

**2015**

**LEGISLATIVE ASSEMBLY FOR THE  
AUSTRALIAN CAPITAL TERRITORY**

**WORKERS COMPENSATION AMENDMENT BILL 2015**

**EXPLANATORY STATEMENT**

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# Workers' Compensation Amendment Bill 2015

## Overview of the Bill

The *Workers' Compensation Act 1951* (the Act) establishes the regulatory framework for the Territory's private sector workers' compensation scheme. The Scheme essentially involves insurers providing rehabilitation services and compensation to employees who are injured at work and collecting insurance premiums from employers to meet the associated costs.

Employers have responsibilities under the Act to assist their injured employees to stay at work or to return as soon as possible following an injury, to hold a workers' compensation insurance policy covering all of their employees and to provide their insurer with information about the number, type and remuneration paid to their employees. This employee information is used by insurers to determine the level of premium payable by the employer.

WorkSafe ACT is the scheme regulator. WorkSafe's role involves assisting employers to understand and comply with their workers' compensation responsibilities by providing education, compliance and enforcement functions for the employer obligations under the Act.

This Bill modernises employer obligations on return to work, by requiring certain types of employer to appoint return to work coordinators. It also improves the regulators capacity to fulfil its employer focused compliance and enforcement role, by aligning inspector right of entry to workplace powers with the powers already available to the inspectorate under the related *Work Health and Safety Act 2011*.

## Human Rights Considerations

The right to privacy in the *Human Rights Act 2004* (the HRA) is based on the right to privacy set out in Article 17 of the International Covenant on Civil and Political Rights ('ICCPR'). As international case law does not exhaustively define 'privacy' or 'private life', the European Court of Human Rights applies a general test of whether there is a reasonable expectation of privacy in order to determine if the right to privacy is engaged<sup>1</sup>.

The UN Human Rights Committee has noted that 'as all persons live in society, the protection of privacy is necessarily relative. However, the competent public authorities should only be able to call for such information relating to an individual's private life the knowledge of which is essential in the interests of society...<sup>2</sup>'. The right to privacy is hence not absolute and may be reasonably limited by laws which can be demonstrably justified in a free and democratic society<sup>3</sup>.

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<sup>1</sup> *Halford v United Kingdom* (1997) 24 EHRR 523 at [45].

<sup>2</sup> UN Human Rights Committee, *General Comment 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art 17)*, UN Doc CCPR General Comment 16 (1988), para 7.

<sup>3</sup> Section 28, *Human Rights Act 2004*.

### Return to Work Coordinators

This Bill introduces obligations on self insurers and large employers to appoint a return to work coordinator.

The return to work coordinator will be a person with specialised training and experience, who will perform a number of the functions currently performed by an employer.

This may involve access to person records including medical information pertaining to an employee. To ensure that an employee's right to privacy is protected, return to work coordinators will be bound by the *Health Records (Privacy and Access) Act 1997*.

The return to work coordinator's power is limited to the existing powers of the employer as contained in the Act. They will not have access to any additional medical information or documentation.

### Inspector Powers

The Bill provides for improved inspector right of entry powers. The operation of the improved right of entry powers under the Bill have incorporated significant safeguards and limitations on their use to ensure that, wherever possible, the impact of these powers on individual rights is restricted. Particular regard has been had to the right to privacy and the fact that there is a long standing expectation that businesses and undertakings will be scrutinised with respect to compliance, no matter where that business operates. In the case of residential premises, the provisions balance the need to protect vulnerable workers who may work in properties that are wholly or partly residential (or appear to be residential in nature) with an individual's right to privacy in their home.

There are restrictions included in the Bill that are aimed at minimising any possible intrusion on a person's privacy. It is recognised that people have greater expectation of privacy when working within a private residence. The Bill ensures that a private residence may only be entered if the inspector reasonably believes that no reasonable alternative access is available, and the inspection is to be undertaken at a reasonable time having regard to the times at which the inspector believes work is being carried out at the place to which access is sought.

It is also recognised that a person has the right to privacy within the workplace that is not a private residence. The operation of the improved right of entry powers under the Bill have incorporated safeguards and limitations on their use to ensure that, wherever possible, the impact of these powers on individual rights is restricted.

Powers for inspectors to enter premises without consent or a search warrant and to put questions to a person following entry are provided for in Clause 5 of the Bill. Such a power is necessary to enforce the law and is proportionate to the aim of ensuring that employers:

- maintain a current workers' compensation policy;
- declare the correct wage and industry classification information to insurers;
- are paying injured workers their legal entitlements; and
- are providing appropriate assistance to injured workers in relation to returning to work as soon as possible, or offering alternate suitable duties where possible.

This will remove situations where obtaining consent or a warrant, would impede inspectors in identifying breaches of the Act.

To ensure that such an authority is proportionate in all circumstances, clause 5 ensures that the occupier of the premises and the employer are notified of the inspection, and that the inspector shows appropriate identification as specified under section 189.

