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Dear Madam Secretary

## **RETURN TO WORK LEGISLATION AMENDMENT BILL 2020**

Law Society Northern Territory (Society) welcomes the opportunity to provide a submission on the *Return to Work Legislation Amendment Bill 2020* (Bill).

The Society is the peak professional body representing the interests of legal practitioners in the Northern Territory and has a broader interest in advocating for fair and consistent law reform where appropriate.

While the Society welcomes the positive aspects of the Bill, it is disappointing that the Bill does not address any of the real issues causing disputes, litigation, and burdens on the court in with work health space, and does not assist practitioners in resolving or advising on any of the most vexed issues such as secondary injuries, or permanent impairment. Nor does it make any progress towards ensuring that the NT has a fair workers compensation scheme reflective of modern principles of compensation.

It has been clear for some time that the *Return to Work Act 1986* (Act) needs significant reform, both in terms of its drafting and in terms of its practical outcomes for injured workers.<sup>[1]</sup>

The Society believes that the Act should be comprehensively reviewed as part of a larger and more holistic, root-and-branch, policy-based assessment of whether the present scheme continues to be the most appropriate design or whether an alternative should be considered. The present amendments do little more than tinker at the edges of a scheme that is in serious need of substantive reform.

### **Scheme design**

The scheme established by the Act cannot be properly called a compensation scheme as it does not comply with the fundamental principles of compensation; namely, that an injured worker should be restored to the state he or she was in but for the injury. The NT scheme fails to meet this fundamental objective in a number of ways, but most noticeably by abolishing all

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<sup>[1]</sup> See commentary in *Donnelly v Charles Darwin University* [2011] NTMC 16 at 23; *Maddalozzo v Maddick* [1992] NTSC 6

rights to common law.<sup>[3]</sup> In the Society's view, the best and fairest workers' compensation schemes provide a statutory or no-fault safety-net, but crucially, maintain meaningful access to common law benefits for those persons who are injured by negligence.<sup>[4]</sup>

The Law Council of Australia, writing about no-fault compensation, identified that:<sup>[5]</sup>

*It has been a regrettable feature of public discourse around the establishment of no-fault injury insurance schemes in other jurisdictions that no-fault accident insurance must be funded by reducing benefits at common law. The effect of this is that those who are negligently injured, who previously enjoyed entitlements according to the 'compensation principle' – that plaintiffs be awarded "such sums of money as would restore them to the positions they would have been in, if there had been no negligence" – have their entitlements substantially reduced in order to fund a no-fault scheme for all others; effectively "robbing Peter to pay Paul". **This offends basic principles of justice and fairness, and ultimately leads to a poorer quality of life for those forced to sacrifice their common law entitlements to "pay" for the proposed scheme.** The experience of no-fault schemes in Australia and overseas strongly indicates that the best performing schemes invariably allow access to common law for those who suffer injury as a result of another person's negligence.* (Emphasis added)

The finality afforded by mechanisms such as the common law carries with it one other benefit of profound importance: the scheme is less expensive for employers. This occurs because:

- (a) Short-tail schemes need fewer people and resources to administer. Those resources are expensive, and employers' premiums bear that expense;
- (b) Long-tail schemes commonly improve their financial outcomes by engaging in a war of attrition with claimants. This invariably generates higher disputation rates, and the dispute-resolution process is, in turn, expensive and resource-intensive. In contrast, short-tail schemes have much lower disputation rates.

In the Society's view, common law access is a central tenet of any fair and sustainable workers compensation scheme and should seriously be considered in any reform of the Act.

## The 260 Week Cap

Section 61A is a 260-week (5 year) cap placed on workers who have been assessed to have suffered an injury below 15% permanent impairment. This assessment cannot include secondary psychological injury. It is recognised that the 2015 amendments introducing this

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<sup>[3]</sup> Even setting aside the inherent negative effects of abolishing access to pain and suffering damages, the Act goes further by building in limitations on workers' rights to compensation, including a step-down effect that effectively means that a Worker can never recover, in a financial sense, from the effect of their injury. The worker is only entitled to 100% of their Normal Weekly Earnings for the first 6 months post-injury; after that their income is reduced to 75% of this figure, with no avenue of objection or review. This ensures only that workers who are seriously injured and remain on the scheme for more than six months are guaranteed to suffer some degree of economic hardship that it is impossible, within the bounds of the scheme, to ever recover. This is fundamentally at odds with the compensation principles above. Access to common law would be a simple way to remedy this.

<sup>[4]</sup> See "Green Paper – No-Fault Catastrophic Injury Cover" Law Council of Australia (2014)

<sup>[5]</sup> Ibid



cap were based on advice from a government actuary that the cap would help manage costs and premiums in the long-term.

