

Legislative Council—No 24

As received from the House of Assembly and read a first time, 16 June 2022

South Australia

**Return to Work (Scheme Sustainability)
Amendment Bill 2022**

A BILL FOR

An Act to amend the *Return to Work Act 2014*.

Contents

Part 1—Preliminary

- 1 Short title
- 2 Commencement

Part 2—Amendment of *Return to Work Act 2014*

- 3 Amendment of section 4—Interpretation
- 4 Amendment of section 7—Injury must arise from employment
- 5 Amendment of section 21—Seriously injured workers
- 6 Amendment of section 22—Assessment of permanent impairment
- 7 Amendment of section 33—Medical expenses
- 8 Amendment of section 40—Supplementary income support for incapacity resulting from surgery
- 9 Amendment of section 53—Redemptions—liabilities associated with weekly payments
- 10 Amendment of section 56—Lump sum payments—economic loss
- 11 Insertion of section 56A
56A Seriously injured worker—election to receive lump sum payment
- 12 Amendment of section 72—No damages unless whole person impairment of at least 30%
- 13 Amendment of section 73—Seriously injured workers—special provisions
- 14 Amendment of section 97—Reviewable decisions
- 15 Amendment of section 134—Delegation to self-insured employers
- 16 Amendment of Schedule 7—Prescribed sum—economic loss
- 17 Amendment of Schedule 9—Repeal and transitional provisions

Schedule 1—Transitional provisions

- 1 Interpretation
 - 2 Application of amendments—seriously injured workers threshold
 - 3 General provision—seriously injured workers
 - 4 Elections—seriously injured workers
 - 5 Interim decisions under section 21(3) of Act
 - 6 Amendment or substitution of Impairment Assessment Guidelines
 - 7 Impairment Assessment Guidelines
 - 8 Supplementary income support
-

The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

- 5 This Act may be cited as the *Return to Work (Scheme Sustainability) Amendment Act 2022*.

2—Commencement

This Act comes into operation on a day to be fixed by proclamation.

Part 2—Amendment of *Return to Work Act 2014*

3—Amendment of section 4—Interpretation

- (1) Section 4(1)—after the definition of *permanent impairment matter* insert:

physical injury means an injury other than a psychiatric injury;

- (2) Section 4(1)—after the definition of *spouse* insert:

stabilised has the same meaning as in the Impairment Assessment Guidelines;

4—Amendment of section 7—Injury must arise from employment

Section 7(2)(a)—delete "an injury other than a psychiatric injury" and substitute:
a physical injury

5—Amendment of section 21—Seriously injured workers

- (1) Section 21(2)—delete subsection (2) and substitute:

(2) For the purposes of this Act, a seriously injured worker is a worker—

- (a) in the case of psychiatric injury—whose work injury has resulted in permanent impairment and the degree of whole person impairment has been assessed under Division 5 for the purposes of this Act to be 30% or more; or
- (b) in the case of physical injury—whose work injury has resulted in a permanent impairment and the degree of whole person impairment has been assessed under Division 5 for the purposes of this Act to be 35% or more.

- (2) Section 21(3) and (4)—delete subsections (3) and (4) and substitute:

(3) Pending stabilisation of a worker's work injury or work injuries, the Corporation may on its own initiative, or must on application made by the worker in accordance with the regulations, make an interim decision to the effect that the worker will be taken to be a seriously injured worker under this Act if—

- (a) it is satisfied, or it appears, that the worker's injury or injuries have resulted or will result in permanent impairment; and
- (b) in the case of physical injury—it appears that the degree of whole person impairment is likely to be 35% or more; and
- (c) in the case of psychiatric injury—it appears that the degree of whole person impairment is likely to be 30% or more,

and the Corporation's decision will have effect under this Act in accordance with its terms.

