

**Maurice
Blackburn
Lawyers**

Since 1919

Maurice Blackburn Pty Limited
ABN 21 105 657 949

Level 21
380 Latrobe Street
Melbourne VIC 3000

DX 466 Melbourne

T (03) 9605 2700

F (03) 9258 9600

5 April 2019

Mental Health Inquiry
Productivity Commission
GPO Box 1428,
Canberra City ACT 2601

Online Submission: www.pc.gov.au/inquiries/current/mental-health/submissions

Dear Sir/Madam,

We welcome the opportunity to provide feedback in relation to the Productivity Commission's inquiry into the social and economic benefits of improving mental health.

Please do not hesitate to contact me and my colleagues
if we can further assist with the Productivity
Commission's important work.

Yours faithfully.

Azmeena Hussain
Principal Lawyer
MAURICE BLACKBURN





**Maurice
Blackburn**
Lawyers
Since 1919

**Submission in response to
the Productivity
Commission Inquiry into
the Social and Economic
Benefits of Improving
Mental Health**

April 2019

TABLE OF CONTENTS

	PAGE
INTRODUCTION.....	2
OUR SUBMISSION.....	2
RESPONSES TO SPECIFIC QUESTIONS IN THE ISSUES PAPER	4
i. Are existing workers' compensation schemes adequate to deal with mental health problems in the workplace?.....	4
ii. What types of workplace interventions do you recommend this inquiry explore as options to facilitate more mentally healthy workplaces?.....	13
iii. What, if any, changes do you recommend to workplace health and safety laws and regulations to improve mental health in workplaces?	17
iv. Are there significant service gaps for people with psychosocial disability who do not qualify for the NDIS?	19

Introduction

Maurice Blackburn Pty Ltd is a plaintiff law firm with 32 permanent offices and 31 visiting offices throughout all mainland States and Territories. The firm specialises in personal injuries, medical negligence, employment and industrial law, dust diseases, superannuation (particularly total and permanent disability claims), negligent financial and other advice, and consumer and commercial class actions.

Maurice Blackburn employs over 1000 staff, including approximately 330 lawyers who provide advice and assistance to thousands of clients each year. The advice services are often provided free of charge as it is firm policy in many areas to give the first consultation for free. The firm also has a substantial social justice practice.

Our Submission

Maurice Blackburn is encouraged by the extent of current focus on mental health, in a number of public policy discussions across a number of jurisdictions. It shows that people suffering mental illness have been treated poorly by current systems and processes – and nowhere is this more starkly evident than in how people with mental illnesses are treated in the workplace.

Maurice Blackburn believes that statutory compensation schemes and insurance processes should be no different for a person with a mental health related injury or claim, than for a person with a physical health or injury claim.

Maurice Blackburn also has concerns in relation to the impact of current government support settings on mental health, particularly in relation to:

- The NDIS: The lack of any coherent mental health framework underpinning the work of the NDIS leads to poor outcomes for participants. NDIS systems and processes do not cope well with episodic nature of mental health conditions. The roll out of the NDIS has left many people with mental illness without supports that they traditionally had through state systems
- The National Redress Scheme for victims of childhood sexual abuse. The current system provides inadequate care for those accessing redress, and those who cannot access redress through the scheme.
- Workplace Health and Safety: Maurice Blackburn particularly draws the Productivity Commission's attention to the impacts of cyberbullying on mental health, and the impacts of whistleblowing on mental health.

To this end, we restrict our comments to four questions from the issues paper.

- i. Are existing workers' compensation schemes adequate to deal with mental health problems in the workplace?¹
- ii. What types of workplace interventions do you recommend this inquiry explore as options to facilitate more mentally healthy workplaces?²

¹ From the section Questions on mentally healthy workplaces, p.30 of the Issues Paper

² From the section Questions on mentally healthy workplaces, p.30 of the Issues Paper

- iii. What, if any, changes do you recommend to workplace health and safety laws and regulations to improve mental health in workplaces?³
- iv. Are there significant service gaps for people with psychosocial disability who do not qualify for the NDIS?⁴

³ From the section Questions on regulation of workplace health and safety, p.31 of the Issues Paper

⁴ From the section Questions on Social Services, p.7 of the Issues Paper

Responses to specific questions in the Issues Paper

i. Are existing workers' compensation schemes adequate to deal with mental health problems in the workplace?

Maurice Blackburn submits that the core issue in relation to the adequacy of statutory compensation schemes in dealing with mental health problems in the workplace is that, in our experience, claimants with mental health claims are treated very differently from those with physical health claims.

Maurice Blackburn submits that there should be no difference.

Maurice Blackburn has several concerns in relation to how statutory compensation schemes respond to claims involving mental health issues. Those concerns can be articulated under the following main headings:

- a. Compensation Scheme treatment of people with mental health claims
- b. Workplace attitudes to mental health

Compensation Scheme treatment of people with mental health claims:

Every day, Maurice Blackburn staff assist people with injuries to achieve compensation through various statutory schemes – be it for a road related injury, a workplace injury and return to work process or some other statutory process.

It is evident that those who are working through the system due to a mental health claim are treated differently than those with a physical injury.

Often these differences are entrenched in the explicit wordings of the legislation. Sometimes the inequity is more about the implicit interpretation of the legislation. Sometimes the differences occur as a result of cases falling between schemes.

