



**Uniting**

# **Submission:**

## **Independent Review into Victoria's Workers Compensation Scheme Agent model and the management of complex claims**

**September 2020**

# Statement of values

## Values of Uniting Victoria & Tasmania

Uniting’s work-related support program (GriefWork) is part of Uniting Victoria & Tasmania Ltd, the community services arm of the Uniting Church in Victoria. The content of this submission reflects and abides by Uniting’s purpose (see coversheet) and values (see below) to make the world a better place through action.

<b>Uniting values to be demonstrated during delivery of services</b>	<b>How values are demonstrated during delivery of services</b>
<p><b><i>Imaginative</i></b> We challenge convention, explore new possibilities and dare to dream for a better future.</p>	<p><b><i>We find imaginative possibilities for healing the harmed.</i></b></p>
<p><b><i>Respectful</i></b> We act with honesty and integrity, and open our hearts to all people without exception.</p>	<p><b><i>We demonstrate "Didarri"<sup>1</sup> by listening with deep intent and love.</i></b></p>
<p><b><i>Compassionate</i></b> We are nurturing, generous and thoughtful in our words and deeds.</p>	<p><b><i>We walk alongside the harmed; encouraging gentle healing.</i></b></p>
<p><b><i>Bold</i></b> We face injustice head on and stand up for what is right and true with confidence and strength.</p>	<p><b><i>We ensure the harmed know their rights and are treated fairly.</i></b></p>

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<sup>1</sup> Didarri – from the northern indigenous language, meaning “listening with deep intent and love”.

## 1. Introduction

Uniting Victoria welcomes the opportunity to provide a submission to the independent review on failings in service delivery by the Victorian workers compensation scheme and inappropriate conduct by licensed agents in its interactions with seriously injured and vulnerable workers. Uniting is concerned that these service and claims management faults are entrenched in the scheme. Action must be taken to rectify the current harm and to prevent further harm.

The challenge to the scheme posed by complex claims is not new. What is relatively new has been the growth in this cohort and its increasing support complication over the long term. This has occurred in a time of change in working arrangements and environments of an unprecedented and historic dimension. The consequence has been a rise in mental injury as a primary and secondary injury. This scenario is well known and accepted.

The working community, and those associated with it, such as Uniting Victoria, has been observing this societal adjustment, and its harmful impact (see part 5). The challenge it poses to the workers compensation scheme has been often noted by the Victorian WorkCover Authority (VWA) in various pronouncements. There is an expectation that agents would manage this new and expanding cohort of claims in a respectful, competent and professional manner. The reports by the Victorian ombudsman over a three-year span asserted that this has not been the case.

The second ombudsman report of 2019 reflected a lack of confidence in the capacity and will of agents to tackle this situation. There also seemed a lack of urgency, which is concerning, given that the life of this agent panel ends next year. The ability to manage the cohort that is subject of the review, must be essential to ongoing tenure. It poses the question as to whether these prominent insurance companies have a commitment to this aspect of their work, should they wish to continue as agents in the longer term. This submission goes one step further and questions whether the current workers compensation model is fit to deliver services to seriously injured workers who are classified as complex claimants, and indeed service other claimants who 'stretch' the scheme.

Uniting Victoria's view is that complex claims must now be given a high priority and that any improvements in the service, including adopting other modes of service provision and delivery, be introduced promptly to manage the harm. This review should inform the development of a form of claims management and service delivery that is able to be more effective in assisting seriously and profoundly harmed workers.

If this is not effective, the operation and performance of the Victorian workers compensation scheme may need reforming.

These are the key themes of this submission.

## 2. This submission

This submission would not had been necessary had the current workers compensation scheme, and specifically, licenced agents, provided seriously injured workers with the appropriate services to heal the harm done to them in unsafe and unhealthy working environments, and potentially get them back to work.

This submission would not have been necessary had agents fulfilled their obligation under their licencing agreement with the VWA.

This submission would not have been necessary had the VWA adequately overseen, assessed and audited agent performance in delivering services to complex claimants.

This submission would not have been necessary had an adaptable and holistic alternative to conventional injury management and service provision be available.

This submission would not have been possible had it not been for the courage and determination of many seriously injured workers who stood up for their rights and entitlements, and demanded an improvement in a scheme that should have been able to assist them and ensure others would not be so affected. This submission is inspired by their action and it is hoped it does them justice.

In preparing this submission Uniting has referred to the ombudsman reports of 2016 and 2019. In general, Uniting endorses those comments about the scheme and its recommendations for improvements. This includes conducting this review to look specifically at complex claims and their engagement with the existing claims process and how they are treated under the parameters of the current scheme model from which those processes are derived.