(4) An interim decision under subsection (3)—

- (a) must be made in accordance with any requirements or principles prescribed by the regulations; and

(b) must not be made unless—

- (i) the work injury to which the decision relates has not stabilised; or
- (ii) in a case involving more than 1 work injury arising from the same cause—at least 1 work injury to which the decision relates has not stabilised.

(4a) An interim decision under subsection (3) will have effect until—

- (a) the expiration of the period of 52 weeks from the date of the decision, together with any extension applying under subsection (4b); or
- (b) the decision is brought to an end under subsection (4d).

(4b) The Corporation may on its own initiative, or must on application by the worker in accordance with the regulations, extend the period of operation of an interim decision under subsection (3) if—

- (a) the Corporation is satisfied that the injury to which the decision relates has not stabilised; and
- (b) the Corporation remains satisfied as to the matters referred to in subsection (3)(a) and, as relevant, (b) or (c).

(4c) An extension under subsection (4b) (and if there is more than 1 extension, any such extension) will be for a period of 52 weeks commencing on the date of the expiry of the 52 week period immediately preceding the extension.

(4d) An interim decision will be brought to an end under this subsection if an assessment of whole person impairment that applies to the work injury or work injuries has been made under Division 5.

(4e) If an interim decision under subsection (3) ceases to have effect under subsection (4a), the worker is entitled to continue to receive weekly payments under section 41 as if the worker were a seriously injured worker until the expiration of 28 days after the day on which the decision ceases.

(3) Section 21—after subsection (6) insert:

(6a) If a seriously injured worker makes an election under section 56A, subsection (6)(b) does not apply on and after the day on which the election takes effect in relation to weekly payments under section 41 to which the worker would, but for the election, be entitled.

(4) Section 21(8)—delete subsection (8) and substitute:

- (8) In assessing whether the relevant threshold under subsection (2)(a) or (b) (as the case requires) has been met—
 - (a) impairment resulting from physical injury is to be assessed separately from impairment resulting from psychiatric injury; and

- 5
- (b) in assessing impairment resulting from physical injury or psychiatric injury, no regard is to be had to impairment that results from consequential mental harm; and
- (c) in assessing the degree of whole person impairment resulting from physical injury, no regard is to be had to impairment that results from a psychiatric injury or consequential mental harm; and
- 10 (d) the relevant threshold under subsection (2)(a) or (b) is not met unless—
- (i) in the case of physical injury—the degree of whole person impairment resulting from the injury is at least 35%; or
- 15 (ii) in the case of psychiatric injury—the degree of whole person impairment resulting from psychiatric injury is at least 30%.

6—Amendment of section 22—Assessment of permanent impairment

- (1) Section 22(4)(e)—delete paragraph (e)
- (2) Section 22(6)—delete subsection (6) and substitute:
- 20 (6) An amendment or substitution in relation to the Impairment Assessment Guidelines under subsection (4)(f) will take effect from a date specified by the Minister as part of the amendment, or in the substituted guidelines, as the case may be (the *commencement date*).
- (6a) If the Impairment Assessment Guidelines are amended or substituted, the amendment or substituted guidelines (as the case may be) will apply in relation to an injury regardless of whether the injury occurred before or on or after the commencement date.
- 25 (3) Section 22(10)—delete "trauma" and substitute:
- cause
- (4) Section 22—after subsection (18) insert:
- 30 (19) Sections 10 (other than subsection (1)) and 10A of the *Legislative Instruments Act 1978* apply to the publication, amendment or substitution of the Impairment Assessment Guidelines under this section (and a reference in section 10 or 10A to a regulation will be taken to be a reference to the Impairment Assessment Guidelines, the amendment or the substitution (as the case requires)).
- 35

7—Amendment of section 33—Medical expenses

Section 33(21)(a)—after "worker" insert:

, except in relation to the limitation on the entitlement to recovery/return to work services applying under section 56A(3)(a)

8—Amendment of section 40—Supplementary income support for incapacity resulting from surgery

Section 40(1)—delete "under section 33(21)(b)"

9—Amendment of section 53—Redemptions—liabilities associated with weekly payments

(1) Section 53(2)(b)—delete paragraph (b) and substitute:

(b) the worker has received financial advice from a qualified financial adviser about the investment or use of money to be received on redemption; and

(2) Section 53—after subsection (5) insert:

(5a) In addition, a seriously injured worker who has made an election under section 56A cannot enter into an agreement for the redemption of a liability under this section for the injury or injuries for which the election was made.