An example of explicitly entrenched inequity can be found in Victorian Workcover legislation. In order to claim Permanent Impairment, the following minimum thresholds apply:

- For a physical injury⁵, the injury threshold is 10% impairment.
- For a psychiatric impairment⁶, the injury threshold is 30% impairment.

Such a difference does not apply in other Victorian statutory compensation schemes, such as the TAC scheme.

Maurice Blackburn submits that the Productivity Commission should identify where such differences exist in legislation across jurisdictions, and determine why such explicit differences exist.

⁵http://www1.worksafe.vic.gov.au/vwa/claimsmanual/Content/6Specialised_Payments/PDFs/Compensation%20Table%20for%20Physical%20Impairment%202018.pdf

⁶http://www1.worksafe.vic.gov.au/vwa/claimsmanual/Content/6Specialised_Payments/PDFs/Compensation%20Tables%20for%20Psychiatric%20Impairment%202018.pdf

Some inequities in statutory compensation schemes' treatment of people with mental health claims are more implicit in the legislation, or have come about through interpretation.

As an example, Comcare legislation, along with that of a number of State statutory compensation schemes, contains a clause restricting compensation mental health claims if the worker has been subject to management action – such as performance management or disciplinary action.

The Comcare website⁷ describes it as follows:

A workplace injury may not be compensable if it was caused by administrative action, such as performance management, denial of leave or promotion decisions. This is to allow employers to manage their employees, provided that the administrative action is reasonable and conducted reasonably.

While the intention of the exclusion is clear, it is being exploited by insurers under the scheme who will trawl a claimant's work history in order to find evidence of performance management that they can use to deny the claim.

As mentioned above, this clause also appears in a number of State statutory compensation schemes, including the Workcover schemes in Victoria and Queensland.

As an example of the impacts of this additional barrier for people with psychological injury to gain access to Workers compensation, we present this case study of a worker that we are assisting in Queensland.

The worker was 47 years old when he commenced as a fitter with a multinational corporation based in Queensland. He was subjected to bullying and harassment over a three year period in the course of his employment. The bullying included taunts about his weight, name calling, swearing at him, acting aggressively and unfairly criticising his performance.

Complaints to management fell on deaf ears or were put down as 'workplace banter' or a 'joke'. The suffering got too much for him and he felt like he had no choice but to attempt to end his life by shooting. This suicide attempt was unsuccessful and he continues to suffer from the permanent effects of the resultant significant brain injury.

His workers' compensation claim was rejected on the basis that the behaviour he was exposed to at work was 'reasonable management action' and his complaints were not substantiated.

The worker is now fighting a lengthy and stressful legal battle, which to date has taken 12 months from lodging his claim, in order to secure an accepted workers' compensation claim to provide him with the much needed income to survive, and money for necessary treatment expenses (including multiple surgical interventions) to bring back some quality of life.

This worker will need to give evidence in the Queensland Industrial Relations Commission, and relive his past experiences in an attempt to overturn the decision to disallow his claim.

⁷ https://www.comcare.gov.au/the_scheme/guidance_on_applying_the_src_act/case_lesson_-_administrative_action_exclusion

In our experience, it is not uncommon in these situations for witnesses to be reluctant to come forward to support a worker suffering a psychological injury such as the above, for a fear of reprisal by their co-workers or their employer.

Appeals processes for injured people who have fallen foul of 'management action' clauses are complex, and the costs are prohibitive for most claimants.

The imposition of the additional barrier of 'management action' obviously treats people with a psychological claim differently from those making a claim for physical injury.

Maurice Blackburn submits that the Productivity Commission should identify where such differences exist in the application of legislation across jurisdictions, and determine why such differences exist.

To make matters worse, after liability for a claim has been accepted by Comcare or a State Workcover scheme, workers are often continuously subjected to medical assessments and ongoing disputes with respect to the extent of their weekly entitlements. This aspect of compensation schemes can have significant impacts on the mental health of workers who are seriously injured.

In this way, in our experience, **it is not unusual for the administration of statutory compensations schemes to generate mental health issues, not resolve them.**

Maurice Blackburn has also seen a number of cases where a worker with a claim for work-induced psychological injury has 'fallen between the cracks' of compensation schemes. Whilst this is rare, we provide the following case as an example.

A worker who experiences trauma in one line of work, may leave that role to pursue a career in another line of work, which is covered by a different compensation scheme. If the worker lodges a claim for psychological damage, there can be significant buck-passing in determining which scheme should be making the payout. Even where there is no question of the worthiness of the claim, the claimant can be forced to wait in some cases years for a determination to be made as to the responsible jurisdiction.

A number of influential inquiries⁸ have demonstrated the prevalence of this issue in the emergency services and first responders workforce. For example, someone working for a State police force (covered by one scheme) then goes to work for the Federal Police (covered by another scheme).

In such cases, the claimant is generally receiving no income, no compensation, and has to rely on their own resources until such time as attribution can be made.

Another way that statutory compensation schemes indirectly disadvantage workers with psychological injury claims is in legislated time limits.

