded where an element of adminstration action exists.

9. The proposed amendment will fundamentally change how claims for psychological injury are viewed, and the change is contrary to the assertion made by Minister Johnston and the State Government that it does not intend to reduce worker's rights.

10. The Australian Lawyers' Alliance is unaware of any evidence which would support the significant expansion of the exclusory provisions for stress claims and is of the view that the proposed changes will create generational disadvantage to Western Australian workers and their families.

11. In the circumstances we advocate for the removal of subsection 7(1) and the retention of the wording within the current Act.

Section 12 – Definition of *worker* – restricting extended definition workers

12. The ALA has significant concerns with the altered definitions of "*worker*" and "*employer*" (definitions in s. 5 of the Bill read with s. 12).

13. The Bill appears to remove 'extended definition workers' as defined in the current Act and will in real terms exclude a class of vulnerable persons from the workers' compensation scheme. It is the position of the Australian Lawyers' Alliance that the altered definitions will create a significant and unjustified disadvantage to injured persons in Western Australia.

14. If not amended, there is little doubt that this provision will drastically reduce the number of Western Australian workers able to access benefits under the workers' compensation scheme.

15. The definition of "*worker*" as contained within the current Act is as follows:

> "***worker*** *does not include a person whose employment is of a casual nature and is not for the purpose of the employer's trade or business, or except as hereinafter provided in this definition a police officer or Aboriginal police liaison officer appointed under the Police Act 1892 ; but save as aforesaid, means any person who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work, or otherwise and whether the contract is expressed or implied, is oral or in writing;*
>
> *the term* ***worker****, save as hereinbefore provided in this definition, includes a police officer or Aboriginal police liaison officer appointed under the Police Act 1892 , who suffers an injury and dies as a result of that injury;*
>
> *the term worker save as aforesaid, also includes —*
>
> *(a) any person to whose service any industrial award or industrial agreement applies; and*
>
> *(b) any person engaged by another person to work for the purpose of the other person's trade or business under a contract with him for service, the remuneration by whatever means of the person so working being in substance for his personal manual labour or services."*

16. The definition of worker above has its focus on the substance of the relationship between the purported worker and employer, to allow a determination to be made taking into account all of the circumstances. The proposed Bill does not.

17. In essence, the current Act ***includes*** workers' who have entered into a formal contract of employment with the employer and also those contractors who have been engaged to perform work for the employer in exchange for remuneration (the extended definition).

18. The extended definition in the current Act includes workers' who have been engaged by the employer as a sub-contractor and may have performed a "one off" job or who work for multiple employers.

19. Section 12(2) of the Bill proposes a new definition of "worker" and expressly excludes persons who perform work "*in the individual's own name or under a business or firm name"*. That provision is in the following terms:

> (2) An individual is a ***worker*** if —
>
> (a) the individual has entered into, or works under, a contract of service with a person, whether the contract is express or implied, oral or written; or
>
> (b) the individual —
>
> (i) has entered into a contract with a person to work as an apprentice, or works under a contract with a person as an apprentice, whether the contract is express or implied, oral or written; and
>
> (ii) has entered into a training contract that specifies the individual is undertaking an apprenticeship; or
>
> (c) the individual has contracted with a person for the performance of work by the individual and —
>
> (i) **the work is not work in the course of or incidental to a trade or business regularly carried on by the individual in the individual's own name or under a business or firm name**; and
>
> (ii) the individual does not sublet the contract; and
>
> (iii) if the individual employs a worker, the individual performs part of the work personally.

20. While the new definition retains the "primary" definition of worker to include individuals who have entered into a "contract of service", section 12(2)(c) ***expressly excludes*** any individual who performs work for another if that work is "incidental to a trade or business regularly carried on by the individual in the individual's own name or under a business or firm name".

21. In contrast to the extended definition of worker in the current Act, the new provision will prevent any individual acting as a subcontractor with an ABN from accessing workers' compensation benefits.

