



Asbestos Disease
Support Society

Support
Awareness
Advocacy
Education

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Committee Secretary
Legal Affairs and Safety Committee
Parliament House
George Street
Brisbane Qld 4000

By email: lascc@parliament.qld.gov.au

ASBESTOS DISEASE SUPPORT SOCIETY SUBMISSION ON THE PERSONAL INJURIES PROCEEDINGS AND OTHER LEGISLATION AMENDMENT BILL 2022

The Asbestos Disease Support Society (the 'Society') welcomes the opportunity to provide a submission on the *Personal Injuries Proceedings and Other Legislation Amendment Bill 2022* (the 'Bill'). The Society's views will only relate to the proposed amendment to Section 39A of the *Workers' Compensation and Rehabilitation Act 2003* (the 'Act').

By way of background, the Society was founded in 1992 to provide support and assistance to people (and their families and carers) who have been diagnosed with an asbestos related disease and information to the community on the health risks associated with exposure to asbestos fibres. In 2018, the Society expanded its support to people who have been diagnosed with silicosis, another deadly dust related lung disease resulting from the inhalation of respirable crystalline silica. This assistance is provided under the banner of the *Silicosis Support Network*. The Society is a member based organisation with over 750 current members.

Sadly, on average, 70 members of the Society pass away annually as a result of preventable dust related lung diseases and cancers.

Society Position

The proposed amendment will negatively impact many of the Society's members who are suffering from debilitating and incurable dust related diseases such as mesothelioma, asbestosis, silicosis and various cancers. As such, the Society does not support the amendment as proposed but will support an amendment to section 39A of the Act that applies to persons whose life expectancy is expected to be terminated within a period of 5 years, which aligns to the original intent of the 2019 amendment. Additionally, concerns are held in relation to the lack of transitional arrangements for terminal claims lodged but not yet determined. The Society's position is that already lodged claims be assessed under the current s39A of the Act rather than have an amended section retrospectively apply to them.



Definition of Terminal Condition

Chapter 3 of the Act specifies entitlements available to workers with latent onset injuries that are terminal conditions. "Terminal Condition" was originally defined as a condition certified by a doctor that is expected to terminate a workers' life within two years after diagnosis.

The definition remained until 31 October 2019 when it was amended by *the Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2019* to remove reference to the workers' life likely being terminated within 2 years – rather, it did not specify a timeframe.

Background to 2019 Amendment

In amending S39A the Act in 2019 by removing the 2 year life expectancy criteria, the Government had a clear intention to increase the class of persons entitled to terminal condition compensation. In making this amendment, the Government would have also been aware of the explicit intention of the Act, at section 5 in "maintaining a balance between providing fair and appropriate benefits for injured workers and ensuring reasonable cost levels for employers, as well as ensuring that injured workers are treated fairly by insurers".

Minister Grace confirmed the intention to increase the class of persons entitled to terminal condition compensation in the Explanatory Notes and First and Second Reading Speeches following introduction of the 2019 amendment by referring to the following:

- Some workers are diagnosed with a terminal work related condition with a life expectancy greater than 2 years – for example 3 or 5 years – which means they are excluded from accessing the terminal condition payment and the Bill amends the Act to extend entitlement to the latent onset terminal entitlement – page 9 of the Explanatory Notes.
- The Bill will ensure that all workers diagnosed with a terminal work related condition have access to lump sum statutory payments under the Act, removing the current provision that denies access to some workers with a terminal condition if their life expectancy is greater than 2 years - page 3351 of the Second Reading Speech.
- The worker retains their rights to seek common law damages for negligence contributing to the workers' terminal condition however, the prompt assessment and payment of the statutory entitlement may alleviate the need of the worker to seek common law damages and allows the worker to spend more time with their family – First Reading Speech.
- Minister Grace provides the example of dust related lung diseases which are terminal conditions as including asbestosis, silicosis and coal workers' pneumoconiosis or a work related cancer – First Reading Speech.

No doubt the Government would have expected there to be an increase in benefits payable, given the intention of the amendment was to effectively bring forward payment of a person's terminal condition entitlement.

Positive Impact of the 2019 Amendment

The amendment to the terminal condition benefit in 2019 saw a positive impact on many of the Society's members (and Queensland workers in general) suffering with slowly worsening yet often debilitating lung diseases – many of which are suffered for a period of several years.