⁸ See for example:

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/Mentalhealth;
<https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2442> (recommendation 10);

[http://www.parliament.wa.gov.au/parliament/commit.nsf/%28Report+Lookup+by+Com+ID%29/F2C31700C3F0C38A48257A8600065F4D/\\$file/CDJSC-Toll+of+Trauma+Final.pdf](http://www.parliament.wa.gov.au/parliament/commit.nsf/%28Report+Lookup+by+Com+ID%29/F2C31700C3F0C38A48257A8600065F4D/$file/CDJSC-Toll+of+Trauma+Final.pdf);

<https://www.qao.qld.gov.au/file/5516/download?token=vZirSgzh>

Most jurisdictions have strict time limits for lodging a workers' compensation statutory claim. In Queensland, for example, the time limit to lodge a claim is six months from being assessed by a Doctor.

Many mental health conditions can take a long period of time to develop, or go underdiagnosed for lengthy periods of time. They are seen as taboo and not discussed especially in the workplace. For those suffering, they often seek medical treatment confidentially, and are reluctant share their experiences, especially at work, in the hope it will go away.

This often means that by the time their condition gets to the stage where they cannot work, or they finally feel comfortable advising their employer, insurers having gained access to medical records will claim that their time limit to lodge a claim has passed.

A failure to meet this time limit without reasonable cause, means the claim is statute barred, denying access to entitlements.

A 2015 report released by Safe Work Australia titled *Work-related mental disorders profile*⁹ revealed that between 2008-09 and 2012-13, on average, around 90 per cent of workers' compensation claims involving a mental condition were linked to mental stress. Exposure to trauma was identified among these conditions.

There is no doubt that this impacts workers with a mental health related claim far more than those claiming for physical injury. In most cases, it is easy to attribute the cause of a physical injury. This is not the case with psychological injury. We have seen cases where insurers have trawled back through a claimant's history in order to find life events which *may* have caused the psychological injury, rather than accept that it is work related. This does not happen with physical injury.

Consider also the following case study, from our Western Australian office:

Our client is a 38 year old male electrician, who has been employed at a mine site with same company for 10 years. Four years ago a fatality at the mine saw our client required to pick up deceased and transport it in back of his ute. Two years ago he witnessed another fatality at the mine, where he saw the worker struggling to free himself, before tragically dying at the scene. One year ago our client suffered his own workplace accident - a small explosion causing burns to his arms, part of his face and chest.

The insurer accepted liability for the burns claim, yet refuses to accept the claim for PTSD.

Six months later, our client is still suffering severe psychiatric symptoms, and there is still no money or treatment offered by the insurer. This will force the matter to an Arbitration hearing because insurer still refuses to accept the PTSD as arising out of the course of his employment.

Our client has a wife and two kids. To use his wife's words: "It's disgusting the way the insurer is treating him"

⁹ <https://www.safeworkaustralia.gov.au/system/files/documents/1702/work-related-mental-disorders-profile.pdf>

In short, people with claims for psychological injury are being treated differently from those suffering physical injury through statutory compensation schemes and their insurers.

The statutory legal test for psychological injury includes complicated explicit and implicit legal exceptions that can apply to exclude a psychological injury claim from being accepted as a workers' compensation injury. This is a higher test than for physical injury, across jurisdictions.

The economic impact of this would be significant. The personal impacts are worse.

Workplace attitudes to mental health:

Safe Work Australia's guide to "Work-related psychological health and safety: A systematic approach to meeting your duties"¹⁰ lists the following as suggestions for overcoming barriers to a successful recovery and RTW following a psychological injury:

- *strengthen your WHS and workers' compensation systems, policies or procedures*
- *ensure there is visible management commitment to injury prevention and RTW*
- *train managers and supervisors in effective RAW and RTW*
- *try to build or repair a positive relationship with your injured worker*
- *maintain your worker's connection with their organisation, supervisor and colleagues*
- *support supervisors and make sure they have adequate time to support your worker when they RAW or RTW*
- ***improve attitudes and address misunderstandings about psychological injuries, for example that workers will not recover, will require a lengthy absence from work, or will not be able to return to pre-injury duties***
- *regardless of liability, you should focus on RAW or RTW. Whatever the outcome of the liability decision, the worker will be assisted. This will prevent or minimise further harm to the worker. Trust medical experts to identify the severity of your worker's injury, and*
- *if you are concerned the RAW and RTW will disrupt the work of others, discuss how these issues can be better managed. (p.34)*

The highlighted dot point above notes the importance of ensuring that workplaces – including supervisors and co-workers – are well educated about the impacts of workplace mental health. It also highlights the importance of a workplace culture which supports and promotes mental health.

Unfortunately, in our experience, this level of acceptance and tolerance is not the norm.

In our experience, mental health is widely misunderstood in the workplace. This leads to a number of potential cultural issues in the workplace, such as:

- A culture which implicitly or explicitly encourages ongoing stigmatisation of a worker who has sustained psychological injury
- A culture where toxic masculinity leads to an unwillingness to come forward with a health concern
- A culture which engenders fear of potential discrimination, harassment or reduced opportunities for career progression.

¹⁰ https://www.safeworkaustralia.gov.au/system/files/documents/1901/work-related_psychological_health_and_safety_guide.pdf

Maurice Blackburn notes that work site inspections are common occurrences for physical health and safety checks – especially following major incidents or identifiable trends of poor process in a workplace. We suggest that the same level of scrutiny does not exist following identifiable trends of poor mental health practices in a workplace. We believe that the resultant economic impact of this may be an area for further consideration by the Commissioners.