22. Section 12(2)(c) is drafted in very broad terms and must be intended to restrict the number of claims brought by subcontractors under the Act.

23. As in practical terms a subcontractor working under their own name and ABN will generally be regarded as a "worker" or "employee", the proposed change to the legislation is grossly unjust.

24. The Australian Lawyers' Alliance is unaware of any evidence which would establish that the changed definitions of "*worker*" and "*employer*" are necessary and given the real disadvantage the proposed definitions would create for Western Australian workers, we suggest that the definitions in the current Act be maintained.

25. Further, and in line with the issues raised in respect of s. 7 of the Bill, the practical effect of s. 12 in its current form would be that many Western Australian workers who are presently covered under the extended definition would no longer fall within the protections of the workers' compensation system.

26. The Australian Lawyers Alliance strongly opposes the implementation of this provision and reiterate that the changes are not in line with Minister Johnston's stated intention.

Reduction in weekly compensation payments after 26 weeks

27. The State Government appears to have proceeded on a false belief in relation to the calculation of workers' weekly compensation benefits (now defined as income compensation).

28. By section 55(3) of the Bill, weekly compensation payments shall reduce to 85% of the worker's pre-injury weekly rate, "after the first 26 weeks in which income compensation is payable".

29. The explanatory memorandum accompanying the Bill states that this provision is beneficial to injured workers by increasing the amount of time in which an injured worker receives weekly compensation payments at the full rate, from 13 weeks to 26 weeks.

30. However, this assertion overlooks established authority of the District Court and Supreme Court which have held there is to be no reduction from the 14th week and onwards for "award workers". Rather, the injured worker is to "*be placed in as near as possible the position that he or she would have been in had the incapacity not occurred".*

31. Sections 55(2) and (3) expressly provide for a reduction in weekly payments for all injured workers after receiving 26 weeks of compensation benefits, with no distinction being made between award workers and non-award workers.

32. A long line of Full Court authority including ***Swan District Hospital v Cue*** (unreported, delivered 7 August 1996, Library No. 960424), ***Nelson v Royal Perth Hospital*** (unreported, delivered 6 August 1998, Library No. 980434) and ***EG Green & Sons Pty Ltd -v- Sabourne*** [2009] WASCA 172, have established the position under the current Act that there is not to be any reduction in the weekly compensation rate from the 14th week and onwards, save for in circumstances in which the worker receives a payment that was "one off' or "unusual" in nature.

33. These authorities have been applied by the District Court in ***Fremantle Hospital -v- Owens*** *(C11 – 2019),* ***Currie -v- Western Power Corporation*** (C11 – 2011) and *McMillan -v- Burrup Fertilisers* (C12-2011)

34. For these reasons the ALA is of the view that s 55(3) should be remove in its entirety. Section 54 adequately addresses all matters in respect of the calculation of weekly payments and it should be left to stand as is.

35. Importantly, under the current Act the "step down" will not apply to any worker whose earnings are "*prescribed by an award*". This phrase has been held to include a situation in which an EBA or modern award underpins the employment of the worker and sets a minimum wage, notwithstanding the worker may have a separate contract of employment with their employer.

36. It appears the State Government aim to avoid a "step down" for award workers by way of section 57 of the Bill, however it is far from clear how this provision will be interpreted given it is confusing and difficult to follow.

37. In particular, sections 57(2) to 57(7) are unnecessarily lengthy and ambiguous. Such uncertainties will more often impact injured workers' who will require a favourable decision from an appellate court to establish their entitlement.

38. It is difficult to see how s 57 of the Bill constitutes "modernisation" and is unnecessary in the circumstances.

39. To the extent that s 55(3) of the Bill is retained, s 57 should be amended to simply state that s 55(3) does not apply to a worker "***whose earnings are prescribed by an industrial award***". That would preserve the position under the current Act.

Reducing or discontinuing compensation benefits:

40. Under the current Act, once liability is accepted for a claim, an employer or insurer cannot cease payments except in limited circumstances.