*Importance of the purpose of the limitation:*

The amendments in this Bill have been developed in line with the notion that governments not only have responsibility to ensure that human rights are free from violation, but are required to provide for the full enjoyment of rights, subject to any reasonable and justifiable limitations. Consideration of this responsibility supports the positive protection of the rights of employees, consistent with section 11 of the *Human Rights Act 2004*.

The current restrictions on inspector right of entry powers significantly impair the regulator's capacity to effectively perform its regulatory compliance functions. This increases the likelihood that some employers will not comply with the Act, for example by not providing proper return to work support for injured workers, not holding a compulsory workers' compensation policy or not paying an appropriate premium amount.

Employer non-compliance of this kind detracts from injured workers receiving the compensation to which they are entitled under the Act.

Historically WorkSafe has operated separate workers' compensation inspectors and health and safety inspectors, which conducted compliance and enforcement activities independently. Through the Access Canberra initiative, WorkSafe ACT is adopting a more effective, holistic compliance model, where all inspectors are trained to conduct both workers' compensation and work health and safety activities.

By aligning inspector right of entry powers for workers' compensation with work safety arrangements, the Bill will allow integrated safety and injury management education, awareness, compliance and enforcement activities to be rolled out across the Territory.

This will significantly increase the effectiveness and efficiency of regulatory operations and will assist employers by establishing a single source of

inspectorate expertise on workers' compensation and workplace safety matters.

For this model to be successful, workers' compensation inspectors require the same powers of entry as work health and safety inspectors.

*Relationship between the limitation and its purpose:*

Currently, restrictions on the regulator allow non-compliant employers to effectively evade regulatory oversight by denying access to inspectors. The limitation will allow an inspector to undertake dual compliance inspections under both workers' compensation and work health and safety, and will limit the ability of employers to evade regulatory oversight.

By removing the obligation on an inspector to obtain consent from the employer prior to entering premises that are, or that the inspector reasonably suspects are, a workplace, the Bill will assist inspectors to perform their function in a much more efficient and effective way. It will also mitigate the use of multiple resources and reduce administrative costs.

**Application of strict liability offences in law**

Clause 5 of the Bill reapplies the existing strict liability offence in section 191 of the Act. It relates to persons at a work premises producing documents and information for inspectors.

Two new strict liability offences have also been introduced in Clause 4 to ensure that an employer appoints an appropriately trained return to work coordinator and provides the necessary facilities and assistance to allow them to perform their role.

The imposition of strict liability offences has the potential to trespass on an individual's fundamental human right as set out in article 14(2) of the International Covenant on Civil and Political Rights which states that: "everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law".

Incorporating strict liability offences was carefully considered during the Bill's development.

The purpose for using strict liability offences arise in a regulatory context where the public interest in ensuring that regulatory schemes are observed, requires the sanction of criminal penalties. In particular, where a defendant can reasonably be expected, because of his or her professional involvement, to know what the requirements of the law are, the mental (or fault) element can justifiably be excluded.

In the case of the new strict liability offences created by the Bill, it is reasonable to expect that employers that may be subject to them will be aware of their relevant workers' compensation obligations. Specifically, the obligations to which the offences relate apply only to self insurers and large

employers which pay an annual premium in excess of \$200,000 per annum. These employers will have been individually notified of the requirements.

While due consideration has been given to the framing of offences in the Bill and the impact on human rights, it should be noted that the new strict liability offence introduced by this Bill will apply to a relatively large employer or self insured employer. Consequently, in the majority of cases, a penalty resulting from a breach will apply to an entity rather than an individual.

See detail section, below.

## OUTLINE OF THE PROVISION OF THE BILL

### Part 1 — Preliminary

#### Clause 1 — Name of Act

This clause provides that the name of the Act is the *Workers Compensation Amendment Act 2015*.

#### Clause 2— Commencement

This clause provides for the commencement of the Act.

Clauses 3 and 5 commence on a day fixed by the Minister by written notice. Section 79 of the *Legislation Act 2001* provides that if a provision of the Act has not commenced within six months of the Act's notification day, the provision automatically commences on the first day after that period.

The remaining provisions commence three months after this Act's notification day.

#### Clause 3— Legislation amended

This clause provides that the Act amends the *Workers Compensation Act 1951*.

#### Clause 4 — New Part 5.4A Return to work coordinators

This clause inserts a new part into the *Workers Compensation Act 1951*:

New section 103A Definitions—pt 5.4A inserts definitions of annual premium and return to work coordinator into part 5.4A.

The return to work coordinator definition is as a consequence of the insertion of the new section 103C.

New section 103B - Application-pt 5.4A requires all employers, including self-insurers with an annual workers' compensation premium of \$200,000 or greater to appoint a return to work coordinator.