Uniting is aware that the State Government accepted the ombudsman's recommendations and expected the VWA and its agent panel to implement them. Uniting is also aware of the statements in the first ombudsman report by the VWA that improvements to agent operations and oversight were already underway and that further reforms to help long term claimants would be implemented forthwith.

However, Uniting's understanding is that there is still discontent in the injured worker community. It is appropriate that the review is conducted at this time to verify if those reforms have been effective, and if not, what the next course of action might be. It is also proper that the review consider alternative forms of service delivery and support mechanisms that are different from the current scheme, and may be more effective in addressing complex harm.

Uniting has reviewed the discussion paper and is aware of the reviewer's terms of reference and limits to the review's scope. This submission is specific to them as much as is possible. Uniting notes the review's questions that are intended to assist making responses to the review. Uniting prefers to leave comments on detailed scheme processes and operational delivery to those who are directly affected by, or work with the scheme, and have the depth of knowledge to make the kind of valued comments required.

Uniting's response focuses on the harm done and the risk of further harm. The submission concentrates on improvements and innovation in service delivery that will allow the scheme to be more effective and flexible in managing the most challenging claimants. This submission is mindful that changes suggested for the scheme are realistic and cannot put it under financial pressure that threaten its sustainability over the long term.

Our comments are guided by these primary concerns:

- the number of complex, long term claimants 'stuck' in the scheme
- harm created and the costs incurred by the inability of agents to address long term claims, regardless of the injury
- the rise in mental injury claims and the risk of further harm over the long term
- comorbidity ie. developing 'secondary' harm while in the scheme -
  - claimants with a mental injury at risk of acquiring a physical condition eg. musculoskeletal disorder (MSD)
  - claimants with a physical injury eg. MSD, at risk of acquiring a mental injury such as a depressive disorder
- seriously injured and vulnerable workers distressed by the complicated and often lengthy, legalistic, medically technical, evidentiary and adversarial nature of workers compensation
- ignoring individual human factors and capacities (biopsychosocial factors) and personal circumstances in rehabilitation, recovery and in return to work initiatives.

Additionally, Uniting is concerned by:

- increases in preventable work-related mental injury adding to the work of the state's mental health service that is already overloaded and under-resourced
- permanently injured workers leaving the scheme and becoming dependent on social welfare
- the health, wellbeing and welfare of long term claimants, especially those who are socially isolated due to immobility from a debilitating condition or by distance eg. in regional centres, or have limited help from family
- the health, wellbeing and welfare of those who are no longer in the scheme and are socially isolated due to permanent and debilitating injury, or by distance
- the health and wellbeing and welfare of carers of family members who have a complex work-related injury that is not being addressed.

Further, Uniting is concerned by:

- the ethics and morality of agents who are responsible for the harm done and the need for greater accountability over these failings. It is assumed agents are bound by corporate and financial industry codes of practice and ethics – as well as conditions of their licence with the VWA - and by association would be expected to conduct claims management in accordance with reasonable expectations of government and the working public

- the lack of public transparency, disclosure and reporting about the conduct and performance of agents. They are serving and acting on behalf of the working public who when harmed have rights and entitlements that must be met.

Comments in the submission are made by the work-related harm community support program, 'GriefWork', of Uniting Victoria. The comments are based on the long-standing work by GriefWork, its partners and other bodies, peer support volunteers, its extensive experience and expertise in injury support, family bereavement and knowledge of the Victorian prevention and compensation system and its understanding of legal and benefits matters. For more information, see part 3.

Some comments in this submission may depart from the reach of the discussion paper but Uniting believes these comments and suggestions relate to the subject of the review's work. Uniting asks that they be taken into account.

See part 4 for Uniting's recommendations and part 5 for 'Context for change' related to the recommendations.

## 3. Uniting's work harms program

Uniting brings a fresh and positive approach to delivering a variety of community services to Victorians. Formerly known as UnitingCare, Uniting is one of the largest community service organisations in Victoria<sup>2</sup>.

In aiming to reduce social harms, assist the vulnerable and build capable, resilient communities that are capable of changing lives, Uniting delivers a range of programs and services across Victoria.

