Submission on the Victoria Workers' Compensation System – Independent Review into the Agent Model and Management of Complex Claims

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The Police Association of Victoria submission to the Victoria Workers' Compensation System – Independent Review into the Agent Model and Management of Complex Claims

The Police Association of Victoria

The Police Association of Victoria (TPAV) is an organisation that exists to advance and represent the industrial, legal, health and safety, professional and welfare interests of its members. The Police Association's membership of more than 17,500 is drawn exclusively from sworn Police Officers at any rank, Protective Services Officers, Police Reservists and Police Recruits who serve in Victoria Police. Membership of the Association is voluntary. By virtue of its constitution, the Association is not affiliated with any political party.

The Context of this Submission

Policing is a high-risk industry and involves a high level of compensable injuries. Police, and indeed all Emergency Service Workers, in the state of Victoria perform some of the most challenging work in our community. While protecting, caring for, and saving the lives of their fellow Victorians is a rewarding experience, the workers who undertake these necessary functions are continually exposed to an inordinate amount of trauma, suffering, and death. It is therefore not surprising that rates of psychological injury for Emergency Services Workers remain high, even though under-reported, and are often poorly managed at an organisational level. Recent research suggests that psychological injury acquired by our Emergency Services Workers can build up over time, with constant occupational stress made worse by uniquely traumatising events.[1] This inevitably takes a devastating toll on their psychological well-being.

Our members, as workers in an occupation with an elevated exposure to traumatic incidents, are at a significantly higher risk than the general public of developing a psychological injury that results in a WorkCover claim.[2] In Australia, employees in police and emergency services organisations have the highest rates of workers' compensation claims outside of defence.[3] Despite an elevated risk of psychological injury, Emergency Services Workers have historically been confronted with far too many barriers in the way of them receiving timely and

[1] Cotton, P, Hogan, N, Bull, P and M. Lynch (2016) Victoria Police Mental Health Review, Victoria Police: Docklands, p. 22.; Harvey, S., Devilly, G., Forbes, D., Glozier, N., McFarlane, A., Phillips, J., Sim, M., Steel, Z., and R. Bryant (2015) Expert Guidelines: Diagnosis and Treatment of Post-Traumatic Stress Disorder in Emergency Service Workers, UNSW: New South Wales, p. 50 at 40.Halpern, J., Maunder, R., Schwartz, B., and M. Gurevich (2012) Identifying, describing, and expressing emotions after critical incidents in paramedics. Journal of traumatic stress, 25(1), 111-114.; Beaton, R and A. Murphy (1995) Working with people in crisis, in Figley, C (Ed) Compassion fatigue: coping with secondary traumatic stress disorder in those that treat the traumatized, New York: Brunnel/Mazel Publishers.

[2] Carleton, R. N., Afifi, T. O., Turner, S., Taillieu, T., Duranceau, S., LeBouthillier, D. M., ... & Hozempa, K. (2018). Mental disorder symptoms among public safety personnel in Canada. *The Canadian Journal of Psychiatry*, *63*(1), 54-64; Samuel Harvey et al, Expert Guidelines: Diagnosis and Treatment of Post-traumatic Stress Disorder in Emergency Service Workers, (Australia: Black Dog Institute, 2015). Shannon Gray and Alex Collie, 'The Nature and Burden of Occupational Injury Among First Responder Occupations: A Retrospective Cohort Study in Australian Workers,' *Injury*, 48/11 (2017), p.2470; Ben Green, 'Post-traumatic Stress Disorder in UK Police Officers,' Current Medical Research and Opinion, 20/1 (2004) p.101; Mary Clair, 'The Relationship Between Critical Incidents, Hostility and PTSD Symptoms in Police Officers,' PhD Thesis, (Drexel University, 2006);

[3] Safe Work Australia. Work-related mental disorders profle. Canberra: Safe Work Australia; 2015. https://www.safeworkaustralia.gov.au/system/fles/documents/1702/work-related-mental-disordersprofle.pdf

effective help to overcome their illness. As we at TPAV have continually advocated,[4] and as acknowledged by Victoria Police in its own Mental Health review,[5] some of these barriers are institutional and cultural in nature. A culture of 'toughness' pervades emergency service work and creates a perception of weakness or 'failure' should workers acquire a psychological injury. In addition, those who do manage to seek help have historically been faced with further barriers and unnecessary tests by the employer and their insurer.

The WorkCover scheme attempts to cover all workers as a homogenous group. The scheme itself arose from, and is based on, a model for physical injury, rather than on mental injury.[6] This basis is clear in current practices and policies. This is not particularly well suited to police for the above reasons. Indeed, the policing sector is bespoke. The role of police is as unique as their treatment needs. In addition to the psychological danger of emergency service work, our members are armed for lethal situations. The psychological impact of this everyday stress is not accounted for in the current scheme. TPAV has been a vocal critic of the workers' compensation system, in particular in relation to the treatment of police suffering from psychiatric/psychological injuries.[7] TPAV has long been concerned with the processes of WorkSafe Victoria and its agents.[8] On behalf of our members, who have had to endure fundamentally unfair and outdated processes when at their most vulnerable, TPAV welcomes the opportunity to make this submission to comment on the complexities of the current workers compensation system, and highlight our particular areas of concern. We feel it crucial to outline the unique experiences and needs of our members, and to describe the evidence-based solutions to the issues posed by the current process.

Identifying and assessing complex claims

3. What are the features of a claim for worker's compensation that make it complex, or at risk of being complex?

Approximately 90% of complex claims that TPAV is involved with are psychological in nature. It is our position that every mental health injury, and some physical injuries, are complex claims from the outset. "Complexity" is further compounded for police specifically, due to the difficulty returning to work and the difficulty accessing appropriate specialist services. The current definition of "complex claims" (as claims "beyond 130 weeks" in duration) needs to be addressed. Claims are complex due to the nature of the injury, not as a function of time. As such, "complex claims" are complex from week one, not once a relatively arbitrary duration has been reached. The 130-week reference is therefore of no relevance, and many of the issues raised by the Ombudsman in the most recent Review are identified well before the claim reaches 130 weeks. We suggest that a narrative test model is far more apt for identifying the complexity of a claim than a time-based model. A narrative model similar to that of the Whole Person Impairment or Consequences of Injury at common law, would provide a better understanding of complexity. However, we caution that the standard to be reached must not be set so high as to exclude workers in need of ongoing support.

4. How, and at what stage, should claims for workers' compensation be assessed as being complex, or at risk of becoming complex?

The assumption of complexity should occur at the very beginning of the process. Failure to recognise cases as complex facilitate a delay in appropriate treatment. As we have previously asserted,[9] any delay in assessment

[4] See for example TPAV (2019) *Submission to the Royal Commission on Mental Health*, TPAV: East Melbourne; TPAV (2016) *Trauma doesn't end when the shift does: Post Traumatic Stress Disorder as a Presumptive Illness for Emergency Service Workers,* TPAV: East Melbourne
[5] Cotton, P, Hogan, N, Bull, P and M. Lynch (2016) *Victoria Police Mental Health Review*, Victoria Police: Docklands,
[6] Kilgour, E., Kosny, A., McKenzie, D., & Collie, A. (2015). Healing or harming? Healthcare provider interactions with injured workers and insurers in workers' compensation systems. *Journal of occupational rehabilitation*, *25*(1), 220-239.
[7] TPAV (2020) *Submission on the Victoria Workers' Compensation System – Introduction of a provisional payments model March 2020*, TPAV: East Melbourne
[8] TPAV (2018) *Submission to Review of Management of Complex Workers Compensation Claims and WorkCover Oversight July 2018*, TPAV: East Melbourne
[9] TPAV (2016) *Trauma doesn't end when the shift does: Post Traumatic Stress Disorder as a Presumptive Illness for Emergency Service Workers,* TPAV: East Melbourne

or treatment is to the detriment of the worker. Ultimately, delays in treatment elevate the risk of developing co-morbid conditions, increase the resistance to treatment, and reduce the return to work prospects for those suffering.[10] The injury can create additional pressures, such as financial and relationship, that add further complexity, and delay return to work.