New section 103C:

- requires an employer to appoint a return to work coordinator;
- allows three months for an employer to reappoint another return to work coordinator if the position becomes vacant. This allows employers a reasonable period of time in which to appoint a suitably qualified return to work coordinator, or alternatively arrange appropriate training for a new or existing staff member; and
- creates a strict liability offence for employers who fail to appoint a return to work coordinator within three months of the position

becoming vacant. The maximum penalty for an offence against section 103C is 50 penalty units.

#### New section 103D:

This section details the type of functions that a return to work coordinator will perform. These are existing functions currently performed by an employer.

- describes the functions of the return to coordinator to assist injured workers to resume suitable duties at the workplace or return to work as soon as practicable;
- requires the return to work coordinator to assist in the development and implementation of an injured worker's return to work plan and personal injury plan;
- requires the return to work coordinator to identify suitable duties for injured workers;
- requires the return to work coordinator to liaise with parties involved in the injured worker's return to work;
- requires the return to work coordinator to monitor an injured worker's progress towards the worker's return to work;
- requires the return to work coordinator to take steps in order to return the worker to suitable duties as safe and soon as possible;
- ensures injury management strategies are promoted; and
- requires that the collection and disclosure of personal health information by return to work coordinators is subject to the Health Records (Privacy and Access) Act 1997.

#### New section 103E:

- requires an employer to provide the facilities and assistance necessary to allow a return to work coordinator to perform their functions. It will ensure that employers cannot impede any aspect of the return to work functions;
- specifies the training and/or experience a return to work coordinator must have to satisfy the requirements of the position. This is to ensure that employers employ appropriately trained or suitably qualified return to work coordinators who are familiar with the requirements of the role;
- ensures that employers comply with any guidelines provided by the Minister regarding their responsibilities in relation to return to work coordinators;



- requires an employer to notify the contact details of the return to work coordinator within 30 days of their appointment;
- allows a determination made by the Minister under section 103(E) (1) (b) regarding return to work coordinator training and qualifications to be notified as a disallowable instrument;
- allows a guideline made by the Minister under section 103E (1) (c) which specifies the employers responsibilities to return to work coordinators to be notified as a disallowable instrument;
- creates an offence for employers who fail to comply with their obligations to appoint and assist a return to work coordinator, and to notify the contact details for the appointed return to work coordinator. The maximum penalty for this strict liability offence is 50 penalty units;
- requires the Work Safety Commissioner to maintain a register of return to work coordinators. This will allow a central location for the information to be kept and accessed by relevant parties. It will also allow WorkSafe to audit the register to ensure that self insurers and employers have a return to work coordinator appointed;
- specifies the type of information to be contained in the register; and
- specifies how the register may be kept and who may access the information contained in the register.

### **Clause 5 – Substitutes Sections 191 & 192 Powers of entry and Notification of entry**

New Section 191 replaces the existing section 191. This new section removes the obligation on inspectors to obtain employer consent prior to entering premises.

New Section 191:

- allows an inspector to enter a workplace or suspected workplace without prior notice;
- allows an inspector to enter a workplace or suspected workplace without the consent of the occupier of the premises;
- specifies that if an inspector enters a premise that is not a workplace that they must leave immediately; and
- specifies that an inspector may enter any premises if the entry is authorised by a search warrant.

The removal of the obligation on inspectors to obtain consent from an employer to enter premises will align the inspector's powers under the *Work Health and Safety Act 2011* allowing them to undertake dual compliance checks in the one visit.

Section 192 replaces the existing section 192. It removes the requirement for an inspector to give notice to enter a workplace, consistent with powers available under the *Work Health and Safety Act 2011*. It also places limitations on inspector's powers to enter a residential premise that is a suspect workplace.

New Section 192:

- allows an inspector to enter a workplace or suspected workplace under section 191 without prior notice. This will ensure that inspectors' can undertake compliance checks under both workers' compensation and health and safety auspices;
- requires an inspector to notify the occupier of the premises and an employer of the premises as soon as practicable after entry;
- allows an inspector to forego notifying the occupier or and employer if doing so would defeat the purpose for which the place was entered or cause unreasonable delay;
- requires a person on the premises to produce for inspection documents and information relating to the employment of workers;
- allows an inspector to take copies or extracts of documents which they may use as evidence;
- requires anyone at the premises to provide the information to an inspector and defines who the information may be requested from;
- specifies that an inspector cannot remain at the premises if requested to leave, unless they show appropriate identity; and
- limits entry to residential premises of an inspector to the following:
  - with the consent of the person with management or control of the place;
  - under the authority conferred by a search warrant; or
  - for the purpose only of gaining access to a suspected workplace where the inspector reasonably believes that no alternative access is available, and, at a reasonable time having regard to the times at which an inspector believes work is being carried out at the place to which access is sought.

## **Clause 6 – Dictionary, note 2**

Refers to the definition of Work Safety Commissioner

## **7 Dictionary, new definitions**

This clause inserts definitions of return to work coordinator and annual premium.