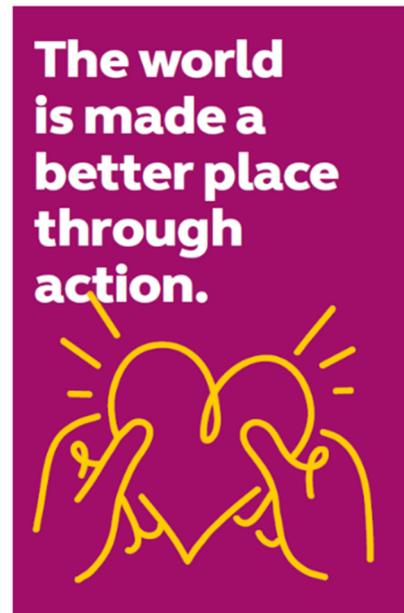
Uniting is the only community service body operating a work-related harm support service - GriefWork<sup>3</sup>. Since 1998, this program has assisted more than 400 families and others affected by work-related death and other serious harms at work. The service is based on a unique pastoral care/companionship/friendship counselling support model developed by social researcher and reformer, Rev John Bottomley, in association with those of the lived-experience.

The program assists families and individuals through the grief process, helps them care for their wellbeing and welfare, and works in partnership with clinical services, to reduce the risk of mental and physical illness during the grief process and when creating a new life beyond grief and loss.

As the founding director of the UnitingCare agency that operated the GriefWork program, Rev Bottomley among others in the working community, expressed early concerns about the incidence of complex claims and their impact on the community. This led to a formative research project. Its findings were published in a 2014 report: *Filling the dark spot*<sup>4</sup>.

This report, supported by UnitingCare/Uniting, looked at the lives of injured workers who would today be classified as complex claimants.

The report identified the difficulties such workers had in their engagement with the workers compensation scheme and the resulting impediments to their recovery. This often caused deteriorating mental health, leading to secondary injury. The report



<sup>2</sup> Uniting Vic.Tas is the independent community service arm of the Uniting Church in Victoria.

<sup>3</sup> Uniting's GriefWork program is core-funded by WorkSafe Victoria.

<sup>4</sup> *Filling the dark spot: fifteen injured workers shine a light on the workers compensation scheme to improve it for others*, Pollock, Bottomley and Taket, CMN 2014

sought to “shine on a light” on the workers compensation scheme, through the experience of seriously injured workers to “improve it for others”.

The report was prescient in raising awareness of the need to provide further support to seriously injured workers that was not available and apparently not possible when they engaged with the scheme. It noted the experience of mental distress related to their claim for physical injury and that the conduct of agents was a contributing factor in affecting wellbeing. “This report calls for the workers compensation scheme ... to treat people who make claims with dignity and assume their honesty from the outset.”

The problems raised in the “*Dark Spot*” report were re-visited in the first ombudsman report of 2016, and again in the second report where the ombudsman stated: “If the problems are persisting despite the adoption of my previous recommendations, the reforms were plainly not fundamental enough.”

The fact that recommendations were not effective is troubling and perplexing from Uniting’s perspective when these matters have been raised many years before by UnitingCare/Uniting and others.

It will be up to the review to determine if the further recommendations of the second ombudsman report are addressing deep-seated case management and service delivery faults, or lack of priority or capacity. Uniting is concerned that the problems are persisting, and if the review finds this is the case, the scheme may be resistant to reform. A different approach may then have to be formulated and imposed to manage this vulnerable group of injured workers in a respectful and caring way.

**Disclaimer:**

Uniting Victoria/UnitingCare has a long association with the Victorian WorkCover Authority on various work-related harm initiatives, particularly in family support following a death at work. Uniting’s GriefWork program is currently core-funded by WorkSafe Victoria to conduct grief support to those in the community impacted by a death or serious injury at work in Victoria.

## 4. Recommendations for improvement

Uniting Victoria's recommendations for change and improvement meet the following criteria:

- in the spirit of recommendations made by the ombudsman's reports
- generally, within the terms and reference, and scope of the review
- align with Uniting values and the operating principles of Uniting's work-related support program – GriefWork
- align with the expectations the VWA has in delivering insurance protection
- support the expectations of the working community in delivery of services
- align with any code of ethics that bind the conduct and behaviour of insurance agents.

The context and concerns related to the recommendations are outlined in part 5.