Complexity can be recognised by the members' initial presentation and immediate history, and should be assumed in the case of psychological injury. At their initial presentation, the person may appear very traumatized. However, this should not be understood as a strict criterion. Characteristics that can result in complexity can include age, stage of career, stage of life, family conflict, workplace conflict, and the type of injury. There a number of reoccurring types of claims that TPAV sees in which the likelihood of complexity is heightened. For instance, cases where a member has been unwell in the workplace for an extended period, and there is a triggering incident. In these cases, it can be predicted from the outset that a claim is complex, and further, that decisions during the claim can add to the complexity. Another specific example of additional complexity is that created under circumstances in which the worker has to make a decision about whether to return to work in circumstances where they are not ready to do so, or to put a pension at risk.

Delineating which cases may be or become complex at first presentation is a fraught process. We suggest that the focus in the first weeks and months of a case must be early intervention and the application of a good clinical treatment plan. Indeed, in order to reduce the incidence of complex claims, the first 13 weeks of the claim is critical. The first 13 weeks determines if a claim will become complex. The focus needs to be on accurate needs assessment, and access to early appropriate treatment. As such, our position is that any mental health injury claim should be considered complex until otherwise borne out. Treatment must be commenced as soon as a claim is lodged with the employer, and treatments undertaken in the initial phase must be covered by any scheme. Any legislative change that is required to achieve this outcome would be supported by TPAV.

As to who should make the assessment of complexity after the initial phase of treatment, in our view, the relevant treating General Practitioner and/or mental health clinician are best positioned to make this determination. Case managers from the insurer, the employer, and Independent Medical Examiners, are not in the best position to determine whether or not a case is to be considered complex. In our experience, case managers are not apt to make appropriate assessments given competing priorities. Members further report that the experience of Independent Medical Examiner assessment is so traumatising that results are not reliable. Accurate assessment, appropriate treatment and timely intervention are required. The clinicians involved in this process would be best placed to determine the status of the case. This occurs under the BlueHub Model which has been shown to offer effective triage. This includes a 90-minute assessment by a clinician within 5 days of a claim being made, and immediate recommendations about trajectory and treatment. The success of this approach is due to its clinical and independent nature.

Case management of complex claims

5. Are current case management practices able to support and treat the individual needs of injured workers with complex claims?

In our view, not only do current case management practices fail to support and treat the majority of police, they are likely to have a negative impact on the individual and their recovery. Recent national research has confirmed that the workers' compensation process is perceived negatively by most police and emergency services employees who have experience with it, and a majority found that it negatively impacted on their recovery.[11] In this study, only 8.2% of employees making a claim had a positive experience while 70.3% had a poor experience.

[10] Harvey, S., Devilly, G., Forbes, D., Glozier, N., McFarlane, A., Phillips, J., Sim, M., Steel, Z., and R. Bryant (2015) *Expert Guidelines: Diagnosis and Treatment of Post-Traumatic Stress Disorder in Emergency Service Worker*s, UNSW: New South Wales;
[11] Kyron, M. J., Rikkers, W., O'Brien, P., Bartlett, J., & Lawrence, D. (2020). Experiences of Police and Emergency Services Employees with Workers' Compensation Claims for Mental Health Issues. *Journal of Occupational Rehabilitation*, 1-10.

Two-thirds of employees who had made a claim reported that the process was unsupportive and stressful, and over half reported that it had an overall negative impact on their recovery.

Our previous submissions have outlined the ways in which the current case management practices create further complexities for our members. [12] The circumstantial investigations undertaken by WorkCover's independent agents are haphazard and impede the objective of WorkSafe Victoria to pay appropriate compensation to all injured workers as expeditiously as possible.[13] Agents are failing to perform their investigations to the expected standard, with repeated unreasonable decisions made in relation to psychological injury claims. Our increasing concern with the circumstantial investigation process is specifically in relation to the gathering of evidence by independent agents, as well as the short timeframe of the investigative period. Despite Recommendation Three of the Ombudsman's 2016 Review,[14] our WorkCover staff members have continued to see agents disregarding reports by the Independent Medical Examiner and ignoring nominated witnesses, who would otherwise provide critical evidence to support a members' claim.

We also note that despite TPAV's best efforts to work with the current insurer (Gallagher Bassett), there are a number of practices that have not changed or been sustained, mirroring our observations of stasis in case management. By way of example, the overuse of 'reasonable management action' grounds to reject a mental injury claim continues, disregarding long term mental health issues of members. As we have previously articulated,[15] a common reason psychological injury claims are rejected relates to counterclaims by the insurer that the injury in the claim is 'wholly or predominantly' caused by reasonable management action, as defined in Section 40 of the WIRC Act 2013.[16] In such instances, all other evidence relating to the psychological injury is discounted. Considering that the copious stress and exposure to trauma police endure through their work significantly increases their likelihood of experiencing mental health issues, the WIRC Act is grossly misapplied in such instances. Practice by insurers that considers all other contributing factors relating to a psychological injury as insignificant is a detriment to officers seeking fair compensation. Inevitably these cases proceed to conciliation where they are then accepted, unnecessarily prolonging the process for officers.

Additionally, there is a persistent lack of transparency by insurers in a system through which the employer still drives decision-making in many instances. When agents obtain evidence that is contrary to the insurers position, it is often disregarded in preference for the narrative of the employer or the manager. If conflicting versions of an incident are reported by employer and employee during an investigation, the case is routinely rejected, regardless of available evidence to support the employee.

There are many instances in which the aforementioned poor investigation of claims by insurers unnecessarily require claims to proceed to court. In such examples a three-and-a-half-month-long process can extend to nine months. Often these cases are accepted in favour of the officer, exemplifying missed opportunity to avoid the court process entirely and lessen the emotional toll such an extensive timeframe has on the worker and their condition. The lengthy process invariably worsens the workers' injury considerably and is further exacerbated

[12] TPAV (2018) *Submission to Review of Management of Complex Workers Compensation Claims and WorkCover Oversight July 2018*, TPAV: East Melbourne

[13] Workplace Injury Rehabilitation & Compensation Act 2013, Section 10(d)

[14] The Ombudsman directed WorkSafe to better target its resources and oversight to ensure quality of decision-making in the cohort of complex cases where disputes frequently arise, Investigation into The Management Of Complex Workers Compensation Claims and WorkSafe Oversight,' (Victoria: Victorian Government, 2016), p.16

[15] TPAV (2019) *Submission to the Royal Commission into Mental Health*, TPAV: East Melbourne; TPAV (2018) *Submission to Review of Management of Complex Workers Compensation Claims and WorkCover Oversight July 2018*, TPAV: East Melbourne

[16] *Workplace Injury Rehabilitation Act 2013, s40* (Vic).

by financial stress and social isolation. The likelihood of receiving effective treatment for a psychological injury declines as the chronicity and severity of symptoms increases.[17]

The lack of consistency and protracted timeframes serve to further harm vulnerable workers.[18] The lengthy process draws out the possibility of our members receiving appropriate and specialised assistance. For many members, these delays reduce the prospect of returning to work, or even normal daily life. Many claimants outside of Victoria Police who are involved in psychological injury claims will accept less compensation or abandoned their claim to avoid these stressors.[19] TPAV believes that the process of rejecting these cases is in the hope that members run out of leave, benefits, or money, so that they give-up, resign, or return to work and forget about the claim.