Once again, this represents a clear difference in workplace attitude to physical injury, compared to psychological injury. Thus, people with mental health issues in the workplace are treated differently to those with physical injuries.

Maurice Blackburn has similar concerns in relation to how mental health issues are processed by the insurance industry.

There are two main areas for concern in this regard:

- a. Making **access** to insurance unattainable for people with a history of mental health issues through blanket and limited exclusions in insurance policies, and
- b. Concerns about disadvantage experienced by people with mental health issues being able to **claim** on insurance

Access to insurance.

Some insurance policies, particularly travel insurance policies and injury/accident policies, will not provide cover for any claim arising from a mental health condition. That means that even if a consumer has no history of mental health problems, if something were to happen in the future and he/she needed to take time off work or otherwise claim for a mental health condition claim, it would not be covered.

This represents a fundamental difference between access to insurance against physical injury or illness compared to mental health issues.

Recent research has found more than half of Australian travel insurers do not cover people with mental health conditions¹¹.

The impact of the denial of access to insurance due to mental health conditions can be devastating. It could lead to:

- People postponing treatment, often at the times when they most need it, in order to satisfy their insurers' requirements¹²
- People choosing to, or being forced to remain uninsured
- People not discussing potential mental health issues with their GP for fear of negative consequences, thereby remaining undiagnosed.

With mental health now being reported as the number one reason why people are going to their GP¹³, and the rate increasing, it makes no sense for these blanket exclusions to exist.

¹¹ <https://www.smh.com.au/business/consumer-affairs/an-absolute-minefield-why-darryl-couldn-t-get-travel-insurance-20180801-p4zuth.html>

¹² <https://www.abc.net.au/news/2018-10-31/mental-health-treatment-excluding-people-from-insurance/10382532>

¹³ <https://www.abc.net.au/news/2018-09-19/number-one-reason-why-people-see-their-gps-mental-health/10281134>

Insurance Claims:

Failure to fully disclose a mental health condition, or even a past mental health condition, can allow insurers to not only deny a claim but also to 'avoid' the insurance cover, as if it never existed.

This means an insurer could refuse to cover any claim under the insurance policy, even if it's completely unrelated to the matter that was not disclosed. This can happen even if the non-disclosure was an innocent oversight.

Maurice Blackburn had a client, for example, who stopped work due to an inner ear imbalance caused by a failed operation. He made an income protection claim, only to have his policy avoided by the insurer because he'd been diagnosed with a mental health problem many years ago, which he hadn't disclosed.

The fact that he considered his mental health condition had long since recovered did not stop the insurer from rejecting the claim.

In many cases such as this one, the mental health condition which has been used by the insurer as the basis for avoiding the claim, has nothing to do with the nature of the claim itself.

In our experience, this is not uncommon. A lot of people going through an insurance application process are mindful of their current health, but not so much of their entire medical history.

A recent Parliamentary Joint Committee inquiry into the Life Insurance Industry¹⁴ heard a number of issues relating to how insurers treat mental health claims. These include:

- That there are questions about the data used by life insurers to assess a mental health claim, and whether such data is up-to-date;
- That policyholders making a mental health claim face a challenging burden in demonstrating to insurers the validity of their condition;
- That a person's mental health condition can be exacerbated or re-emerge in response to an insurer, or a specialist working for an insurer, questioning the validity of their mental health claim;
- That individuals may not seek treatment for mental ill health due to concerns of how this information will be used by life insurers; and
- That for someone who has made a mental health claim, it can be destructive to subject them to surveillance when their mental health has since improved and they are trying to move forward.

The final report of that inquiry¹⁵ made a number of relevant recommendations:

Recommendation 10.6

The committee recommends that the Financial Services Council's Life Insurance Code of Practice include explicit commitments that:

- *where a pre-existing condition is to be used by an insurer as the basis for denying a claim or avoiding a contract a direct medical connection between the prognosis of a pre-existing diagnosed condition and the claim must be established; and*

¹⁴https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/LifeInsurance

¹⁵ https://www.aph.gov.au/~media/Committees/corporations_ctte/LifeInsurance/report.pdf?la=en

- *the statistical and actuarial evidence and any other material used to establish a pre-existing condition, as well as a written summary of the evidence in simple and plain language, be provided by the life insurer to the consumer/policyholder on request.*

Recommendation 10.7

The committee recommends that after consultation with relevant medical professionals independent of the life insurance industry and mental health advocacy groups, the Financial Services Council establish a mandatory and enforceable Code of Practice for its members, or a dedicated part of its existing Code of Practice, specifically in relation to mental health life insurance claims and related issues.

The committee further recommends that these consultations discuss requiring insurers to:

- *ensure that applications for insurance that reveal a mental health condition or symptoms of a mental health condition are not automatically declined;*
- *refer applications for insurance that reveal a mental health condition or symptoms of a mental health condition to an appropriately qualified underwriter;*
- *give an applicant for insurance the opportunity to either withdraw their application or provide further information, including supporting medical documents, before declining to offer insurance or offering insurance on non-standard terms;*
- *where an insurer offers insurance on non-standard terms, for example, with a mental health exclusion or a higher premium than a standard premium, specify:*
 - *how long it is intended that the exclusion/higher premium will apply to the policy;*
 - *the criteria the insured would be required to satisfy to have the exclusion removed or premium reduced;*
 - *the process for removing or amending of the exclusion/premium; and*
 - *develop, implement and maintain policies that reflect the above practices.*

Recommendation 10.8

The committee recommends that consideration be given to allowing insurers to more actively promote and fund evidence-based best-practice preventative health measures targeted at promoting good mental health at a general level.