### **Recommendations:**

- A comprehensive assessment of complex cases to determine those seriously injured workers who have been 'harmed' by the scheme. The assessment would need to explain how this harm occurred and what additional support and/or rectification is necessary in acute cases.
- Learnings from the above assessment to apply to case management to reduce the risk to 'new' claimants from secondary injury and further harm while engaged with the scheme.
- Improvements in the mode of case management and support necessary to improve recovery and create other positive outcomes for complex claimants. This may include earlier intervention and more efficient and effective support that may also reduce time in the scheme and costs of service provision.
- In relation to the above recommendation, and the following recommendation, provide training to case managers on how individual needs and circumstances may have a bearing on recovery time and costs of service provision and how additional support may assist in enhancing outcomes in service provision.
- Consideration of new modes of support for complex claimants that may also have wider impacts for other seriously injured workers. Uniting recommends introducing a more holistic, flexible, non-clinical support service that focuses on individual needs. This would be client-driven and work in association with clinical services and the agent on 'total' claimant support.
- Agents made accountable for the reduction in secondary injury, and the numbers of acute complex claims. Meaningful measurement and reporting is needed as a priority and appropriate sanctions and incentives applied to improve outcomes to the satisfaction of claimants.
- Agents made accountable for unethical behaviour that has caused harm, and compromised recovery outcome and contributed to higher scheme costs. Standards of ethical behaviour need to be specified by the regulator, appropriate training put in place, and a separate complaints referral process established to investigate complaints and review service provision.

## 5. Context for change

Concerns by Uniting about the workers compensation scheme, delivery of service to the seriously injured and the conduct of the current agent panel in relation to complex claims, underpins Uniting's recommendations in part 4.

Uniting believes the following matters are important in framing and informing the outcome of the review and are in accord with the ombudsman's recommendations:

### 1. Is the Victorian workers compensation scheme broken?

Uniting's view, echoed by many, is the current scheme is proven and operates effectively for the vast majority of injured workers in the scheme. This is verified in the VWA's annual report. Over a long period of time the satisfaction rate has been consistently reported above the 80 per cent range. However, it has been explained that this KPI refers to the so-called standard claims that suit the scheme's processes. They are not complicated, rehabilitation and recovery is manageable, and claimants return to work in good time. As a result, costs are contained, services are delivered efficiently, and there is no compelling business case to be made for reforming the scheme.

The nominal 20 per cent of complex long term claims that do not fit the aforementioned model could therefore be described as a 'square peg in a round hole'. As has been widely reported, this relatively small cohort of claims accounts for more than 80 per cent of the scheme's costs and with every prospect of incurring more costs in the coming years. It is accepted that this situation cannot be sustained and must be corrected to reduce financial pressure on the scheme. The concern is the harsh and even abhorrent way expensive, long term complex claims have been 'eliminated' to contain costs.

This intolerable situation raises these questions about how such claims should be managed in an appropriate, less costly and more timely way that has agreeable outcomes for the claimant and the agent:

- Is the current process-driven agent scheme capable of managing complex claims in a satisfactory way? The assumption is that the recommendations from the ombudsman, and further improvements in this regard by the VWA, will make this possible.
- If the answer is no, and recommendations have had limited impact, what other options are there to ensure the agent network may improve its ability to manage such claims? What other new approaches may be necessary to do this in a cost effective and timely way?
- If a new approach is preferred for complex claims, does it need to be managed within the agent model? What benefit might there be in providing a specialised service in support of the scheme, so that agents can concentrate on standard claims.
- How can the improvements be associated with the necessary reductions in scheme time and costs to ensure agents do not choose expediency over outcomes when removing complex claims from the scheme?

- What new measures and reporting might be necessary to monitor improvement in service provision related to complex claims? What new rules and accountability may be required to stamp out unethical behaviour that has become rife throughout the finance industry sector in recent times.

## 2. The extent of the problem

The nature of the problem is known but the extent is not clear.

According to the ombudsman report (2016) the total number of workers on workers compensation in a financial year (new claims and ongoing) is approximately 90,000<sup>5</sup>, the first time such a figure has been noted. This figure was repeated in the discussion paper<sup>6</sup>. The proportion of 'complex' claims, based on the 90,000 total active claims cohort, was between 10 and 20 per cent, according to the ombudsman. At 10 per cent, the active complex claims total would be 9000. Cost for complex claims were estimated at 80 per cent of the scheme.

The discussion paper for this review records the total 'current' cohort at 63,085 active claims<sup>7</sup> (at June 2018), of which seven per cent are considered complex claims. The proportion of costs to the scheme was stated at 90 per cent.

In its most recent annual report (2018-19) VWA records its total claims cohort at June 2019 at 79,654<sup>8</sup>, although the proportion of complex claims was not shown but assumed to be similar to the above estimates.

The nature of the problem cannot be understated. It is therefore vital there is clarity and accuracy about the exact number of complex claims, their proportion of total claims in the scheme, the cost to the scheme (which is said to be considerable) and what these costs entail.