TPAV considers that agent decision making processes have not changed substantially since the Ombudsman's first investigation in 2016. As per our previous submission(s), we have evidence that an increasing number of claims are being mishandled. At present, police-specific issues remain. For example, our records demonstrate that 80% of post-traumatic stress disorder (PTSD) claims are eventually accepted, but only 50% are accepted initially. Around 30% are still delayed by the investigation/decision process. More broadly, two thirds of decisions are being overturned in the favour of the worker under the new system. Unsurprisingly, the animosity and distrust between employees and the employer created by these practices remains unchanged.

TPAV acknowledges that guidelines and recommendations made by the Ombudsman in relation to case management are in place on paper. The principles of case management are well known and WorkSafe has appropriate guidelines. However, these are not implemented into consistent practice. This reflects a problem of independence. There exists a conflict of interest between the insurer and WorkSafe, and it appears that there is no real appetite to implement recommendations. We suggest that this reflects a long history of short-term reaction to recommendations in this space, and a swift return to "business as usual."

7. If your answer to question 5 is no, describe what needs to change in the case management practices of complex claims so that injured workers are better supported and treated.

The recommendations of the Ombudsman in 2016 and 2019 are considered and detailed, and TPAV supports their implementation in practice. However, we suggest that even with thorough implementation, these recommendations alone will not resolve the issues specific to police outlined above. There is a need for a tailored system with respect to mental health injuries, or, in the alternative, a separate system for police. We consider that there are a number of key elements to such an effective system:

I. This model will not work if complex cases are managed by the agents. As noted by the Ombudsman, the current system lacks a personalised approach. Decisions to terminate payments are made using arbitrary deadlines and thresholds. Further, management by agents is not based on clinical assessment, nor the provision of psycho-social supports. As articulated above, there is a need tailored treatment, particularly for police.
II. Communication between the treaters and insurer (or Worksafe) is vital to ensure that each case is managed effectively.
III. Clinicians need to have input into any case management model, particularly around return to work. We feel that utilisation of BlueHub would be ideal for this purpose, as the BlueHub system provides the assessors and oversees the clinical practice required but is separate from the payment of weekly wages or medical costs.

[17] Victoria Police, *Victoria Police Mental Health Review: An Independent Review Into The Mental Health And Wellbeing Of Victoria Police Employees*, (2016), 28 <https://content.police.vic.gov.au/sites/default/files/2019-01/2016-Mental-Health-Review.pdf?_ga=2.165753790.1659093387.1555480810-1492263908.1541124078>, accessed 6 June. 2019.
[18] Lippel, K. (1999). Therapeutic and anti-therapeutic consequences of workers' compensation. *International journal of law and psychiatry*, *22*(5-6), 521-546.
[19] Noreen Tehrani, (2004) Workplace Trauma and the Law: Concepts, Assessment and Interventions, New York, NY: Brunner-Routledge, p.57.

IV. The system must also account for downstream complex claims within this system. We would support the utilisation of an independent body for the assessment of downstream complex claims.
V. Finally, measurements of "outcome" must not rely solely on return to work status, but further, a return to functioning.

Financial incentives and agent decision making

8. What role do the current financial incentives for agents have in the agent's management of complex claims?

In our view, the current incentives are driven by terminating claims, and in particular, long-standing claims. Thus 'management' of claims is largely a commercial decision-making process, rather than an ethical one. History has demonstrated that no matter what the incentives are changed to, behaviour will modify against rational decision-making with respect to the needs of the worker. This has been identified in successive reviews by the Ombudsman. The process lacks integrity, as by its very nature invites decisions against logic and needs.

9. Do the current financial incentives for agents support prompt, effective and proactive outcomes for injured workers with complex claims?

We consider that financial incentives for agents not only fail the delivery of prompt, effective and proactive outcomes, they can and do contribute to adverse experiences. Previous research has considered that the cost-pressures and the desire to identify possible fraud place unduly high burden on people with mental health issues to prove they have a mental health condition.[20] Other research has demonstrated the impact of financial pressures on the decision-making of Independent Medical Examiners.[21] The 2016 Ombudsman's review highlighted the unreasonable decision-making of insurers in relation to complex claims, which provided a forceful indication that the system does not work.[22] We have witnessed the series of unnecessary challenges our members face in terms of receiving treatment and just compensation for their workplace injuries. Their defencelessness is heightened with the knowledge that WorkCover legislation impedes their access to appropriate compensation and treatment. TPAV notes the current workers compensation system remains ineffective and is easily manipulated by insurance companies for financial gain.

11. a. Describe the ways in which the current financial incentives for agents could be changed to maximise outcomes for injured workers with complex claims.

The financial incentives for agents must be eliminated by the creation of a non-commercial scheme for police. As long as Victoria Police are liable for the premium, they will fail to support mental injury claims. A disincentive could be created by separating Victoria Police from the premium. To this end, we suggest removing mental health injury claims from the purview of the agent (currently Gallagher Bassett). Instead, these should be handled by an independent statutory body that is given a fee to assess claims. This fee should not be based on the outcome of the assessment. This could be achieved in the form of a levy paid by the State Government each year. One potential process would involve the State Government providing an independent organisation such as BlueHub funding for this matter, as occurs with respect to Veterans at Commonwealth level, or establish an alternative funding model. We further suggest that treatment options should be expansive. We note here that WorkSafe does not approve cutting edge treatments (psychological or physical), as a matter of course, due to cost.

Such a levy would significantly lower the premium for Victoria Police. Additionally, the insurer would no longer have a vested interest in the outcome. We also suggest that this structure would address the inherent risk in

[20] Kilgour, E., Kosny, A., Akkermans, A., & Collie, A. (2015). Procedural justice and the use of independent medical evaluations in workers' compensation. *Psychological injury and law*, *8*(2), 153-168.
[21] Lippel, K. (1999). Therapeutic and anti-therapeutic consequences of workers' compensation. *International journal of law and psychiatry*, *22*(5-6), 521-546.
[22] Deborah Glass OBE, *Investigation into The Management of Complex Workers Compensation Claims and WorkSafe Oversight,'* (Victoria: Victorian Government, 2016), p.13.

combining the assessment, payer, and clinician under the same umbrella. The advantage of a separate system for police is the elimination of rewards that incentivise denial of claims. Given the current incentivised system, we would not want to see anyone who answers to Victoria Police handling the claims of members. We acknowledge that such a system would require oversight.

11b. Any different or additional measurements which could be linked to financial incentives to promote quality decision making by agents

We are adamant that there must not be financial incentivisation for agent decision-making in any form. The adverse outcomes of this approach are well documented, and it should be the aim of this Review to minimise the denial of ongoing treatment and further injury to workers. In the event that this review considers that such an approach must remain, financial incentivisation should be aimed toward maximising benefit delivery, rather than terminating benefits. To this end, we suggest financial sanctions be made against agents if the dismissal of a claim is overturned at court. We further suggest that financial incentives for agents only be based on long term outcomes for workers, as measured well beyond the three-week return to work period.

12. Describe any non-financial mechanisms by which agents could be encouraged to promote quality decision making.

We suggest that any adequate system for police, and all Emergency Service Workers, requires a presumptive footing. The hard-won provisional acceptance model that we currently have has contributed to an increase in appropriate and effective treatment, and we note that this is now being considered in other jurisdictions due to its efficacy.[23] However, our members still face resistance and a protracted process of having to prove that their suffering is work related. This is not only unnecessary, but occurs at great cost to the worker. A recent national study confirmed that while mental health can be affected by experiences at work and outside of work, most mental health conditions among employees of police and emergency services organisations were associated with exposure to traumatic experiences in the course of duty.[24] We believe that presumptive legislation will further minimise the stress of the process for our members, and indeed all Emergency Service Workers, specifically. Extensive research has demonstrated that the burden of the worker to prove that their symptoms were caused by exposure to trauma in the workplace can exacerbate symptoms of distress and hinder recovery.[25] Conversely, As presumptive approach of treatment has been demonstrated to severely limit downstream issues.