The findings of the Parliamentary Joint Committee were also reflected in the outcomes of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.

In the Royal Commission's summary of the Round 6¹⁶ – the public hearings dedicated to the behaviours of the insurance industry – Commissioner Hayne posed the following policy questions for consideration:

19. Should life insurers be prevented from denying claims based on the existence of a pre-existing condition that is unrelated to the condition that is the basis for the claim?

20. Should life insurers who seek out medical information for claims handling purposes be required to limit that information to information that is relevant to the claimed condition?

21. Should life insurers be prevented from engaging in surveillance of an insured who has a diagnosed mental health condition or who is making a claim based on a

¹⁶ <https://financialservices.royalcommission.gov.au/public-hearings/Pages/round-6-hearings.aspx#pqatm6cs>

mental health condition? If not, are the current regulatory requirements sufficient to ensure that surveillance is only used appropriately and in circumstances where the surveillance will not cause harm to the insured? If the current regulatory requirements are not sufficient, what should be changed?

Similar discussions arose during the Senate Community Affairs References Committee's inquiry into the My Health Record system.

The final report of that inquiry¹⁷ notes that:

Some submitters raised concerns that an employer nominated health practitioner could obtain access to the healthcare recipient's MHR and potentially disclose information that the healthcare recipient would prefer was kept confidential in the context of a pre-employment medical or workers compensation claim. (p.24)

The impact of this would be that workers would be discouraged from discussing mental health concerns with their GP, if they believe that those records could be used to deny them access to employment or insurance.

The inquiry made the following recommendation:

Recommendation 7

The committee recommends that the Australian Government amend the My Health Records Act 2012 and the Healthcare Identifiers Act 2010 to ensure that it is clear that an individual's My Health Record cannot be accessed for employment or insurance purposes.

Maurice Blackburn submits that the evidence above provides a clear indication that people with mental health conditions are regularly discriminated against in their dealings with the insurance industry – both in their capacity to access insurance, and in their capacity to achieve a successful claim.

¹⁷ https://www.aph.gov.au/~/_media/Committees/clac_ctte/MyHealthRecordsystem/Final_report/report.pdf?la=en

ii. What types of workplace interventions do you recommend this inquiry explore as options to facilitate more mentally healthy workplaces?

Maurice Blackburn draws the Commission's attention to two specific areas which can contribute to a mentally healthy workplace:

- a. Impacts of cyberbullying on mental health
- b. Impacts of whistleblowing on mental health

Impacts of cyberbullying on mental health in the workplace

Maurice Blackburn is concerned about the impacts that online workplace-related bullying and harassment is having on many Australians under the current, mostly unregulated on-line environment.

We draw the AHRC's attention to the effects of exposure to such behaviours by those whose work, by necessity, involves interaction via social media platforms.

In particular, we are concerned by the reports from journalists and those involved in the media about the prevalence and impacts of on-line workplace-related abuse.

We believe that employers must be held accountable for creating a work environment that exposes their employees to the risk of mental health issue resulting from this form of abuse.

We are aware that some employers in the media industry, for example, have expectations of their staff relating to their on-line inputs, and set key performance indicators in areas such as the number of 'hits' a story receives.

Journalists are also frequently expected by their employers to participate in on-line discussions that emanate from their story. Some employees have reported that employers expect them to express personal opinions in relation to on-line stories. We are concerned that these 'forced' interactions are exposing media professionals to online workplace-related cyber-hate and cyberbullying.

We note the reporting of the Media, Entertainment and Arts Alliance (MEAA) on this matter:

"The lived experience of many MEAA members working in the media industry is of being regularly subjected to harassment, abuse and threats on social media"¹⁸

MEAA has written substantially on the topic, noting that their members have suffered diagnosable psychiatric injuries as a consequence of cyber abuse.

There appears to be clear differences in the impacts of interaction with the readership, between on-line and traditional media functions. These include:

- Anonymity. Reports suggest that anonymity may be a determining factor in whether on-line input is threatening, abusive or personal. It seems probable that

¹⁸ Ref Media Entertainment and Arts Alliance submission to Legal and Constitutional Affairs References Committee inquiry into the adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying: <https://www.apf.gov.au/DocumentStore.ashx?id=5590919d-ca1e-4049-9834-44ab87e8bedc&subId=562289>

the ability to hide behind anonymity might be an enabler of on-line harassment and abuse. Journalists, on the other hand, are encouraged to use their own names. This inequality is concerning in the workplace context.

- Immediacy. Responding to on-line media does not encourage introspection or the tempering of language or behaviour.
- The perception that 'the rules are different on-line'. Threats or harassment made on-line seem to be held to a different standard of accountability than if they were made via any other mechanism. Some of the current academic work around 'online disinhibition' is worthy of exploration.

We have long argued that a legislative framework is needed which incorporates:

- Regulation and criminal sanctions holding the behaviours of abusers, employers and carriage services to account, and
- A civil regime through which victims and survivors of online abuse can access legal tools to allow them to seek relief and damages.