10—Amendment of section 56—Lump sum payments—economic loss

(1) Section 56(1)—before "seriously" insert:

prescribed

(2) Section 56(4), definition of *PS*—after "impairment" insert:

, provided that the prescribed sum cannot exceed the prescribed sum applicable for 34% whole person impairment

(3) Section 56(6)—delete subsection (6) and substitute:

(6) If—

(a) a worker suffers a work injury that gives rise to an entitlement under this section; and

(b) the worker suffers or has suffered—

(i) an aggravation, acceleration, exacerbation, deterioration or recurrence of the injury referred to in paragraph (a); or

(ii) a new work injury, including a new work injury affecting the same body part as the injury referred to in paragraph (a),

and the worker, as a result, has more than 1 entitlement under this section,

there will be a reduction of the lump sum payable under this section in respect of each entitlement by the amount of the payment for the earliest entitlement unless such a reduction is incorporated into the provisions of the Impairment Assessment Guidelines (and then this subsection will apply in relation to any third or subsequent entitlement in the same way in order to ensure that each lump sum previously paid is taken into account as new entitlements arise) and the reduction applies regardless of the order in which the entitlements are paid.

5

10

(6a) The total payment under this section that a worker may receive cannot exceed \$434 863 (indexed).

(4) Section 56—after subsection (11) insert:

(12) In this section—

15

prescribed seriously injured worker means a seriously injured worker who has not made an election under section 56A.

11—Insertion of section 56A

After section 56 insert:

56A—Seriously injured worker—election to receive lump sum payment

20

(1) Subject to this section, a seriously injured worker may elect to receive a lump sum payment under section 56 at any time on or after the day on which the worker is assessed and determined to be a seriously injured worker as provided by Part 2 Division 4.

25

(2) An entitlement does not arise under this section in relation to—

(a) a psychiatric injury or consequential mental harm; or

(b) noise induced hearing loss.

(3) If a seriously injured worker elects to receive a lump sum payment under section 56, the worker is not entitled (on and after the day on which the election takes effect) to—

30

(a) recovery/return to work services within the meaning of section 24(1) for the work injury; or

(b) weekly payments under section 41 for the work injury.

35

(4) In connection with subsection (3)(b), if a seriously injured worker whose impairment results from physical injury makes an election under this section, the worker is not entitled (on and after the day on which the election takes effect) to receive weekly payments under section 41 for psychiatric injury arising from the same cause.

(5) An election under this section by a seriously injured worker—

40

(a) must be made in a manner and form approved by the Corporation; and

(b) takes effect from—

(i) in the case of an election made by a 50% or more WPI worker—the day on which the election is approved by the Tribunal under subsection (11); or

(ii) in any other case—the day on which the election is received by the Corporation,

(the *election day*).

(6) An election under this section cannot be made by a worker who is taken to be a seriously injured worker under section 21(3) pending an assessment of permanent impairment.

(7) Despite subsection (3)(b), if a worker makes an election under this section, the worker is entitled to continue to receive weekly payments under section 41 as if the worker were a seriously injured worker until—

(a) the day immediately preceding the day on which the lump sum payment under section 56 in respect of the election is paid, up to a maximum of 28 days; or

(b) the day falling 28 days after the election day.