41. The existing wording of s 61 of the Act, as interpreted by the Supreme Court, makes it extremely hard, if not impossible, for insurers to unilaterally cease compensation payments. This protection is fundamental to injured workers under the current legislation.

42. Decisions including ***Vurlow v Leighton Nursing Home*** and ***Qantas Flight Catering v Joncevski*** have held that unless the procedure provided by section 61 is followed, the application brought by the employer / their insurer will not be entitled to succeed.

43. Both s 61 and s 62 of the current Act provide a clear safeguard to injured workers, preventing the cessation of weekly payments until such time as an order from an Arbitrator is obtained.

44. The ALA is concerned that should the Bill pass in its current form, there is the prospect of an insurer being able to unilaterally cease the payments of the injured worker, thus removing the protections afforded by s 61 of the Act.

Section 5 - Definition of 'return to work'

45. The first issue relates to the proposed change to the definition of "return to work".

46. The definition is far too broad, subjective and would erode the legal principles that have been established to protect the cessation of weekly payments pursuant to s 61 of the current Act. Specifically, the proposed change in definition would be at odds with the decision of ***Department of Education v Kenworthy*** (1990) 3 WAR 1 which prevents an employer from discontinuing or reducing weekly payments other than as authorised by the Act.

47. The law is well established with respect to the definition of the phrase "*return to work*", and the Australian Lawyers Alliance is of the view that the provision should remain as worded in the current Act. Again, the attempt at "modernisation" is likely to achieve the opposite effect, by creating uncertainty.

Section 63 – Reducing or discontinuing compensation on the basis of a return to work

48. Section 63 of the Bill appears to extend the operation of s 61 of the current Act, by providing that:

> "An employer must not reduce or discontinue income compensation payments to a worker on the basis of the worker's return to work unless the employer has informed the worker in accordance with the regulations of:
>
> (a) the basis for the reduction or discontinuance with reference to the position to which the worker has returned; and
>
> (b) the amount, if any, of income compensation that will be paid to the worker for any partial incapacity for work".

49. This provision must be considered alongside the definition of "return to work" which is defined by s 5 as:

> (a) the worker holding or returning to the position that the worker held immediately before becoming incapacitated if it is reasonably practicable for the employer who employed the worker at the time the incapacity occurred to provide that position to the worker; **or**
>
> (b) if the position is not available, or if the worker does not have the capacity to work in that position, the worker taking a position, whether with the employer who employed the worker at the time the incapacity occurred or another employer —
>
> (i) for which the worker is qualified; and
> (ii) that the worker is capable of performing;

50. These provisions, when read together, will allow an insurer to reduce or discontinue weekly compensation benefits if, ***in their view***, the worker is able to "return to work". Under the new definition that includes returning to work in any role for which the worker is qualified and "capable of performing".

51. Importantly, s 63 of the Bill does not provide a mechanism for a worker to file an application to WorkCover WA disputing the right of the employer to reduce or discontinue weekly payments on account of a "return to work". That is compared with s 64 of the Bill which affords this protection and requires an employer to give the worker 21 days' notice of its intention to reduce or discontinue payments.

52. Should a notice be served, the worker is then, within that period, able to apply to WorkCover for a resolution of the dispute. Until the dispute is resolved, the employer cannot suspend or reduce compensation payments.

53. It appears that s 63 will allow an insurer to unilaterally cease payments without the need for an application to WorkCover WA, provided the insurer "informs the worker in accordance with the regulations".

54. That is in contrast to the current Act which requires the insurer to make an application to suspend or reduce a worker's compensation payments pursuant to s 62 of the Act. The worker's payments cannot be impacted until such time as the insurer obtains an order from an Arbitrator, following a hearing on the merits.

55. We take the view that this provision will be widely used by employers and will cause significant hardship for injured workers and their families.