There is solid basis for this presumptive footing. International jurisdictions, including provinces in Canada and a number of states in America, have recognised the importance of presumptive acceptance in the adequate treatment of workers.[26] In 2019 the Tasmanian Government passed legislation to automatically accept

[23] SuperFriend, Safe Work Australia (2018). Taking action: a best practice framework for the management of psychological claims in the Australian workers' compensation sector. Canberra: Safe Work Australia.

[24] Kyron, M. J., Rikkers, W., O'Brien, P., Bartlett, J., & Lawrence, D. (2020). Experiences of Police and Emergency Services Employees with Workers' Compensation Claims for Mental Health Issues. *Journal of Occupational Rehabilitation*, 1-10. P. 7; Beyond Blue Ltd. Answering the call national survey, National Mental Health and Wellbeing Study of Police and Emergency Services—final report. Hawthorn: Beyond Blue Ltd; 2018; Lawrence D, Kyron M, Rikkers W, Bartlett J, Hafekost K, Goodsell B, Cunneen R. (2018) Answering the call: National Survey of the Mental Health and Wellbeing of Police and Emergency Services. Detailed report. Perth: Graduate School of Education, The University of Western Australia.

[25] Collie A. (2019) The mental health impacts of compensation claim assessment processes. Insurance Work and Health Group, School of Public Health and Preventive Medicine, Faculty of Medicine Nursing and Health Sciences, Monash University; Brijnath B, Mazza D, Singh N, Kosny A, Ruseckaite R, Collie A (2014) Mental health claims management and return to work: qualitative insights from Melbourne: Australia. J Occup Rehabil. 24(4):766–776.; Kilgour E, Kosny A, McKenzie D, Collie A. (2014) Interactions between injured workers and insurers in workers' compensation systems: a systematic review of qualitative research literature. J Occup Rehabil.;25(1):160–181.

[26] Fien N. (2017) Manitoba's changes to workers compensation legislation regarding post-traumatic stress disorder: analysis and legislative process. Manit Law J.;40:1.

diagnosed claims for PTSD compensation as work-related.[27] Additionally, recent changes to legislation in Queensland and New South Wales support this presumptive footing. We note that the recent senate inquiry has recommended a national stakeholder working group be convened under the Council of Australian Governments (COAG) to examine the benefits of presumptive legislation relating to psychological injuries for emergency service workers.[28] We believe that this review affords Victoria an opportunity to be a leader in this area.

Oversight of agents by WorkSafe

13. Are WorkSafe's processes for overseeing agents' management of claims achieving prompt, effective and proactive outcomes for injured workers?

WorkSafe processes continue to be partisan, biased, and conflicted. As successive Ombudsman reviews have established, WorkSafe is in many ways incapable of controlling the industry. The relationship between WorkSafe and agents is difficult because WorkSafe are conflicted in their oversight role. In our experience, Worksafe have a collaborative relationship with agents, which results in a lack of independence between the WorkSafe and agents. A lack of proper oversight of the practice of agents and insurers means that there is inconsistency and unreasonable decision-making in the investigation and handling of claims as outlined above.

14. Do the new mechanisms implemented by WorkSafe in response to the Ombudsman's 2019 report address any limitations in WorkSafe's oversight of agent decision making?

As stated, we question the degree to which the mechanisms recommended by the Ombudsman in 2019 have been implemented. Again, TPAV believes that proper implementation would alleviate some of the current issues identified. However, such mechanisms can only go so far.

16. If your answer to question 14 is no, describe why not.

It is our view that successive reviews by the Ombudsman have delivered short term focus on the broken aspects of the system. In the experience of our members, and as reflected both anecdotally and statistically, there is often a brief period of "good behaviour" in the wake of any Review. Recommendations and behavioural changes lose prominence with the passage of time. Once practices are no longer under the microscope, decision-making behaviour returns to form. Agents and Insurers bare no consequences for this backslide. This degradation is facilitated by a constancy in the turnover of personnel within claims management. Within this turnover, cultural attitudes return, and practice reverts to business as usual. There is a discernible lack of oversight post-Review, that in our view, reflects a maintained focus on the commercial aspects of the scheme, rather than the delivery of benefits to workers.

17. How could any limitations in WorkSafe's oversight of agent decision making be overcome?

Considering our advocacy for a separate system for the processing and management of claims by police and emergency service workers, we consider this an opportunity for us to continue to explore the idea of an independent Government body reporting to the appropriate minister to manage complex cases in policing. TPAV is of the view that proper oversight requires direct reporting to Parliament or the Attorney General. We suggest that the Department of Justice is not fit for this ultimate oversight role as assessment would likely revert to being nothing more than a cost exercise. The key to proper oversight, as with treatment, is independence and a removal of financial incentives – the impacts of which have been outline above.

[27] Tasmanian Government. Ministerial review relating to establishing entitlements under the Workers Rehabilitation and Compensation Act 1988 for workers suffering post-traumatic stress disorder. Hobart: Department of Justice: 2018.
[28] Education and Employment References Committee. The people behind 000: mental health of our first responders. Canberra: Parliament of Australia; 2019.

Evaluation measures

18. To what extent do current measurements of outcomes for injured workers, including return to work rates and worker surveys, accurately measure whether the agent model achieves prompt, effective and proactive outcomes for injured workers?

In our experience, return to work rates are not an accurate reflection of how well the system works. In particular, these rates do not reflect the unique issues of police in returning to work. Worker surveys provide a skewed result as those who have suffered as a result of the claims process are unlikely to engage with such data gathering exercises. This is more likely to the case with those suffering a mental health injury. The over-reliance on physically injured workers means that data is likely to show false levels of success.

With respect to the overall data used by WorkSafe, we suggest that a heavy reliance on quantitative data based on input and outcome is reflective of a focus on the sustainability of the scheme rather than the individual experience of workers. This kind of data is unlikely to reveal poor decision-making by agents. We further note that the actual, qualitative experience of workers is lacking in the data. There is no attempt to capture the impact of the process itself on the injured worker.

19. Describe any additional or alternative methods of measuring outcomes for injured workers that should be considered?

The most glaring omission of the current measurements used by WorkSafe is the satisfaction of the worker with the process itself. Qualitative data concerning the quality and success of service provision needs to be obtained during and after participation in the scheme. This will add a critical dimension to the assessment of decision-making. This is borne out by the utility of the data collected in successive Reviews by the Ombudsman.

The current assessment for return to work occurs far too early in the process for the worker to provide accuracy. We suggest that this be assessed at intervals of three months post the worker's return. We further suggest that return to work rates do not equate to a return to functioning. This is a key measure missing in contemporary evaluations. 'Success' must be predicated on a qualitative assessment of the worker's return to functioning and overall satisfaction with recovery.

The current agent model and alternative models

20. Does the current agent model achieve prompt, effective and proactive management for injured workers with complex claims?

The current agent model not only falls short of achieving prompt, effective and proactive management for injured police, it exacerbates the injury in the majority of cases. Refer to our responses above, particularly at Context, 5, 9, and 13.

23. Are there practices or procedures used by other compensation schemes, in Australia or overseas, that maximise outcomes for injured workers that the Review should examine?

We understand that a model under consideration is the TAC Model. There are a number of aspects of the TAC Model that we believe would be of benefit to the current WorkCover Model. Importantly, there is a clear focus on benefit delivery over scheme viability in the practices of the TAC. TAC does not outsource claims management to agents, affording more transparent decision-making and oversight. The TAC Model engages stakeholders, and gives adequate weight to clinical opinions. The Joint Medical Examination Model employed by the TAC limits the ability to be selective with Health Services and particular practitioners. Each of these elements reflects a cultural and attitudinal difference to WorkCover. While the TAC operates on a much smaller scale than WorkCover, we suggest that the benefit delivery approach adopted by TAC is worth exploring in the context of this Review.