It should be noted that the total standard claims changes with each reporting year. However, it is assumed the number of complex claims are not reducing by proportion and remain of significant concern.

It is also worth noting that:

- the total number of new claims and the annual rate of standards claims in Victoria have been increasing (2019). As a consequence, the number of complex claims is likely to be increasing too.
- the type of claims most associated with the complex/secondary claims are at a high proportion - mental claims are rising sharply and now up to 14

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<sup>5</sup> *Investigation into the management of complex workers compensation claims and WorkSafe oversight*, Victorian ombudsman 2016, p.6

<sup>6</sup> *Independent Review into Victoria's Workers Compensation Scheme* p. 9

<sup>7</sup> *Ibid*, p. 21

<sup>8</sup> *Annual report, WorkSafe Victoria 2018-19*, p. 2

per cent<sup>9</sup>. This is a phenomenon not experienced in Victorian claims history. At this point MSD, a secondary injury element, remain the biggest injury at approx. 40 per cent of all claims.

As the extent of the problem has not been quantified and qualified, Uniting will base this submission on the indicative harm at 10 per cent of the current VWA report of approximately 80,000 active claims. That makes the number of complex claims at approx. 8000.

While not all 'complex' claimants would be at risk, that is indisputably a significant number needing further support. One way of showing the scale of the impact of complex claims as raw numbers, is that the number roughly equates to the lowest market share of an agent in the current Victorian scheme (by policy) which is 10 per cent. While not a valid comparison, it indicates that the complex claims cohort is at a scale that may require the resources of ONE agent to 'manage' them, if they were the responsibility of a single panel licensee under the current scheme model.

### **3. The definition of 'complex' claim**

Uniting believes the level of complex claims is much higher than has been reported. One of the reasons for this is the narrow definition of what constitutes a "complex" claim.

This is another way the extent of the problem is understated. This potentially reduces the urgency of the matter and any appreciation of the need to provide more assistance, or make any major scheme adjustments. If these claims are not identified and assessed, it is likely some claimants will be left at risk. Given that the scheme has harmed a number of those it pledges to heal and return to work as soon as possible, this definition needs to be reviewed to capture the full cohort of workers harmed by the scheme.

The current definition as expressed in the review states that 'complex claims' are those that progress beyond the scheme support time limit of 130 weeks. 'Waiting' for the deadline does not take into account that many secondary claims, and some primary cases, are by their very nature 'complex' before 130 weeks and may require additional care earlier. It is also possible that time has been wasted by the agent, as a result of lack of service. A more likely possibility is resources are diverted to minor, short term claim processing and throughout to maximise financial gain.

The ombudsman alluded to this definition but did not limit the report to that cohort, indicating harm could occur well before the 130 week cut off. Uniting's experience is that some workers with serious injuries eg. a spinal injury, may be at risk of contracting a secondary mental injury as early as three months, when the reality of their situation is fully realised.

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<sup>9</sup> Ibid, p. 19

For these reasons, Uniting believes the scheme must accept that a claim can be defined as 'complex' at any point, particularly where there is comorbidity and when personal circumstances and biopsychosocial factors are evident.

While a process timeline and end date is necessary for practical reasons, this is process-driven and doesn't fit when complications in many different types of injuries can emerge anytime during the claims management process, and may require additional support.

Uniting is suggesting that once a seriously injured worker has been engaged with the scheme for a nominal sixth month period, and has not responded adequately to recovery, the case could be assessed as a 'complex' claim, and a further form of assistance be provided as necessary.

The scheme is required to manage claims, and competently, at any time. Managing complex claims more effectively is a test and could be described as a learning/development experience for a scheme that prides itself on service. This would be considered as healing at its best and most excellent. That is much more worthy of praise than a high service score for short term, conventional claims.

#### **4. The myth of sustainability**

The VWA has consistently stated over its history that the provision of workers compensation is dependent on financial sustainability. The scheme is now under pressure from the cost of complex claims, including the rise in mental injury claims, and a persistent flow of actions for redress under common law. Both pressure points could be associated with failures in the scheme – harm created in the scheme and harm caused in unsafe workplaces being unresolved by the scheme over the longer term.

The total cost of claims is increasing, as is the average cost of claims. The average cost of mental injury claims is markedly greater than claims resulting from physical injury. The number of total claims and claims rate is no longer reducing and return-to-work rates are disappointingly low.

There has been no additional investment in the scheme for many years. VWA holds premium rate at an average of 1.272 per cent as part of long-standing government policy. No further investment is likely because of the need to contain government charges and 'compete' against other jurisdictions on keeping a lid on business costs.