This will necessitate criminalising particularly nefarious behaviours, and then providing the relevant police and regulatory services with the resources to successfully prosecute people engaging in abusive behaviours through on-line platforms.

We believe that for this to have the required deterrent effect, it is important that all those who cause, enable or expose people to on-line abuse and harassment should be held to account, and this includes employers, and social media platforms, as well as those who generate and distribute the abusive material.

We recognise, however, that given the scope and pervasiveness of on-line abuse and harassment, no regulator or law enforcement agency, no matter how well equipped, will be in a position to effectively deal with every case, let alone every extreme case. Hence the need for a concurrent civil process which provides citizens with the tools required to achieve appropriate redress.

Maurice Blackburn believes Australia needs a civil / criminal legislative framework which could ensure:

- That breaches, can be investigated by a statutory body established under the Act, and failing that, the courts.
- That the statutory body can order that offending materials be removed from an on-line platform, and require a correction and/or an apology.
- That the frameworks allows for the release of the identity of anonymous abusers.
- That on-line bullying and harassment is criminalised where:
 - the abuser intends a digital communication to cause harm,
 - a person would reasonably expect the person in the position of the victim to be harmed, and
 - the individual suffers serious emotional distress

Impacts of whistleblowing on mental health in the workplace

A recent report¹⁹ for the Australian Institute of Criminology noted the potential psychological impacts of whistleblowing in the workplace:

For many whistleblowers, the outcomes of disclosing illegal behaviour and misconduct were substantial. These included both the outcomes associated with observing and reporting misconduct as well as the retaliation experienced. In many cases, the acts of retaliation experienced exacerbated the overall impact on whistleblowers. (p.7)

The report goes on to say:

Emotional and psychological impacts, including stress, exhaustion, mental and physical health related issues were some of the most profound impacts experienced. These consequences have also been canvassed in previous research in the United States. (p.8)

In recent years, a series of scandals involving the Commonwealth Bank, IOOF, 7 Eleven, NAB and Reserve Bank owned company, Securrency, have highlighted the difficulties experienced by employee whistleblowers.

Limited protections are available for whistleblowers in the private sector. In our experience, in the overwhelming number of cases, protections are rarely successfully invoked.

Public sector employees have stronger whistleblower protections than private sector employees at both State and Commonwealth levels.

A 2017 inquiry into Whistleblower protections by the Joint Parliamentary Committee on Corporations and Financial Services²⁰ noted the following:

Evidence to the inquiry, as well as consideration of existing laws, indicates that whistleblower protections remain largely theoretical with little practical effect in either the public or private sectors. This is due, in large part, to the near impossibility under current laws of:

- *protecting whistleblowers from reprisals (i.e. from retaliatory action);*
- *holding those responsible for reprisals to account;*
- *effectively investigating alleged reprisals; and*
- *whistleblowers being able to seek redress for reprisals. (p.ix)*

The inquiry made the following recommendation:

Recommendation 10.2

The committee recommends that a [new] Whistleblowing Protection Act reflect whistleblower protections, remedies and sanctions for reprisals in the Fair Work (Registered Organisations) Act 2009, including:

- *protection from harassment, harm including psychological harm and damage to property or reputation;*
- *remedies for exemplary damages;*
- *sanctions including civil penalties; and*

¹⁹ Dussuyer, I. & Smith, R.G. (2018). Understanding and responding to victimisation of whistleblowers. *Trends and Issues in Crime and Criminal Justice*, No.549 (May 2018).

²⁰https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/WhistleblowerProtections/~media/Committees/corporations_cte/WhistleblowerProtections/report.pdf

- *separating the grounds for criminal and civil liability.*

The inquiry went on to recommend the implementation of a rewards system as a means for encouraging whistleblowing behaviours.

The Committee further recommended that:

Recommendation 12.5

The committee recommends that the public and private sector whistleblower legislation include consistent provisions that allow civil proceedings and remedies to be pursued if a criminal case is not pursued.

Recommendation 12.6

12.94 The committee recommends that the compensation obtainable by a whistleblower through a tribunal system be uncapped.

From these recommendations, we can glean that the Committee recognised the harm of retribution on a whistleblower, the potential consequences on the health and wellbeing of the whistleblower, and the need for appropriate compensation as a result of the harm.

Maurice Blackburn submits that the Productivity Commission, in its exploration of the drivers of poor workplace mental health, consider the impact of whistleblowing activities and whether recent legislative adjustments are adequate to address these impacts.

iii. What, if any, changes do you recommend to workplace health and safety laws and regulations to improve mental health in workplaces?

As noted in our response to the previous question, Maurice Blackburn believes that workplace health and safety laws should be broadened to place responsibility on the PCBU to ensure that:

- Workers are not exposed to cyberbullying, on-line sexual harassment, cyber abuse or other forms of cyber hate in the workplace; and
- Whistleblowers are protected against retribution, harassment and discrimination.

Maurice Blackburn is of the view that one of the significant failings of the current legislative protections for people with mental illness in the workplace is the onus it places on victims to seek redress for the harm they have suffered.

Instead, we believe that the Productivity Commission could recommend the development of a legislative regime that places a positive obligation on employers to prevent the harm occurring in the first instance.