The Gunner government, while in opposition, explicitly committed to a repeal of this cap.<sup>[2]</sup>

The 15% figure chosen is arbitrary and can have disproportionate impacts on workers whose injury falls below this threshold but who are precluded from continuing their employment (this is often the case for workers in heavy manual labour, plumbing, mining etc). It is common to see workers with limited education or qualifications suffer a minor impairment to an arm, hand, or knee, which renders them unfit for physical work for the rest of their lives. While their impairment will almost certainly be assessed below 15%, their working future, and their entire life, has been permanently impacted in a way that is currently not able to be compensated for under the scheme. For example, a worker who has undergone a back fusion procedure may only receive an assessment of about 10%, and be limited under the cap to only 5 years of compensation despite never being able to return to their trade.

It is the Society's position that the cap is an unfair tool that effectively sets the untreated pain and suffering, as well as ongoing real economic loss of an individual who fails to meet the threshold, at zero, wholly to the benefit of the employer and insurer.<sup>[3]</sup>

Further to the effects on injured workers, the cap is also a cause of significant delay in the resolution of claims. Legal practitioners are often unable to properly advise their clients as to the reasonableness of any lump sum settlement under the Act if there is a possibility that the worker may be assessed above 15%, as the difference between a closed period and a potential ongoing liability is considerable. This means that any worker with a possibility of achieving the threshold is forced to wait and to be formally assessed once their injury has stabilised (which in some cases can take many years). These delays cause increases in legal costs for all parties, as well as uncertainty and obstacles to claims being resolved in an efficient and cost-effective manner.

## **Secondary injuries**

An injured Worker is required, by s80 of the Act, to give notice of their injury as soon as practicable. Giving notice of an injury is separate from making a claim.<sup>1</sup> The failure to give such notice is an absolute bar to the worker's entitlement to make a claim. The question of whether an injured worker has given proper notice of an injury is a central debate in a substantial majority of litigated Work Health Court matters. This question arises, in large part, due to the uncertainty surrounding how a worker is to give notice of an 'injury' that arises as a consequence of, or secondary to, a primary (accepted) injury.<sup>2</sup>

The Act itself speaks only of 'the injury'. Subsequent decisions of NT courts have held that 'the injury' includes any secondary or sequela injuries. However, the Act is silent as to how the inclusion of these secondary injuries is to be treated under a scheme that, on its face, speaks only in the singular, and deals only with acceptance and rejection of 'claims'. Fundamental to

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<sup>[2]</sup> See, for example, Michael Gunner's announcement on May Day 2016: "Labor will reverse the CLP's draconian changes to the Return to Work Act...A Labor government will return to the model that was effectively in place since 1987 to ensure our workers are looked after up to the end of their working lives."

<sup>[3]</sup> For a more detailed discussion of this and other factors, see *'There Must Be a Better Way': Personal Injuries Compensation since the 'Crisis in Insurance'*, A Field, Deakin Law Review 1 (2008) 13 at 67 -98

<sup>1</sup> Though the making of a claim automatically counts as the giving of notice.

<sup>2</sup> Often referred to as 'sequela' injuries

this is when and how a worker is to give 'notice' of any secondary injury, and the consequences of failure to do so.

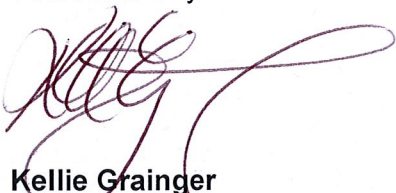
The Court of Appeal addressed this issue in *Lee v McMahon Contractors* [2018] NTCA 7. With respect, the decision of the Court in that matter has left the position of notice in such a state that an injured worker would find it almost impossible to comply with their obligations unless they seek legal advice. The Court of Appeal held that a worker must give formal, s80 notice not only of their secondary injury, but of their specific intention to rely on that secondary injury as the cause of any incapacity or expense. These requirements, which are not explicit in the Act, have created a minefield of 'invisible' obligations that an ordinary worker would not be able to divine without receiving legal advice. This is inimical to the objects of the scheme, and to access to justice more generally.

The Parliament should review in detail the issue of secondary injuries and put forward amendments to properly and meaningfully resolve this ongoing area of dispute. Such resolution would reduce the number of technical legal disputes in the Work Health Court and would facilitate clearer understanding of the worker's obligations by all interested parties.

## **Conclusion**

While the Society acknowledges that the Bill, in its current form, provides some useful updates (particularly the definition of worker, and the alignment with the NIIS), there is still a great deal of work left to be done. The Society calls for principled, fair, and substantive reform to the Act to ensure that injured Territorians have access to a scheme that is fit for purpose. The Society's members also require a workable version of the Act in order to confidently give proper advice to their clients and to remove the uncertainties currently causing unproductive legal disputes and proceedings.

Yours faithfully



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