Cost containment is vital. Agents are rewarded for reducing services costs, closing cases and getting more people back to work. The concern is that there has been unjustified cost-cutting and reduction of services to complex claimants in response to a drive for more profit. This is reprehensible when such an approach is associated with 'rewards' from the government regulator in the form of bonuses for achieving 'soft' KPIs.

Uniting believes that a cost cutting/claims 'termination' mentality among agents is a false economy at all levels of the scheme.

The subject of this review is therefore as much about financial management as it is about proper claims management delivery and operational conduct. It may be that increasing funding for the workers compensation in specific areas ie. improving outcomes for complex claims using a more effective and efficient service model may help eradicate harm in the scheme. This may reduce costs in the longer term.

As of 2019, the VWA had a significant surplus<sup>10</sup> generated from premium to consider topping up the scheme for such a purpose. The risk of ongoing costs from complex claims is a lack of certainty about the viability of the current workers compensation scheme and a lack of confidence in the ability of the scheme. This may even have political implications.

## **5. The voice of the injured**

The ombudsman reports gave a voice to the injured. It is a voice that has been heard in some forums. But rarely has that voice been heeded to the extent that fundamental respect was given and the need for change embraced by those with the capacity and responsibility to make that change.

The injured initially express their shock and anger that they have been harmed in a workplace that by law is required to be safe and healthy. The trauma and distress from a serious injury may be experienced differently by individuals and their families, and influenced by personal circumstances. Then comes the realisation that under the claims scheme there is no blame attributed to the offender and therefore no 'sense of justice'. It is a difficult concept for the seriously injured to grasp.

Uniting's experience is there are actually 'two' voices to be heard after that 'shock'. Typically, these both emerge within three months of the harm.

The first voice follows engagement with the workers compensation scheme where the injured worker becomes a case file and control is with a large insurance company. At this point, while still grappling with the all-consuming discomfort of the harm, the injured commonly asks: "How do I manage in an adverse medical and legal scheme that I am struggling to understand?"

This requires assistance with and beyond the process and a reassurance that the scheme at least provides them with financial security to maintain their welfare and the welfare of their family. In most situations injured workers need to know they will not be 'pushed' back to work 'for the sake of it' and that when they recover, they will return to a workplace that is now safe from the cause of their injury.

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<sup>10</sup> Does not take into account any impact on premium and investment from the outbreak of the Covid-19 pandemic.

The second voice is particular to long-standing claimants and is less about confronting a stressful and intimidating process. It is about the circumstances they are experiencing at an emotional level: the loss of 'life' as they knew it; the loss of identity and self, as they used to be. This is a yearning for being normal again, or being able to be the parent or worker they used to be.

Uniting's experience is this is a form a grief that may be as profound and as deep as any grief over the physical death at work of a loved one. And like grief over a death, it is an emotional state, not a mental disorder that necessarily requires costly, long term psychological support. In the case of a physically injured worker who identified strongly with their trade or profession, such an emotional state can quickly descend into debilitating clinical depression - the so-called 'secondary injury'.

Uniting's understanding from its diverse work in the community is that some injured workers in distress have contracted conditions such post-traumatic stress disorder and had an increased risk of suicide. The conditions were not identified in the compensation processes. They may only be apparent to those who have experience of more individualised support that involves a relationship with the harmed. Even individuals who do not have that level of acute distress are often faced with a bumpy road that may be 'smoothed' by appropriate, additional support.

While claims managers and case workers can provide some assurance, Uniting's view is that a process-driven, time-limited scheme cannot address significant individual discomfort and distress that may slow down legal, medical and claims management processes. It may even create barriers to critical rehabilitation and recovery or lead to disputes.

The question Uniting poses is: can agents provide this level of support to keep claims management 'on track', or is this a role that requires a different approach?

Uniting's experience is that the voice of the harmed has an honoured and essential place in a non-clinical mode of support and support coordination. This is because this model is more client-driven. It focuses on the individual's needs, at the pace of the individual, but still firmly complements the clinical support that is vital.

What Uniting finds perplexing is that the scheme has formal avenues for complaint that on the face of it, appear to muffle the voice of the injured, and have led to more disputation. It is disappointing that this part of the scheme has not been successful in 'listening' to the voice of the severely injured and resolving matters in an open and respectful way that is agreeable to both parties. While this is subject to some of the ombudsman's recommendations, these hearings should be reserved for the most critical legal and medical matters. Complex harms should be dealt with operationally by rigorously identifying inadequacies

and failures and allocating the kind of additional support necessary to address them promptly.