56. If these concerns are realised, this aspect of the Bill will reduce the rights of injured workers, against the stated intention of Minister Johnston and through legislation introduced by a Labor Government.

57. In the circumstances we propose the removal of s 63 of the Bill and recommend that the terms of s 60, s 61 and s 62 within the current Act be retained.

Section 64 – Reducing or discontinuing compensation on basis of medical evidence

58. With respect to proposed section 64, we query why the terms of s 61 of the Act have been altered and raise our concern as to the way in which this provision may be interpreted and/or applied.

59. Importantly, s 61 currently provides that an employer must serve on the worker a notice (Form 5 notice) which includes a report of a medical practitioner who "has certified that the worker has total or partial capacity for work or that the incapacity is no longer a result of the injury".

60. By the authority of ***Vurlow v Leighton Nursing Home*** [1978] WAR 15, it has long been held in the jurisdiction that unless a valid notice is served, it may be struck out and the application dismissed.

61. The proposed wording of section 64 is far too broad and is likely to erode establish legal principles.

62. In particular, the phrase contained at s 64(1)(b), "***the extent to which the worker's incapacity for work is a result of the worker's injury***", is vague and would allow an employer to serve a notice in a wide range of circumstances.

63. Much like s 63, the ALA is of the view that this provision will be used by employers to cause significant hardship, with the overall result being a reduction in the rights of injured workers.

64. We submit that the terms of s 61 in the current Act should be retained, and section 64 amended to reflect this. We suggest that section 64 expressly recognise the fact that unless the certificate or report accompanying the notice certifies to a relevant matter, the notice will be held invalid.

65. Further, the provision should expressly state that income compensation payments may only be reduced or discontinued should a medical practitioner "*certify that the worker has total or partial capacity for work, or that the incapacity is no longer a result of the injury*".

Section 63(2) and 64(4) and (5) – The power of an Arbitrator to review income compensation payments

66. Further to the concerns raised above, we believe sections 63(2), 64(4) and 64(5) are far too broad and confer too much discretion on an Arbitrator when reviewing the entitlement to weekly compensation payments.

67. Consistent with the way in which applications pursuant to s 61 of the Act are currently determined, the legislation should expressly state that the Arbitrator is to determine whether or not the worker has total or partial capacity for work, or whether the incapacity is no longer a result of the injury.

68. We submit that this should be the extent of the power conferred on the Arbitrator and consider that sections 63(2) and 64(4) should be amended to this effect, whilst section 64(5) should be removed in its entirety.

69. Indeed, section 64(5) goes to matters well beyond the scope of a s 61 or s 62 dispute given it allows an Arbitrator to take into account additional matters, such as whether the worker has participated in a return to work programme (which is highly subjective and could be applied unfairly).

Sections 163 and 164 – Duties of worker and refusal to comply

70. The Australian Lawyers Alliance has real difficulty with sections 163 and 164 of the Bill, and we query their legislative intent.

71. Alarmingly, section 163(2) provides that "***An injured worker must, <u>in cooperation with the worker's employer</u>, make reasonable efforts to return to work***".

72. Further, s 163(4) places an onerous duty on a worker to "comply with reasonable obligations placed on the worker under the worker's return to work program, including any obligation to undertake workplace rehabilitation".

73. Not only is this provision entirely subjective, it seeks to reverse the onus by placing an obligation on the worker as opposed to the employer and rehabilitation provider.

74. Proposed section 163(6) establishes a "duty" on the part of the worker to provide progress medical certificates issued to the worker within 7 days of receipt.

75. These provisions appear to assume that workers involved in the scheme are not motivated to return to work and engage in rehabilitation. That is hardly the case and is a false assumption.

76. Section 164(1) of the Bill then provides that an employer (or their insurer) "may apply for an order of an arbitrator in respect of a worker's refusal or failure to comply with a duty under s 163".

77. If successful with such an application, the worker's payments may be suspended by order of an Arbitrator.

78. These provisions are likely to cause significant hardship to injured workers and will be used whenever possible by the employer or the insurer.