(8) There will be a reduction of the lump sum payable under section 56 to a seriously injured worker who makes an election under this section by the amount of—

(a) weekly payments made to the worker under section 41 (other than weekly payments made after the election day in accordance with subsection (7)); and

(b) any other weekly payments made to the worker as a result of an interim decision made by the Corporation under section 21(3).

(9) An election under this section cannot be made unless—

(a) the worker has received competent professional advice about the consequences of making an election; and

(b) the worker has received financial advice from a qualified financial adviser about the investment or use of money to be received on the election; and

(c) the worker has received advice from a recognised health practitioner about the future progression of their injury and its likely impact on their capacity to work.

(10) An election under this section made by a 50% or more WPI worker is referred, by force of this subsection, to the Tribunal.

(11) The Tribunal may approve the making of an election by a 50% or more WPI worker for the purposes of subsection (5)(b)(i).

(12) Before approving the making of an election under subsection (11), the Tribunal may take into account a report by a recognised health practitioner relating to whether or not the election is contrary to the best interests of the worker.

- (13) An election by a worker under this section cannot be withdrawn on or after the election day.
- 5 (14) A seriously injured worker may only make 1 election under this section and after the worker receives the lump sum payment under section 56 to which the election relates, they are not entitled to a payment under section 56 for any other injury (whether suffered before or after the election).
- 10 (15) In addition, a seriously injured worker who has entered into an agreement for the redemption of a liability under section 53 cannot make an election under this section for the injury or injuries to which the redemption relates.
- (16) The Corporation is liable to indemnify the worker for reasonable costs of obtaining the advice required under this section up to a limit prescribed by regulation.
- 15 (17) A 50% or more WPI worker is entitled, subject to any limit prescribed by the regulations, to an award against the relevant compensating authority (within the meaning of section 75(9)) for the worker's reasonable costs of proceedings before the Tribunal relating to an approval under subsection (11).
- 20 (18) In this section—
50% or more WPI worker means a seriously injured worker whose degree of whole person impairment has been assessed and determined under Part 2 Division 5 for the purposes of this Act to be 50% or more.

25 **12—Amendment of section 72—No damages unless whole person impairment of at least 30%**

- (1) Section 72, heading—delete "whole person impairment of at least 30%" and substitute:
relevant whole person impairment thresholds met
- 30 (2) Section 72(1)—delete subsection (1) and substitute:
- (1) No damages may be awarded against an employer except in circumstances that are consistent with the operation of this Part and unless the injury results in—
- 35 (a) in the case of physical injury—a degree of permanent impairment of the worker that is at least 35%; or
- (b) in the case of psychiatric injury—a degree of permanent impairment of the worker that is at least 30%; or
- (c) the death of the worker.

(3) Section 72(3)—delete subsection (3) and substitute:

(3) In assessing whether the relevant threshold referred to in subsection (1) has been met—

(a) impairment resulting from physical injury is to be assessed separately from impairment resulting from psychiatric injury; and

(b) in assessing impairment resulting from physical injury or psychiatric injury, no regard is to be had to impairment that results from consequential mental harm; and

(c) in assessing the degree of whole person impairment resulting from physical injury, no regard is to be had to impairment that results from a psychiatric injury or consequential mental harm; and

(d) the relevant threshold referred to in subsection (1) is not met unless—

(i) in the case of physical injury—the degree of whole person impairment resulting from the injury is at least 35%; and

(ii) in the case of psychiatric injury—the degree of whole person impairment resulting from psychiatric injury is at least 30%.