In addition to the adoption of a benefit delivery approach, we suggest that there is clear need for a specific model for police, as our cohort has challenges not faced by the broader sector. Given the issues of a lack of independence and continued financial incentivisation noted above we do not believe that a specialised unit within the Insurance Agent to manage complex claims would be effective for police. The policing experience is too unique for this to work. Any unit that looks across all workplaces will not address issues unique to policing. For the same reason, and the consistent issues outlined above, any specialised unit within WorkSafe that would deal directly with complex claims would have limited effectiveness for police.

As stated throughout this submission we must move to a presumptive model for police, the first element of which is the treatment of all psychological injury claims for police as complex until otherwise borne out. This must be bolted onto a separate model for police. In our view, these specific reforms are needed to ensure the system is geared towards supporting recovery by providing the support that is needed in a timely way without inducing unnecessary additional stress or exacerbating symptoms of mental health conditions. As the most recent national research suggests, a key consideration of reform is the implementation of presumptive legislation for police and emergency services workers, which would eliminate the burden for employees with mental health problems to prove that they were caused.[29] The provisional model of acceptance that we have been able to achieve through BlueHub is a sound model, and one that represents a step in the right direction for police receiving the necessary early and accurate intervention required. However, as articulated above, the next step is clear.

We suggest that such a reform must be a part of a separate system for police as outlined above. We consider that there should be a levy paid to an independent organisation, regardless of outcome, to assess and treat police and PSOs. This would remove issues with financial incentives and lack of independence. We believe that clinicians need to have input into any case management model, particularly around return to work. TPAV suggests that utilisation of BlueHub would be ideal for this purpose, as the BlueHub system provides the assessors and oversees the clinical practice required but is separate from the payment of weekly wages or medical costs. The system must also account for downstream complex claims within this system. We would support the utilisation of an independent body for the assessment of downstream complex claims.

Each of these suggestions for reform have strong research basis, and jurisdictional precedent. A move toward a presumptive basis is fast becoming best practice with respect to Emergency Service Workers, with a growing body of research demonstrating this need and consideration of these issues at a federal level. While we admire the Victorian Government's desire to potentially extend it to other industries, we contend police are unique and cannot be thrown into a bucket in complex claims. What provisional acceptance has highlighted is that this issue overwhelming exists in our sector.

Victorian Ombudsman 2016 and 2019 reports

24. Have you observed any changes to (i) agent decision making and (ii) the oversight of agents by WorkSafe since the 2016 Ombudsman report? Please describe.

We attach herewith as Appendix A, our initial submission to the Ombudsman in 2018. As we note in this most recent submission, we have not witnessed long-standing or cultural change that reflects the findings of the Ombudsman.

Further considerations

28. Are there any other matters the Review should consider in meeting the Terms of Reference?

[29] Kyron, M. J., Rikkers, W., O'Brien, P., Bartlett, J., & Lawrence, D. (2020). Experiences of Police and Emergency Services Employees with Workers' Compensation Claims for Mental Health Issues. *Journal of Occupational Rehabilitation*, p. 9.

The burden across families and the broader community is compounded by limited access to appropriate mental health treatments. Most workers who have rejected claims have the situation compounded by financial stressors, reduction in income, and uncertainty on the time frames for the process are key elements that contribute to the deteriorating mental health of workers who endure the WorkCover process. Access to treatment should be predicated on an appropriate treatment plan being developed and access provided to suitable clinicians. The cost benefits of such a scheme will be evident as this should reduce the number of workers who are away from the workplace and not accessing appropriate treatment in a timely manner. For the broader community, there are clear benefits in promoting better mental health whether the injury has been caused by work or not. Returning any members of society to optimal health is a good outcome.

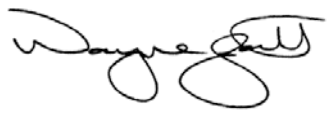
In April 2019, the Commonwealth Department of Home Affairs announced that the Police Federation of Australia (PFA) will receive $2.5 million from the Department of Health to establish the BlueHub Project. This funding had led to the establishment of a Victorian based pilot led by The Police Association Victoria. The pilot is available to members of Victoria Police and Victorian based Australian Federal Police members.

The purpose of the BlueHub Project is to support the health and wellbeing of police officers by providing them with timely access to appropriate specialist mental health services. The project consists of the development and implementation of a clinical assessment framework, and related research and training resources for mental health practitioners to provide appropriate specialist mental health support for police officers.

TPAV has engaged Phoenix Australia to provide training, a quality assurance framework and evaluation standards for the project. Data will be obtained to monitor treatment outcomes with a view of building the knowledge base on best practice evidence-based modalities to treat traumatic injury in the policing context. A network of clinicians in both private and hospital-based settings has been established and will compliment a stand-alone Phoenix Australia site in providing services to police members.

TPAV recognises that the culture of rejection within the workers compensation system cannot be addressed without making amendments to the current framework. We are also aware that timeliness and consistency in the adjudication process is essential to recovery and well-being. We acknowledge the limitations of attempting to reform a system in its entirety. Nonetheless, the separation of police claims from the mainstream system, the use of an independent body such as BlueHub for the assessment of claims (inclusive of complex claims), and the application of presumptive treatment for police and other Emergency Service Workers would vastly improve the lives of thousands of our members.

For consideration,



Wayne Gatt
Secretary
The Police Association Victoria
21st of September 2020

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Appendix A

Ms Deborah Glass OBE

Victorian Ombudsman
570 Bourke Street
Melbourne
Victoria, 3000

The Police Association of Victoria submission to the Review of Management of Complex Workers Compensation Claims and WorkCover Oversight

The Police Association of Victoria (the Association) is an organisation that exists to advance and represent the industrial, legal, health and safety, professional and welfare interests of its members. The Police Association's membership of approximately 16,500 is drawn exclusively from sworn Police Officers at any rank, Protective Services Officers, Police Reservists and Police Recruits who serve in Victoria Police. Membership of the Association is voluntary. By virtue of its constitution, the Association is not affiliated with any political party.

The Purpose of this Submission

The Association has long been concerned with the processes of WorkSafe Victoria and its agents. Our members, as workers in an occupation with an elevated exposure to traumatic incidents, are at a significantly higher risk than the general public of developing a psychological injury that results in a WorkCover claim.[30] Consequently, we have a vested interest in the Ombudsman's second investigation into WorkSafe Victoria and the outcomes as they relate to our members.

The Ombudsman's previous review (the Review) highlighted the unreasonable decision-making of insurers in relation to complex claims, which provided a forceful indication that the system does not work.[31] We have witnessed the series of unnecessary challenges our members face in terms of receiving treatment and just compensation for their workplace injuries. Their defencelessness is heightened with the knowledge that WorkCover legislation impedes their access to appropriate compensation and treatment. The Association notes the current workers compensation system remains ineffective and is easily manipulated by insurance companies for financial gain.

The focus of this submission (the Submission) to the Ombudsman is on the psychological injury claims made by our members. Drawing on case study examples which best encapsulate the issues in question, we address four critical concerns: the evidence and decision-making by independent agents; the tendency of the insurer to reject claims; the 'arguable case' test and failure of conciliators to exercise their power to direct; and the length of time involved in reactivating a claim.

On behalf of our members, who have had to endure fundamentally unfair and outdated processes when at their most vulnerable, the Association welcomes the opportunity to make this submission to the Ombudsman to comment on the complexities of the current workers compensation system and highlight our particular areas of concern.