Uniting reminds the review that under recent legislative changes, the cohort of the 'harmed' are now effectively elevated to the status of a VWA stakeholder, along with employer and worker representative bodies. They will be soon be given a voice on the Ministerial Workplace Incidents Consultative Committee<sup>11</sup> managed by the Department of Justice and Community Safety, on behalf of the Minister for Workplace Safety. A key role of the committee will be to advise the minister on the needs of persons who are affected, directly or indirectly, by incidents that cause harm.

The representatives of seriously injured workers appointed to the committee by the minister will have expectations about the management of injury claims and the conduct of agents. They will speak for their peers and will be entitled to raise concerns about the operation of the workers compensation scheme that are brought to them.

In a recent paper Monash University legal academic, Dr Eric Windholz<sup>12</sup>, stated that the creation and presence of the committee may have a significant impact on how WorkSafe Victoria operationalises and enforces the law, although he was mostly referring to the impact of OHS law.

## 5. Restitution and prevention

The fact that harm was done in the scheme is shocking. One of the outcomes of this review must be to determine the level of harm done to complex claimants in the scheme. Then consider a level of restitution. While the VWA can penalise agents for failures, it is not known if there were any actions that resulted in additional support given to those who were owed it for the further harm done. There is no precedent for this but the level of complaint and the fact that two ombudsman reports were necessary to shed light on this problem was also unprecedented.

It is also unknown what harm may have been done to other claimants in the three-year period between the first and second ombudsman reports. The fact that the ombudsman was compelled to produce a second report indicates that further harm may have indeed been done. The fact that this review is necessary says there is no guarantee of sufficient improvement in decision-making, service provision and conduct. If the review finds this to be the case, then a form of restitution may be essential. The cohort could be large but there would be sufficient funds available from agent sanctions and draw from VWA's surplus.

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<sup>11</sup> Part 9A of the OHS Act 2004, amended 2019 - Workplace Incidents Consultative Committee

<sup>12</sup> *Victoria's new workplace manslaughter laws: It's all in the messaging*. Windholz (2020), Employment Law Bulletin 87.

Another reason to consider restitution is that a significant amount of data would be collected and experiences recounted from claimants about failures and how to prevent recurrence.

A third reason is to reset scheme integrity and restore confidence in the 'fairness' of workers compensation for seriously injured workers who have to engage with the scheme and may do so with trepidation and suspicion, and with low expectations that they may recover.

Responsible employers who faithfully and diligently play their role in claims management and recovery have every right to believe that the policy they take out with an agent endorsed by the VWA results in professional, effective service. Employers may see damage to their business reputation if their worker, and possibly a valued one, is made 'sicker' in the scheme. The claims-prevention cycle is supposed to be based on continuous improvement. It would be galling for a reputable and contrite employer who invested in improving the safety of their workplace to prevent such an incident happening again only to realise their agent may have protected the business from blame and liability under the concept of pooled risk but had not protected their worker from becoming a 'complex claimant'. The business impact will be tangible when the employer views upcoming premium notices. It would have no bearing on a large employer but a different story for the majority of small-medium-enterprises that are more sensitive to rises in business charges they cannot control.

## **6. Evaluation, reporting and disclosure**

The VWA annual report, tabled in parliament, sets out the performance of the workers compensation scheme it manages. The first part of the report has consistently stated that in up to 90 per cent of engagements the scheme functions to the satisfaction of those being provided with services.

Apart from passing reference to the challenge of complex claims, on page seven of current 2018-19 report, readers would be led to believe there is no major issue in the scheme of the order that was subject of the two ombudsman reports and triggered this review. The VWA annual report does mention the implementation of the recommendations of the first ombudsman report, and the ongoing investigations, but this was at the end of the 'recovery' section of the report on page 43. The only other mention of the workers compensation scheme, in the appendices, does indicate specific KPIs of the agent panel. Once again there is nothing to indicate anything is amiss related to complex claims.

Under the circumstances, this lack of disclosure and accountability is unsatisfactory. It masks the issue and gives the impression that complaints and reporting on failures are not grave or urgent.

It is acknowledged that such specifics may not fit with the broad reporting requirements and substantive operational and financial matters of an organisation's annual report. However, there is scant and meaningful public reporting of workers compensation matters in Victoria. Had there been, it is

possible the matter requiring this review may not have required an investigation by the ombudsman and a response by the minister<sup>13</sup> with responsibility for the VWA.