13—Amendment of section 73—Seriously injured workers—special provisions

(1) Section 73(2)(b)(i)—delete subparagraph (i) and substitute:

(i) a redemption of a liability to make weekly payments under Part 4 Division 5 or a lump sum under section 56 (pursuant to an election under section 56A); and

(2) Section 73(4)—delete "enter into an agreement under Part 4 Division 5" and substitute:

proceed under Part 4 Division 5 or section 56A

(3) Section 73(5)—delete "enter into an agreement under Part 4 Division 5" and substitute:

proceed under Part 4 Division 5 or section 56A

14—Amendment of section 97—Reviewable decisions

Section 97—after paragraph (b) insert:

(ba) a decision not to extend the period of operation of an interim decision under section 21(4b);

15—Amendment of section 134—Delegation to self-insured employers

Section 134(1)(a)—after the entry relating to section 56 insert:

section 56A

16—Amendment of Schedule 7—Prescribed sum—economic loss

Schedule 7, table, after row relating to 29% whole person impairment—insert:

30%	\$371 723 (indexed)
31%	\$386 592 (indexed)
32%	\$402 056 (indexed)
33%	\$418 138 (indexed)
34% or more	\$434 863 (indexed)

17—Amendment of Schedule 9—Repeal and transitional provisions

- 5 (1) Schedule 9, clause 69(1)—delete subclause (1) and substitute:
- (1) The Governor may, by regulation, make provisions, or additional provisions, of a saving or transitional nature consequent on the amendment of this Act by another Act.
- (2) Schedule 9, clause 69(2)—delete "this Act" and substitute:
- 10 the amendment

Schedule 1—Transitional provisions

1—Interpretation

- (1) In this Schedule—
- 15 *designated day* means a day appointed by proclamation as the designated day for the purposes of the provision in which the term is used;
- designated worker* means a worker who has been assessed and determined to be a seriously injured worker before the designated day, other than a worker who, immediately before the designated day, is taken to be a seriously injured worker under section 21(3) of the principal Act pending an assessment of permanent impairment;
- 20 *principal Act* means the *Return to Work Act 2014*.
- (2) Other terms used in this Schedule have meanings consistent with the meanings they have in the principal Act.

2—Application of amendments—seriously injured workers threshold

- (1) This clause applies in relation to work injuries other than psychiatric injuries.
- 25 (2) Subject to subclause (3), the amendments made to the principal Act by sections 5(1), 5(4), 12 and 16 of the Act apply in relation to any work injury where the final examination relating to the worker by an accredited medical practitioner for the purposes of an assessment under section 22 of the principal Act occurs on or after the designated day (even if the injury is attributable to trauma that occurred before the designated day and even if anything arising from the examination, or any assessment
- 30 made by the accredited medical practitioner, is subsequently set aside or disregarded by the Tribunal or a court).

- (3) Where 2 or more accredited medical practitioners are required to undertake an examination or assessment under section 22 of the principal Act to determine the degree of impairment of a worker in relation to injuries arising from the same trauma, the amendments made to the principal Act by this Act will only apply if none of the injuries are the subject of a final examination by an accredited medical practitioner for the purposes of an assessment under section 22 of the principal Act before the designated day.
- (4) For the purposes of this clause, the final examination relating to a worker by an accredited medical practitioner is when no further attendance, radiological or other investigation or examination, is required (including any attendance following further radiological or other investigation or examination) to enable an assessment of whole person impairment under section 22 of the principal Act.

3—General provision—seriously injured workers

Subject to this Schedule and the other provisions of this Act—

- (a) a designated worker immediately before the designated day will continue to be regarded as a seriously injured worker; and
- (b) a worker who is taken to be a seriously injured worker under section 21(3) of the principal Act immediately before the designated day will continue to be taken to be a seriously injured worker.