[30] Shannon Gray and Alex Collie, 'The Nature and Burden of Occupational Injury Among First Responder Occupations: A Retrospective Cohort Study in Australian Workers,' *Injury*, 48/11 (2017), p.2470; Ben Green, 'Post-traumatic Stress Disorder in UK Police Officers,' Current Medical Research and Opinion, 20/1 (2004) p.101; Mary Clair, 'The Relationship Between Critical Incidents, Hostility and PTSD Symptoms in Police Officers,' PhD Thesis, (Drexel University, 2006);Samuel Harvey et al, Expert Guidelines: Diagnosis and Treatment of Post-traumatic Stress Disorder in Emergency Service Workers, (Australia: Black Dog Institute, 2015).
[31] Deborah Glass OBE, *Investigation into The Management Of Complex Workers Compensation Claims and WorkSafe Oversight,'* (Victoria: Victorian Government, 2016), p.13.

1. Evidence and Decision-Making of Independent Agents

The circumstantial investigations undertaken by WorkCover's independent agents are haphazard and impede the objective of WorkSafe Victoria to pay appropriate compensation to all injured workers as expeditiously as possible.[32] Agents are failing to perform their investigations to the expected standard, with repeatedly unreasonable decisions made in relation to psychological injury claims. Our increasing concern with the circumstantial investigation process is specifically in relation to the gathering of evidence by independent agents, as well as the twenty-eight-day timeframe of the investigative period.

Gathering Evidence

Despite Recommendation Three of the Ombudsman's previous Review,[33] our WorkCover staff members have continued to see agents disregarding reports by the independent medical examiner (IME) and ignoring nominated witnesses, who would otherwise provide critical evidence to support a members' claim. The below case studies provide examples of one of the many instances in which the insurer has chosen to ignore an IME report to support the rejection of a psychological injury claim:

Case Study One - Senior Constable "A"[34]

Senior Constable A presented to the Association seeking assistance with his rejected worker's compensation claim. After a minor incident with a member of the public whilst on duty, Senior Constable A had ceased work. He submitted a worker's compensation claim form, provided valid Certificates of Capacity and underwent an independent medical examination at the request of the insurer. Despite an IME concluding that Senior Constable A's injury was a recurrence of a pre-existing psychiatric condition, with issues occurring in employment being significant contributors to the recurrence, the claim was still rejected. Senior Constable A's claim form included details of his treating psychologist and psychiatrist. Following a circumstantial investigation it was determined by the insurer that the injuries sustained by Senior Constable A were caused wholly and predominantly by reasonable management action taken in relation to the incident with the member of the public. An enquiry with the nominated treating psychologist would have revealed Senior Constable A has sought treatment for his psychiatric condition on over 40 separate occasions in the seven years prior to the claim. These instances were the result of cumulative work-related traumatic events, including details of specific traumatic events that could be verified. The insurer relied on the General Practitioner to conclude that the member had not sought treatment for a mental health condition, despite being prescribed anti-depressant medication and having previously been referred for treatment for his mental health condition. This matter is listed for hearing at conciliation and it is unlikely to resolve. Senior Constable A has exhausted his leave entitlements and is funding his own ongoing treatment for his mental health condition.

Case Study Two - Sergeant "B"

For over eight months, Sergeant B has been involved in the workers compensation claims process. He has lodged two psychological injury claims over this duration, both of which were rejected by the insurer on the basis of reasonable management action. In both instances, the insurer ignored medical evidence provided by the IME which ascertained that Sergeant B's posttraumatic stress disorder was a result of his employment. The insurer twice failed to provide Sergeant B's medical reports at conciliation and, in both instances, requested the IME to review their initial determination. Despite the support of the IME, the insurer rejected the cases and forced Sergeant B to attend conciliation. The claim has since been accepted.

[32] *Workplace Injury Rehabilitation & Compensation Act 2013*, Section 10(d).

[33] The Ombudsman directed WorkSafe to better target its resources and oversight to ensure quality of decision-making in the cohort of complex cases where disputes frequently arise, *Investigation into The Management Of Complex Workers Compensation Claims and WorkSafe Oversight,'* (Victoria: Victorian Government, 2016), p.162.

[34] Although the case studies provided herein pertain to real members, we have chosen to redact their names and other identifying details for the sake of privacy.

This 'cherry-picking'[35] of evidence to support the rejection or termination of a members' claim is seemingly entrenched within the investigative process. The insurer regularly ignores critical evidence in the comfort of knowing they will not be tested at conciliation, as the Accident Compensation Conciliation Service (ACCS) will rarely direct the dismissal of a case. This issue is raised further in this Submission. Utilising alternate methods of review other than conciliation have also shown to be ineffective, as internal reviews by the insurer will often uphold the rejection of a claim. The below case studies provide another example of the insurer choosing to ignore critical evidence, specifically not speaking with nominated witnesses, to support the rejection of a psychological injury claim:

Case Study Three – Senior Constable "C"

In Senior Constable C had a PTSD claim rejected on the basis of management action. A substantive IME report diagnosed Senior Constable C with PTSD, noting symptoms were first experienced more than 15 years prior, and that reliving this period was particularly overwhelming for the member. There was no attempt by the circumstantial investigator to obtain statements from any of the three Victoria Police members mentioned in the manager's WorkCover report. A statement was also not taken from one of Senior Constable C's supervisors who was able to corroborate Senior Constable C's statement regarding first notifying his employer about his symptoms. At the time of the conference, the insurer withheld two documents supporting the acceptance of liability (the manager's WorkCover report and the IME supplementary report) from the conciliator and Senior Constable C.

Case Study Four – Sergeant "D"

The Association assisted Sergeant D who is suffering from posttraumatic stress disorder as a result of his work. Prior to his diagnosis of PTSD, Sergeant D was operating in a seconded position for an extended period. After requesting an extension on his secondment, which was rejected, Sergeant D prepared to return to his gazetted position. Due to undertaking significantly taxing work during this time, Sergeant D had previously expressed concern to a fellow employee about his mental health. Sergeant D saw his general practitioner and was subsequently diagnosed with PTSD. Prior to returning to his gazetted position, Sergeant D lodged a WorkCover claim. The corroborating witness who could verify Sergeant D having expressed concern about his mental health prior to his imminent return to his gazetted position, was not spoken to. Instead, the independent agent spoke to the supervisor at the station who affirmed that Sergeant D lodged his claim soon after being told that he would be returning to his gazetted position. The case was ultimately rejected based on reasonable management action. The corroborating witness was not mentioned by the independent agent in their final report to Gallagher Basset.

Case Study Five - **Officer "E"**

Officer E lodged a WorkCover claim after developing Carpel Tunnel syndrome in his right wrist. A general practitioner and a chiropractic physician determined that the injury was a result of his forty years employment with Victoria Police, and his excessive keyboard use. The insurer stated that they did not receive the evidence from Officer E's practitioner and rejected the claim on the grounds that an IME found the injury did not occur as a result of his employment. At conciliation, the insurer accepted costs (non-liability).

The Association has realised if the agent obtains evidence that is contrary to the insurers position, it is often disregarded in preference for the narrative of the employer or the manager. If conflicting versions of an incident are reported by employer and employee during an investigation, the case is routinely rejected, regardless of available evidence to support the employee. This has serious implications for those cases involving sexual harassment or discrimination. The perpetrator in these instances is often involved in the investigative process, as many perpetrators in these instances operate in the role of immediate manager of the complainant. When a complaint is lodged, the circumstantial report that is prepared by the agent is often provided to, or answered

[35] Deborah Glass OBE, *Investigation into The Management Of Complex Workers Compensation Claims and WorkSafe Oversight,'* (Victoria: Victorian Government, 2016), p.157.

by, the immediate manager. Therefore, the decision to reject the claims lies with the manager who is often integral to the complaint. The below case study demonstrates this discrepancy in practice:

Case Study Six – "F"

'F' was a victim of sexual harassment in the workplace. Her case was subsequently investigated by SALUS. After ceasing work as a result of the sexual harassment, F lodged a claim for workers compensation. The perpetrator of the sexual harassment was F's supervisor. In conducting their circumstantial investigation, the agent took a statement from F's supervisor and the claim was rejected on the basis of this statement. Following intervention by the Association and the SALUS outcome, the claim has since been accepted.