Uniting suggests a form of separate annual reporting specifically on workers compensation matters, for the information of all parties involved in and affected by the scheme. Such a reporting mechanism may continue to point to the scheme's areas of performance, but also openly report matters where difficulties have been encountered and assessed. Of importance would be an account of the measures that are being considered to alleviate those difficulties in the best interest of employers and the injured and, as a consequence, improve and strengthen the scheme.

## **7. Ethical conduct**

The elephant in the room over complaints covered in the ombudsman reports is the decision-making about case management. At the same time the culture of greed in the finance industry was being forensically examined in a federal Royal Commission<sup>14</sup>. The finance sector has a large stake in workers compensation through business protection insurance services. Decisions about performance in the delivery of business services and the lack of ethical conduct demonstrated was laid bare in the royal commission. The concern raised by those providing evidence to the royal commission was that the two streams overlap and may be difficult to tease apart.

The extent expediency and profitability in workers compensation still over-rides agent policy and decision-making on service provision, disputes and claims termination, is an issue for the review. Through its workers compensation business, insurers are entrusted to engage formally with vulnerable people, in charge of spending employer premium, judging disputes and directing medical and legal providers. At the higher level it represents government on a fundamental matter of social support. In the view of the ombudsman it has breached that trust and that reflects badly on the industry and on the image of regulator that oversees it.

The current scheme is based on the premise that private insurance, motivated by profit, offers choice to employers. The conventional view is that competition improves services. The counter argument is it is a race to the bottom on costs and level of service in order to generate greater profit and lock in a vested interest.

It raises the question about what is the most ethical and fair workers compensation model? Is Victoria's hybrid model still fit for purpose after more than 20 years? The rapid changes in workplaces this century and the way work is being conducted, gives a new perspective about such questions. Might the

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<sup>13</sup> At the time of the first ombudsman report, the responsible minister was Robin Scott, Minister for Finance

<sup>14</sup> Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry 2017-2019

answers be within the influence of this review? They may be relevant given that the current agent panel tenure ends next year.

In support of these marks, Uniting refers the reviewer to a recent report for the finance sector union in Victoria<sup>15</sup> which followed the findings of the royal commission. The report “identifies the powerful assumptions of capitalist ethics operating within the finance sector, and how those assumptions work to mask the injustice and harm done by finance sector companies”.

The report claimed a pervasive culture “tempered” ethics in the delivery of services. This not only valued profit over delivery of service but often violated the personal ethics and morality of those who made decisions and who delivered services to “clients”. This was normalised and rationalised within a fast-paced, process-driven business culture that risked the mental health of finance workers who were trained and coerced to set aside their views to deliver a service that was lacking, harmful and even unlawful. One worker quoted in the report says: “I want to do the right thing, but often the right thing is against policy and procedure and I feel concerned about risking my job to do it. Sometimes doing the ethical thing is so time-consuming that it is made impossible to do.”

While these are not Uniting’s views, they reflect Uniting’s disquiet about business ethics and social justice related to delivering services to the vulnerable.

Without a change in that mode of conduct, the insurance industry that sells and seeks to profit from workers compensation may not be able to improve its service to vulnerable people.

Uniting is sceptical that the current model can continue in its current form when providing services to seriously workers requires a greater level support and the ability to do that in a more flexible, and holistic manner. Private insurance firms are unaccustomed to, and may be unsuitable for, providing that type of service. And to paraphrase the aforementioned report, this would be a challenge unless the necessary factors are identified to create “a robust scheme of professional ethics in a conflicted work environment”.

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<sup>15</sup> *Justice Tempered. How the finance sector’s captivity to capitalist ethics violates workers’ ethical integrity and silences their claims for justice*, Bottomley, Byrne and Flett, University of Divinity/FSU, 2020.

## 6. Conclusion

Uniting thanks the review for the opportunity to provide a submission to this important initiative. Uniting invites the review to consider the comments in this document.

Uniting's major concern is the blurring between the mental harm in the working community and mental harm in the wider community. Our position is that the VWA and its agents have a social responsibility to make every effort to reduce workplace mental harm, and its resulting impact on the general community.

The likelihood that additional harm has been, and may still be, caused to the most vulnerable injured workers while in the current workers compensation scheme is unacceptable. We hope the recommendations set out in part 4 contribute to restitution and additional support that may be needed in the scheme right now, and to prevent occurrence in the future. Uniting believes this will be a factor in improving outcomes, reducing claims time and cost, and therefore be in the best interest of maintaining a sustainable, more capable and fairer scheme over the longer term.

Should the review wish to discuss the contents of this submission, and related matters, Uniting would look forward to that discussion.

Ends

September, 2020



**Uniting**

...to inspire people, enliven communities  
and confront injustice.