The prolonged suffering of those with serious work related lung diseases should not be undervalued. Feedback from the Society's members who have received the benefit has been overwhelmingly positive and exactly in line with the entire intention of the amendment in the first place – that is, to allow the workers to seek compensation for their condition now, rather than having to wait to fit within a short timeframe to pursue a common law claim for damages which can be costly and protracted.

Specifically, the benefit has allowed them to spend more time with their family, plan and attend to their financial, medical and care needs and was, again, a positive amendment for workers that should never have been exposed to asbestos, silica or coal dust in the first place.

Policy Intent of the 2019 Amendment

Page 6 of the Bill's Explanatory Notes states:

"A three-year timeframe is considered appropriate as it aligns with the policy intent of the 2019 amendment and provides an additional year buffer where there is medical uncertainty about a worker's prognosis".

The above statement is incorrect as the policy intent of the 2019 amendment was to provide for terminal condition payment if life expectancy was within 3 to 5 years. This is confirmed on page 15 of the same Explanatory Notes which states as follows:

"The policy intent of the 2019 amendments was to entitle a worker with access to terminal compensation if their death was expected within three to five years if their injury was sustained on or after 31 January 2015".

Additionally, The Society does not support the following statement, also on page 15 of the Explanatory notes:

"Since the 2019 amendments, it is unlikely workers would have an expectation of receiving terminal compensation so far into the future, in particular the explanatory notes for the Bill and the guidance material issued by the Regulator noted the policy intent of the 2019 amendment. This expectation only arose due to the Blanch decision on 2 December 2021."

The Society submits that injured workers with a terminal condition are well aware of the 2019 amendment and the ability to pursue terminal benefits beyond the proposed 3 year time frame. The Society rejects the conjecture that the *"expectation only arose due to the Blanch decision"*. Many claims have been submitted prior to the *Blanch decision*, as the 2019 amendment was clear and unambiguous in the deletion of any specified time frame. Certainly, workers with a claim currently lodged but not yet determined would have an undeniable expectation that their claim will be assessed as per the current wording of the section 39A. The *Blanch decision* merely confirmed what was already known.

Future Impact: 3 vs 5 years

By reducing the life expectancy to as low as 3 years, many injured workers will be precluded from a reasonable level of early access and "prompt assessment and payment of their statutory entitlement" – as outlined in the 2019 amendment First Reading Speech.

It is reasonable to assume that those who are certified by a doctor as having a life expectancy of 5 years or less are certain enough of their disease progression and will be eventually entitled to the benefit in any event when they reach a 3 year life expectancy.

The Society appreciates that the 2019 the amendment did not specify a timeframe at all, leaving it open to many sufferers to pursue a claim, such as Mr Blanch with an 18 year life expectancy. This has raised concerns that the workers' compensation scheme may be too financially burdened by the number of cases able to be pursued. However, the Society also understands that although the insurer bears the upfront cost of awarding terminal condition compensation, it is often the case that they are able to recover all or part of the compensation paid via a common law claim – either with the assistance of the worker or on their own, thereby financially replenishing the Scheme.

This should be taken into account in respect of the argument relating to the future financial burden on the Scheme.

Transitional Arrangements

The Society holds deep concerns in relation to transitional arrangements, or lack thereof. Society members have claims currently lodged for terminal benefits under the current s39A. It would be appropriate for these already lodged claims to be assessed under the current s39A rather than have an amended section retrospectively apply to them. It is submitted that without these transitional arrangements, the Government is effectively breaching its duty to ensure "injured workers are treated fairly by insurers".

Summary

To achieve the intention of the Act to provide proper benefits, treat the injured worker fairly and ensure the viability of the scheme, a 5 year period of life expectancy as a definition of terminal condition would be appropriate and supported by the Society. Additionally, claims lodged but not yet determined should be assessed under the current s39A rather than the amended section.

The Society appreciates the opportunity afforded by the Committee to provide our views on this matter.

If further information or clarification is required in respect of this submission, please contact the Society's General Manager, Mr Trevor Torrens on mobile [REDACTED] or email [REDACTED].

Yours sincerely,