79. Presently, s 156B of the Act provides an Arbitrator with the power to order a worker to participate in a return to work programme, however there is no power to suspend weekly payments. We consider this appropriate.

80. We recommend the removal of these provisions and a redraft of the legislation to focus on a collaborative approach to return to work, as opposed to placing onerous obligations on the worker which could lead to the suspension of weekly payments.

The Prescribed Amount and Maximum Weekly Compensation Rate (Amount C)

Sections 53 and 56 – Maximum weekly rate of compensation

81. We note that the bill retains the present Amount C cap, described as the "maximum weekly rate of income compensation".

82. When considering the success of the state's economy and the fact that many workers, particularly those working in the mining industry, are earning well in excess of Amount C ($2,872.00 gross per week), we submit that this provision should be removed, or the maximum weekly rate increased.

83. It is difficult to understand the rationale for retaining this provision and causing disadvantage to high income earners when injured.

84. Increasing or removing a cap on the amount to be paid in weekly compensation benefits is also consistent with the authority referred to above which provides that an injured worker "*should be placed in as near as possible the position that he or she would have been in had not the incapacity occurred".*

Section 538 - General Maximum Amount

85. Following on from the above, we note that section 538 of the Bill retains the "prescribed amount" of $243,991.00 under the current Act, defined as the "general maximum amount". Save for annual indexation, there is no intention to increase this sum.

86. We take the view that section 538 should be amended to increase the "general maximum amount" to at least $300,000.00, indexed annually, or three years annual earnings, whichever is the greater.

87. As stated above, many workers in 2023, particularly those working in the mining industry, are earning in excess of $150,000.00 per year, and an increase to the prescribed amount is logical to ensure high income earners are adequately compensated.

88. When having regard to the current prescribed amount of $243,991.00, a worker receiving the maximum weekly rate of $2,872.00 gross per week will receive compensation for a period of only 85 weeks, should they remain off work.

89. We consider this to be an unacceptable situation given those with serious (or even moderately severe) injuries are unlikely to have exhausted all treatment options by this time and may not have stabilised to the extent required to undergo a WPI assessment.

90. We cannot see the basis for a scheme which unfairly impacts high income earners and consider the proposed change of allowing up to three years of annual earnings to be a fair and equitable result.

91. The three year period also coincides with the limitation date for personal injury claims and by this point, a worker with serious injury is likely to have commenced common law proceedings.

92. The current prescribed amount of $243,991.00 has caused significant prejudice to many injured workers and we implore the Government to rectify this issue.

Common Law Restrictions:

Part 7, Division 2 - Constraints on Common Law Proceedings and Damages

93. The Australian Lawyers Alliance consider that one of the key areas of the Act requiring legislative reform are the provisions restricting the right of an injured worker to commence common law proceedings against their employer.

94. We note that Part 7 of the Bill contains no substantive amendments, and the intention is to maintain the constraints on common law damages introduced in 2005.

95. As solicitors and barristers having direct involvement with workers affected by these provisions, we have seen how the legislative restrictions cause significant prejudice and hardship.

96. It is evident that obtaining a whole person impairment (WPI) assessment of not less than 15%, let alone 25%, is difficult, and many workers with serious injuries do not meet the minimum threshold.

97. We consider these restrictions to be artificial, unduly harsh and prevent many workers with serious injuries from being able to prosecute a common law claim against their employer. In such circumstances, the claim for compensation is limited by the prescribed amount, notwithstanding the worker may be permanently incapacitated for work.

98. Whilst we commend the Government for removing the “termination day” by way of its 2020 amendments, many injured workers with a strong case in negligence against their employer are unable to bring that case given the restrictions currently imposed.

99. We bring to the Government’s attention the fact that an injured person may bring other forms of action, such as a motor vehicle accident claim, public liability or medical negligence claim without having to overcome any form of WPI threshold.