Investigative Time-Frame

The Association has found that the current timeframe of twenty-eight days for the circumstantial investigation is generally insufficient for meaningful evidence to be obtained by the insurer. Often, a case is not referred to the IME until the final seven days of the twenty-eight-day period. This ensures that the history of the claimant, as gathered by the IME, cannot be comprehensively verified by the circumstance investigator. As such, at the end of the twenty-eight-day period, the circumstance investigator provides the insurer with insufficient or incomplete evidence, upon which the claim is rejected.

The Association can also identify instances of procedural unfairness by independent agents when a nominated witness is on leave and is therefore unavailable for interview during the twenty-eight-day investigative timeframe. There is a tendency to reject these claims, despite the opportunity for an agent to speak with a witness during the six-to-eight-week timeframe for a case to reach conciliation.

Recommendation One: That in the absence of a comprehensive circumstance investigation, the circumstances as detailed to the IME should be relied upon.

2. A Culture of Rejection

There has always been a clinical uncertainty as to the validity of psychological injury claims. Their invisibility is a key factor fuelling the stigma associated with mental health within the police force and is a proven factor in the approval of psychological claims by the insurer.[36] The Association finds that the current WorkCover system is facilitating the rejection of our members' psychological injury claims and is impeding their access to treatment and recovery.

The Association acknowledges that since the Ombudsman's previous Review, there has been an improvement in acceptance rates for mental health injuries related directly to trauma. This is specific however, to cases where workplace conflict, performance management or other 'management actions' cannot be attributed as a cause.

The common reasons for rejection of our members' psychological injury claims include difficulties ascribing singular causal 'events' as the basis for a diagnosis, the inability to prove that non-occupational factors are not a primary or significant contributory cause of the psychological illness, and counter-claims by the insurer that the application is being made only in light of reasonable management action. The *WIRC Act* contains twelve different instances that constitute management action.[37] If a psychological injury can be seen to be caused 'wholly or predominately'[38] by management action, then the claim can be legally rejected. Our WorkCover officers continually witness independent agents utilising this provision to reject our members' claims, as shown in the case study below:

Case Study Seven – Constable "G"

[36] Bianca Brijnath et al, 'Mental Health Claims Management and Return to Work: Qualitative Insights from Melbourne, Australia,' Journal of Occupational Rehabilitation 24/4 (2014), p.770.
[37] *Workplace Injury Rehabilitation & Compensation Act 2013, s40(7)(a)-(m).*
[38] The Police Association of Victoria, *Care Booklet*, (Victoria: The Police Association of Victoria, 2015), p.48.

Constable G lodged a psychological injury claim which was rejected by the insurer on the grounds of reasonable management action. This was despite medical assessments and findings by the IME that Constable G's incapacity for work was contributed to by her injury. The insurer claimed Constable G did not provide an accurate history to the IME, choosing to ignore and overlook the IME findings and rely instead on the report by the circumstance investigator. This was despite the IME being fully informed of Constable G's circumstances at the time of the claim, including the death of her brother, her nonoperational status and PMO assessment. This case was taken to conciliation wherein the Association sought a direction. The case has since been approved.

For some members, the claims process is about seeking recognition of the legitimacy of their claims as much as it is about seeking help or treatment or compensation. Irrespective as to whether a member has gone through the WorkCover process themselves, there is a perception engrained in our membership that psychological injury-related WorkCover claims will be rejected. Our members' anxiety in relation to making a psychological injury claim is heighted by this reputation of WorkCover. Even in the instance where all parties (the Association, the employer and the IME) agree that the claim will be accepted, the claim is rejected by the insurer and is taken to conciliation, as is demonstrated in the below case studies:

Case Study Eight – Senior Constable "H"

Senior Constable H had been successful in a worker's compensation claim in relation to a back injury sustained whilst on duty. He was required to attend several hearings in relation to this injury concerning access to treatment. During this period, the member accessed counselling services for psychological treatment related to exposure to trauma in the workplace. These sessions were funded by the insurer. Three years later, Senior Constable H was interviewed in relation to a discipline matter. This incident triggered a significant decline in his mental health condition and he ceased work and lodged a new claim. Senior Constable H had attended a series of fatal motor vehicle accidents in the previous twelve months, including fatalities where the deceased persons were personally known to him. Senior Constable H's claim was rejected by the employer due to the reasonable management action clause. Prior to conciliation, a request was forwarded to the insurer requesting a review of the decision. The review maintained the rejection of the claim, despite the employer conceding that the claim should be accepted. There was no factual dispute that Senior Constable H has been exposed to significant trauma or that he is suffering PTSD. The fact that he was interviewed and received a low level disciplinary sanction for inappropriate communication with a fellow member has been used by the insurer as the sole cause of the injury to Senior Constable H. This matter has not resolved, and Senior Constable H is yet to receive appropriate clinical treatment for his condition. The fact that the employer has approved funding for external specialist clinical treatment for the member outside the scope of the workers compensation system is evidence of the level of concern held for the wellbeing of Senior Constable H.

Case Study Nine – Senior Constable "I"

Having been a member with Victoria Police exposed to many critical incidents for in excess of twenty years, Senior Constable I experienced difficulties in managing his mental health condition and comorbid alcohol misuse. To manage his condition, Senior Constable I transferred from an operational role to Prosecutions and then sought an extended period off on leave without pay. It became apparent that the members condition was affecting all levels of functioning and, on attempting to return to Victoria Police after a short period of time off, Senior Constable I was directed to attend the Police Medical Officer. The following year, Senior Constable I submitted a Workcover claim citing his exposure to trauma as the reason for his diagnosed condition of PTSD and alcohol misuse. The member attended an IME who concluded his condition related to a single traumatic exposure in his personal life, so therefore was not a work-related injury. This was sufficient for the insurer to reject the claim. Such was the concern for Senior Constable I's welfare that Victoria Police funded a three-week admission to the Austin Health Post Traumatic Recovery Service and has since provided 60 days Special Sick Leave as Senior Constable I has exhausted all leave entitlements. At conciliation, evidence was provided by a clinician from PTRS, a General Practitioner and a further independent psychiatrist who concluded that Senior Constable I was experiencing chronic PTSD because of his exposure to culminative trauma whilst performing his

role as a police officer. This matter was not resolved and is to be heard at the Melbourne Magistrates Court. The member has been granted a temporary Disability Pension through his superannuation fund to provide some financial support during this period.

The litigation process related to psychological injury claims has been suggested by our members to be equally or more stressful than the injury itself.[39] Many claimants outside of the force who are involved in psychological injury claims will accept less compensation or abandoned their claim to avoid these stressors.[40] The Association believes that the process of rejecting these cases is in the hope that members run out of leave, benefits, or money, so that they give-up, resign, or return to work and forget about the claim. The below case study outlines one of the difficulties faced by our members in their claims process; a lack of inconsistency of claims managers:

Case Study Ten - Senior Constable "J"

Senior Constable J had his psychological injury claim rejected. As a result, Senior Constable J was denied treatment for his work-related depression, anxiety and complex posttraumatic stress disorder for over 300 days. This was despite several medical experts providing written documentation to the insurer detailing the impact of this delay on Senior Constable J. This was also despite confirmation from an IME who agreed with the proposed treatment plan which required hospital stay involving treatment. Three or four days prior to the conciliation hearing, Senior Constable J was informed that the insurer had omitted the IME report which supported a hospital stay treatment plan. Once the IME report was received by the conciliator the claim was approved and the treatment initiated. Since lodging a claim with the insurer, Senior Constable J has had more than ten claims managers. This has caused him distress and has created further unnecessary disruptions to the claims process. Senior Constable J has also had to request 'many' times that he be permitted to continue seeing the same IME for continuity and to avoid repeatedly re-living his injury.