We believe there should be enforceable sanctions against employers who fail in their duty to provide a safe workplace for their employees.

Maurice Blackburn also believes that bystanders to harassment of workers with mental health issues, who occupy positions of power, should be required to take positive action to intervene.

Maurice Blackburn further submits that any review of workers' safety needs to consider the changing nature of the workforce. Increases in precarious and temporary work and contracting, labour hire arrangements and the increasing use of technology in the allocation of work. Each of these elements magnify the effects of poor workplace practices.

Workers with mental health issues are reliant on the protections afforded by workplace health and safety laws and regulations.

Over the past two decades, business operators have continued to find new ways to avoid their responsibilities under Fair Work legislation, WHS legislation, workers' compensation laws and other legal and regulatory structures.

'Gig economy', sham contract and labour hire arrangements require the service provider to be a self employed independent contractor, rather than an employee, thereby abrogating the business operators of employer responsibilities.

By insisting that people who work for them be self-employed independent contractors, business operators avoid having to take responsibility for the provision of safety nets that Australians have come to expect, including the rights associated with mental health in the workplace.

Sham contracting arrangements are especially prevalent in the most vulnerable and low-paid sectors, where those doing the work have little market power, such as cleaners, construction workers, beauticians, call centre workers, those in the agricultural sector and drivers.

Labour Hire and particularly the rogue, 'invisible' labour hire operators, operate outside employment and WHS frameworks and routinely exploit workers.

While a number of states are implementing Labour Hire Licensing schemes²¹, there is still the outstanding issue of how federal laws intersect with these schemes, while other states continue to be without a framework.

The rise in precarious work continues to be a significant factor increasing insecurity among the workforce. This uncertainty would undoubtedly influence the behaviour of workers where they would otherwise pursue their right to WHS coverage or access support and compensation if they suffer a physical or psychological injury.

Businesses which engage people but abrogate their legal responsibilities for workplace safety are being given an unfair commercial advantage over business which play by the conventional rules. The playing field must be levelled.

Maurice Blackburn has been a vocal advocate for encouraging governments to consider ways through which gig economy platforms, Labour Hire firms and those engaging in sham contracting can be held to the same account as other employers.

It is worth noting that, in its final report²², the Senate Education and Employment References Committee inquiry into Corporate Avoidance of the Fair Work Act made the following recommendation:

Recommendation 29

The committee recommends that the federal government work with state and territory safety regulators to review health and safety and workers' compensation legislation to ensure that companies operating in the gig economy are responsible for the safety of workers engaged in the gig economy.

Maurice Blackburn believes that clarifying common law definitions of 'worker' and 'contractor', which include those working in temporary and labour hire roles, would be a good first step.

In keeping with our core point of advocacy to this inquiry, Maurice Blackburn submits that the Productivity Commission should seek changes to workplace health and safety laws and regulations that ensure that claimants with mental health claims enjoy the same rights and protections as those with physical health claims.

²¹ See, for example, <https://www.worksafe.qld.gov.au/news/2018/regulation-of-the-labour-hire-industry-in-queensland>; <https://economicdevelopment.vic.gov.au/inquiry-into-the-labour-hire-industry>; <https://www.sa.gov.au/topics/business-and-trade/licensing/labour-hire/labour-hire-licence>

²²https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/AvoidanceofFairWork/Report.

iv. Are there significant service gaps for people with psychosocial disability who do not qualify for the NDIS?

Maurice Blackburn has consistently argued that the national roll-out process for the NDIS is leaving vulnerable people and groups behind.

The ideal of the transition to a free market model has not, in our experience, been grounded in the reality of the change process. NDIS is now trying to cope with burgeoning demand and an underdeveloped supply market.

In our experience, the roll out of the NDIS has left many people with psychosocial disability without the supports they were receiving under pre-NDIS funding arrangements.

This is supported by evidence provided to the Productivity Commission, in their Review of the National Disability Agreement²³. The report from that review notes “Supports for people with psychosocial disability” as one of the areas where there is a lack of clarity around funding arrangements since the introduction of the NDIS. The report reads:

There is potentially a large gap in the number of people with severe psychosocial disability not eligible for the NDIS. Psychosocial disability relates to the effects (through impairments or restrictions) on someone’s ability to participate fully in life as a result of mental ill-health. About 282 000 people aged up to 65 are estimated to have severe psychosocial disability requiring supports. Once the NDIS is fully implemented, approximately 64 000 people are estimated to be covered on the basis of a primary disability of psychosocial disability. Funding of some services used by non-NDIS participants is being transferred to the NDIS from existing Australian Government programs, including the Personal Helpers and Mentors, Day to Day Living, Partners in Recovery and Mental Health Carer Respite programs. Participants also raised concerns about gaps caused by the transfer of (already underfunded) community mental health programs to the NDIS. (p.14)

This is in line with our experience.

There are fundamental issues with the perception of the role of the NDIS in relation to psychosocial disability. These include:

- NDIS systems and philosophies are not equipped to deal with the episodic nature of mental illness. The need for support is real at the times when the disability is impacting the person’s life.
- Representative bodies of groups with mental illness struggle to equate the NDIS requirement that “the person’s impairment or impairments are, or are likely to be, permanent”.²⁴

Whilst these issues are playing out, it is the clients that are missing out on services.