100. We consider this illogical and see no reason why a work injury claim against an employer should be subject to a WPI threshold when other personal injury claims are not.

101. While an employer owes its employees a strict, non-delegable duty, employers can escape liability for their negligence when a worker does not reach the 15% WPI threshold. We believe the legislation should be structured in a way that ensures employers are kept accountable for their actions and workplaces are kept safe. The Act as presently drafted does not promote such an objective.

102. Whilst we understand these constraints were put in place to reduce the overall cost of the scheme, it is now injured workers who are paying the price.

103. We believe the Western Australian Labor Government is presented with the opportunity to bring about a positive and long lasting change to the state's workers' compensation system by removing or softening the constraints on common law damages.

104. It is difficult to accept the position that a person with a reasonable case in negligence is unable to proceed with that claim through the application of an artificial WPI threshold. Simply put, if a worker has a case in negligence against the employer and their damages claim is likely to exceed the entitlements payable under the legislation, they should be entitled to prosecute that claim.

105. In these circumstances we implore the Government to rectify this injustice by either removing the WPI thresholds entirely, or by reducing the percentage required to commence a common law claim.

106. At the very least, we submit that the WPI threshold should be reduced to either 5% or 10%, which would prevent minor claims from progressing to the District Court. Otherwise, the restrictions on the award of damages contained in Part 2 of the *Civil Liability Act* 2002 (WA) should apply to ensure that certain thresholds are met in relation to the claim (which would be consistent with all other personal injury claims).

Section 185 – Secondary conditions to be disregarded in certain cases

107. Beyond the issues identified above, the Australian Lawyers Alliance advocates for the removal of this clause to ensure that the assessment of whole person impairment includes secondary psychiatric conditions.

108. This is an important issue in the jurisdiction, and we are not aware of any publication or study which suggests that scheme costs will dramatically increase should the change be made.

109. As an example, if a worker contracts a Major Depressive Disorder as a <u>direct result</u> of the pain and restrictions cause by a physical injury, this should be accounted for in assessing whole of person impairment. It is superficial that workers who have Post-Traumatic Stress Disorders or other conditions considered to be "*primary*" can have these conditions accounted for in assessing whole of person impairment but those mentioned in the former example cannot.

Sections 423 and 424 - Effect of election to retain the right to seek damages on entitlement to compensation

110. Of further concern to the Australian Lawyers Alliance are the provisions contained within sections 423 and 424 of the Bill. We note these are in substantially the same terms as s 93P and s 93K of the current Act.

111. As outlined above, we submit that the 15% WPI threshold should be removed or reduced.

112. In any event, we advocate for the removal of section 423 so as to ensure that once the relevant WPI threshold has been reached, all common law claims are treated equally.

113. Section 423(1) and (2) (currently contained at s 93P of the Act) are particularly prejudicial and are designed to deter an injured worker from commencing common law proceedings in the first place. That deterrence is in the form of a withdrawal of compensation benefits over a period of 6 months, and the immediate cessation of statutory expenses.

114. Of even greater significance is section 424 (the current s 93K(5) – (7)) which limits the amount that can be awarded in damages for those workers assessed as being between 15% to 24%. That maximum (known as “Amount A”) is currently $512,384.00, however this includes the total of all compensation benefits received under the Act.

115. Consequently, at the point a worker resolves their claim in the District Court the amount received in damages is significantly less, usually in the range of $200,000.00 to $300,000.00. That is in circumstances where the total claim for damages would be two or three times this amount.

116. We repeat our submission above that these artificial thresholds should be removed thus allowing a claim for damages to be assessed on its own merits.

117. It is difficult to accept a position whereby the actual claim for damages exceeds the maximum allowed, yet the statute arbitrarily limits the amount that can be sought. It is only work injury claims that are subject to this limit and the Australian Lawyers Alliance implore the Government to carefully consider this issue and implement important change.

118. That can occur through the reduction (or removal) of the WPI threshold and by appropriate amendment to sections 423 and 424.