It is clear that the workers compensation system creates further complexities for our members. The lengthy process draws out the possibility of our members receiving appropriate and specialised assistance. This invariably worsens the members' injury considerably and is further exacerbated by financial stress and social isolation. The likelihood of receiving effective treatment for a psychological injury declines as the chronicity and severity of symptoms increases.[41] For many members, these delays reduce the prospect of returning to work, or even normal daily life. The lengthy claims process has seen many of our member exhaust all their leave entitlements, as is detailed in the below case study:

Case Study Eleven – Senior Constable "K"

Senior Constable K presented to the Association whilst experiencing a significant mental health crisis. He was immediately removed from the workplace and referred for treatment. Management were notified of this course of action. The member had been restricted in his duties in the workplace in part to concerns for his welfare. On submitting a worker's compensation claim Senior Constable K detailed a series of critical incidents and traumatic events that contributed to his condition. On review, the insurer determined that the injury caused was due to the reasonable management action of the employer in addressing performance issues. There was no dispute that the member has a diagnosable mental health condition or that he was involved in the critical incidents described in his claim. This matter proceeded to conciliation approximately 16 weeks post the lodgement of the claim form. Medical evidence was submitted confirming Senior Constable K had sought treatment for his mental health condition immediately post one of the critical incidents described and prior to the claim being submitted. The matter was unable to be resolved and Certificate of Genuine Dispute was issued. Senior Constable K engaged with a legal firm the day following conciliation, some four months later the matter is yet to be listed for hearing in a court setting. It is unlikely that the matter will be concluded this year, eight months has already

[39] The Police Association Victoria, *Trauma Doesn't End When the Shift Does,: Post-traumatic Stress Disorder as a Presumptive Illness for Emergency Service Workers,* Submission to Parliament, (Victoria: The Police Association of Victoria, 2016).
[40] Noreen Tehrani, Workplace Trauma and the Law: Concepts, Assessment and Interventions, (New York, NY: Brunner-Routledge, 2004) p.57.
[41] Peter Cotton et al, Victoria Police Mental Health Review,' p.28; Alexander McFarlane, 'Work Related Mental Health and Suicide Prevention,' Submission to Parliamentary Committee on Occupational Safety, Rehabilitation and Compensation, (2016) p.2.

passed since the claim was lodged. Senior Constable K has exhausted all leave entitlements and is required to either utilise the EAP services provided by the employer or self-fund a treater of his choice. The circumstances have caused ongoing significant financial hardship for the member.

The Association recognises that the culture of rejection within the workers compensation system cannot be addressed without making amendments to the current framework. We are also aware that timeliness and consistency in the adjudication process is essential to recovery and well-being. To overcome these challenges, and to provide our injured members with the best possible chance of a full recovery, the Association believes a system must be introduced where all mental health claims are immediately provisionally accepted.

The core components of the proposed provisional acceptance model are early intervention; accurate diagnosis; appropriate evidence-based treatment plans; a focus on return to work; and clear pathways and support for those unable to return to the workforce. Under this model, the onus is with the insurer, rather than the employee to establish that the injury was not contributed to by employment. Provisional acceptance of liability would extend for 13 weeks, allowing a member to seek appropriate evidence-based treatment and an accurate diagnosis. The provisional acceptance model would also allow members involved in disciplinary action to obtain an accurate assessment of their condition and commence a structured mental health care plan. Rehabilitation post the conclusion of the disciplinary process, regardless of whether the member is retained as an employee, will be enhanced due to this early-intervention model.

Recommendation Two: That a provisional acceptance model for mental health WorkCover claims is introduced for all Victorian police.

3. Reforming the Conciliation Framework

A high proportion of our members' claims that reach conciliation are not resolved. Recommendation Two of the Ombudsman's previous Review was a direction to Government to amend the *WIRC Act 2013* to empower the Accident Compensation Conciliation Service (ACCS) to issue a direction to an agent where a decision has no reasonable prospect of success were it to proceed to court.[42] Our WorkCover officers have identified that this recommendation has not been followed through.

There is a perceived reluctance of the ACCS to issue a direction at conciliation, despite the insurer rarely presenting an 'arguable' case. The threshold for an 'arguable case,' as evaluated by the ACCS, is seemingly very low. This lack of direction on the part of the ACCS leads to lengthy and ultimately futile delays for our members, as claims inevitably resolve prior to a court hearing.[43] Our injured members are therefore spending an increased length of time in the system, without access to treatment.

Prolonging a decision in relation to claims pertaining to psychological injury has a detrimental impact on the mental health of our members. As at the end of the twenty-eight-day investigative period, a member suffering from a mental health injury may not have a diagnosis from an IME. The only treatment available to a member, free of charge, is the Employee Assistance Program (EAP). This treatment is short-term, solution focused therapy which will not be appropriate for all members suffering a serious psychological injury who may require intensive or directive treatment. Even if a member is willing to pay for their treatment sessions, it is unlikely that they will receive applicable, comprehensive treatment from a general-practitioner-recommended psychologist during this time. The aforementioned presumptive/provisional acceptance model of treatment will rectify this issue.

Recommendation Three: That the ministerial guidelines for conciliation be varied to provide greater guidance to conciliators. For example, if the matter is more likely than not to go in the workers favour should the evidence remain as is at trial, then the conciliator is required to direct the acceptance.

[42] Deborah Glass OBE, *Investigation Into The Management Of Complex Workers Compensation Claims and WorkSafe Oversight,'* (Victoria: Victorian Government, 2016), p.162.
[43] Ibid, p.8.

4. Reactivation of Claims

Members are waiting up to six months to recommence the claims process. If a member returns to work after their claim has been accepted, only to relapse and inform the insurer of their intent to reactivate their claim, there is no timeframe in which the insurer must respond.

Case Study Twelve – Senior Constable "L"

Senior Constable L submitted a worker's compensation claim and completed a return to work. Three years later, the matter was referred to conciliation following a dispute around weekly payments after Senior Constable L was required to take leave due to his mental health condition. This matter was resolved with the weekly payments being reinstated for a period. The member again returned to work. The following year, Senior Constable L experienced a relapse of his condition and again took leave and sought to have his original claim reinstated. The insurer was informed of this intention to reactivate the claim immediately. The insurer was unable to arrange an Independent Medical Examination until five months after this notification. This delay was explained to Senior Constable L as being caused by a lack of IME's being available to conduct the examination. On completion of the examination, two further reviews were sought by the insurer before accepting the claim in seven months after the claim was reactivated. In the interim, Senior Constable L had exhausted his leave entitlements and experienced severe financial hardship, which has had a significant impact on his mental health condition.

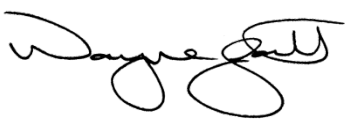
Recommendation Five: That the time in which the insurer has to respond to an individual reactivating their claim should be a mandated twenty-eight days.

5. Recommendations

The Association makes the following recommendations to the Ombudsman in light of her re-investigation into complex workers compensation claims:

- **That in the absence of a comprehensive circumstance investigation, the circumstances as detailed to the IME should be relied upon.**
- **That a provisional acceptance model for mental health WorkCover claims is introduced for all Victorian police**
- **That the ministerial guidelines for conciliation be varied to provide greater guidance to conciliators. For example, if the matter is more likely than not to go in the workers favour should the evidence remain as is at trial, then the conciliator is required to direct the acceptance.**
- **That the time in which the insurer has to respond to an individual reactivating their claim should be a mandated twenty-eight days.**

For consideration,



Wayne Gatt
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The Police Association Victoria
20th of July 2018

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