4—Elections—seriously injured workers

- (1) Subject to this clause, a designated worker may make an election under section 56A of the principal Act, as enacted by this Act, on or after the designated day.
- (2) If an election is made under subclause (1), sections 56 (as amended) and 56A (as enacted) of the principal Act will apply, subject to the following modifications and qualifications:
- (a) the age factor (AF) applying in relation to the worker will be taken to be the worker's age at the date of the election rather than the relevant date as it applies in relation to the worker under section 5 of the principal Act;
- (b) the total payment under section 56 that the worker may receive cannot exceed the prescribed sum applicable for 29% whole person impairment;
- (c) the references to 28 days in section 56A(7) will be taken to be references to 60 days;
- (d) section 56A(8) will apply so that the only amounts to be deducted are weekly payments made to the worker under section 41 of the principal Act on or after the designated day and before the date of the election.
- (3) Despite any other provision and subject to this clause, a worker who, immediately before the designated day, is taken to be a seriously injured worker under section 21(3) of the principal Act pending an assessment of permanent impairment, may only make an election under section 56A of the principal Act if, on or after the designated day, they are determined to be a seriously injured worker other than as a result of an interim decision under section 21(3).

(4) If an election is made under subclause (3), sections 56 (as amended) and 56A (as enacted) of the principal Act will apply subject to the following modifications and qualifications:

(a) the age factor (AF) applying in relation to the worker will be taken to be the worker's age at the date of the election rather than the relevant date as it applies in relation to the worker under section 5 of the principal Act;

(b) section 56A(8) will apply so that the only amounts to be deducted are weekly payments made to the worker under section 41 on or after the designated day and before the date of the election.

(5) Despite any other provision, a worker who is a seriously injured worker as a result of an injury that is attributable to a trauma that occurred before 1 July 2015, is not entitled to make an election under section 56A of the principal Act.

5—Interim decisions under section 21(3) of Act

(1) Subject to this clause, subsections (3) to (4e) of section 21 of the principal Act, as enacted by section 5(2) of this Act, extend in relation to any work injury that occurred before the designated day, including where the Corporation has made a decision under section 21(3) of the principal Act in relation to the injury before the designated day (an *existing decision*).

(2) In relation to an existing decision, for the purposes of subsections (4a) to (4e) of section 21 of the principal Act, as enacted by section 5(2) of this Act, the existing decision will be treated as if it took effect on the designated day.

(3) Until the relevant day, the reference to 35% in section 21(3) of the principal Act, as enacted by section 5(2) of this Act, will be taken to be a reference to 30%.

(4) In this clause—

relevant day means the day appointed under clause 2.

6—Amendment or substitution of Impairment Assessment Guidelines

(1) Subject to this clause, subsections (6) and (6a) of section 22 of the principal Act, as enacted by section 6(2) of this Act, apply in relation to any amendment or substitution of the Impairment Assessment Guidelines that takes effect on or after the designated day (including in relation to an injury that occurred before the designated day).

(2) The WorkCover Guidelines for the evaluation of permanent impairment, published in the Gazette on 26 March 2009, will continue to apply in relation to an injury that has been the subject of an application made under regulation 5 of the *Return to Work (Transitional Arrangements) (General) Regulations 2015*.

(3) The Impairment Assessment Guidelines, published in the Gazette on 12 March 2015, will continue to apply in relation to an injury that has been the subject of an application made under regulation 4 of the *Return to Work (Transitional Arrangements) (General) Regulations 2015*.

(4) Despite section 22(6a) of the principal Act (as enacted by section 6(2) of this Act), in the case of an injury that has stabilised where the worker has before the commencement date (within the meaning of section 22(6)) given a written notice to the Corporation that selects a particular accredited medical practitioner to undertake an assessment of the degree of impairment resulting from an injury, section 22(6a) does not apply such that the amendment or substituted guidelines (as the case may be) will not apply in relation to the injury and the version of the guidelines applying in relation to the injury immediately before the commencement date will continue to apply.

(5) Subclause (4) ceases to apply on the designated day.

7—Impairment Assessment Guidelines

The Impairment Assessment Guidelines, as in existence immediately before the designated day, are not subject to the operation of subsection (19) of section 22 of the principal Act, as enacted by section 6(4) of this Act, but that subsection will apply to any amendment or substitution of those guidelines that takes effect on or after the designated day.

8—Supplementary income support

The amendment made to the principal Act by section 8 of this Act applies in relation to surgery approved by the Corporation on or after the designated day.