A number of inquiries have concluded that the frameworks adopted by the NDIS in relation to mental health issues are failing to provide clarity or certainty in these issues.

Joint Standing Committee on the National Disability Insurance Scheme’s recent inquiry into market readiness highlighted the same thing. Recommendation 6 of their report²⁵ notes:

²³ <https://www.pc.gov.au/inquiries/completed/disability-agreement/report/disability-agreement.pdf>

²⁴ <https://www.legislation.gov.au/Details/F2018C00165>. Part 5, s 5.1(b)

²⁵ https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/National_Disability_Insurance_Scheme/MarketReadiness/~/_media/Committees/ndis_ctte/MarketReadiness/report.pdf

The committee recommends the NDIA urgently implement the tailored pathways designed to support:

- *participants with complex support needs;*
- *children aged zero to six;*
- ***participants with psychosocial disability;***
- *participants from culturally and linguistically diverse (CALD) backgrounds;*
- *Aboriginal and Torres Strait Islander communities;*
- *remote and very remote communities, and*
- *LGBTQIA+ communities.*

Maurice Blackburn would support this finding.

Mental Health and Other Social Services

It is important and appropriate for this inquiry to focus on people with mental illnesses who may be 'falling through the gaps' in service provision across jurisdictions. We would argue that there are other cohorts of people with mental illness who are missing out on services due to resourcing gaps.

There are increasing reports about concerns with the National Redress Scheme for survivors of childhood sexual abuse.

The Royal Commissioners personally heard the stories of more than 8,000 abuse survivors. They made almost 2,500 referrals to the police²⁶. The final report puts the number of abuse Australians in the tens of thousands.

At the time of writing, 2,728 applications have been received by the Redress Scheme secretariat. Of those, applications, 51 survivors have received payments. Despite a legislated cap of \$150,000, the average payout made through the Redress Scheme so far is under \$80,000²⁷.

The main reason that so few of the applications have been finalised is that institutions have failed to sign up to the scheme.

Maurice Blackburn is concerned about the potential for these delays to exacerbate the conditions of survivors living with mental health conditions as a result of the abuse suffered as children.

Questions have also been asked about the resourcing of the Scheme in terms of its capacity to urge institutions to sign up. This concern is shared by the Victorian Attorney General, who is quoted as saying:

*...the federal government could increase resources to the scheme to speed up claims, because delays risk re-traumatising victims. Many people don't report that they were victims of child sex abuse for a long period of time and the scars of that emotional and physical trauma often play out in a range of ways.*²⁸

²⁶ <https://www.childabuseroyalcommission.gov.au/>

²⁷ <https://www.sbs.com.au/news/institutions-not-in-redress-scheme-named>

²⁸ <https://www.9news.com.au/2019/03/06/19/45/news-melbourne-national-redress-scheme-delays-victorian-government-politics>

Maurice Blackburn submits that the Productivity Commission should consider the impacts of the development, continuation or worsening of mental health conditions due to an inability to access appropriate redress.

Maurice Blackburn also draws the Productivity Commission's attention to mental health issues experienced by asylum seekers.

The Government's National Mental Health Commission's Statement on the mental health of refugees and asylum seekers²⁹ notes the following:

Asylum seekers and refugees should have access to effective support for their mental health and wellbeing, irrespective of where they are located. Priority should be given to providing support that is trauma informed and culturally appropriate. Maintaining connections should be a key consideration, particularly the connections between children and parents.

Everyone has a right to live a contributing life, including asylum seekers and refugees protected under Australia's Refugee and Humanitarian Program. Effective support, care and treatment; connections with family, friends, culture and community; and feeling safe, stable and secure are some of the foundations for enabling people to live a contributing life.

This is starkly at odds with the experiences of agencies working with asylum seekers.³⁰

A recent report by Medecins Sans Frontieres (MSF)³¹ made the following observations:

- MSF's data shows that Nauru is in the grip of a mental health crisis. The mental health suffering on Nauru is among the most severe MSF has ever seen, including in projects providing care for victims of torture.
- MSF's data also demonstrates that this alarming level of mental health distress is related to Australia's offshore processing policy.
- The way in which Australia administers its resettlement policies is widely perceived as opaque and unjust, adding to people's sense they have no control over their lives; a perception that was associated with major psychiatric diagnoses. Family separation due to medical evacuation was also found to be extremely psychologically damaging.

Maurice Blackburn believes that the Government must be held accountable for the treatment of refugees and asylum seekers, and we continue to work to provide legal advice and assistance to these vulnerable individuals.

Maurice Blackburn submits that the Productivity Commission should find that Australia's offshore processing policy has a severe impact on the mental health of asylum seekers and refugees, and that the economic cost of this will be significant in both the short and long term.

²⁹http://www.mentalhealthcommission.gov.au/central.health/dfsuserenv/Users/User_01/Towilm/Desktop/Statement%20on%20asylum%20seekers%20and%20refugees.pdf

³⁰ See for example <https://www.theguardian.com/world/2018/dec/03/nauru-in-the-grip-of-a-mental-health-crisis-doctors-group-says>; <https://www.abc.net.au/news/2018-10-26/leaked-psychological-reports-on-nauru-child-mental-health-crisis/10428178>

³¹ <https://www.msf.org.au/article/statements-opinion/indefinite-despair-mental-health-consequences-nauru>