

Submissions to the Australian Law Reform Commission Inquiry into Justice Responses to Sexual Violence

*Prepared by Sophie McKenzie, Maurice Blackburn Lawyers
July 2024*

Introduction

I am a personal injury lawyer at Maurice Blackburn Lawyers in who practices largely in workers' compensation matters in the state jurisdiction of Queensland.

For context, Maurice Blackburn Pty Ltd is a plaintiff law firm with 33 permanent offices and 30 visiting offices throughout all mainland States and Territories. The firm specialises in personal injuries, medical negligence, employment and industrial law, dust diseases, superannuation (particularly total and permanent disability claims), negligent financial and other advice, and consumer and commercial class actions.

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

Maurice Blackburn has been instrumental in helping workers with lived experience of sexual harassment achieve access to justice.¹ We have pursued countless workplace sexual harassment complaints before the Federal and State/Territory Courts and Commissions as well as compensation claims.

I am personally a member of Maurice Blackburn's Sexual Harassment team in Queensland, which has been set up to deal with the increasing number of enquiries that we receive from victim-survivors of sexual harassment (including violence). In the past few years I have provided advice to dozens of women who have experienced sexual violence and harassment in their workplace.

Importantly, I am also a young woman. So, like many young women, I have also had my own unique experiences with the matters that this Inquiry will consider. I therefore rely on my research, professional experience and personal reflections in these submissions.

I am thankful to the Commission for considering my submissions. I would be delighted to provide any further information you should require in the future.

I would like to address to main areas of concern, being time limits (in relation to which I have referred below to TBG's story) and Reasonable Management Action.

TBG's Story

In 2023 I commenced acting for a young woman who had experienced sexual violence during the course of her employment. For the purposes of my submission, I will use the pseudonym TBG.

¹ See for example: <https://www.mauriceblackburn.com.au/about/media-centre/media-statements/2020/dysonheydon-victims-to-take-legal-action/>

I am aware that The Commission has received separate submissions from TBG in relation to her experience of sexual violence and the justice system. I therefore will not repeat the story she has so bravely told, but will reference the relevant context for my submissions.

TBG experienced egregious sexual harassment in her workplace over a prolonged period from February 2019 to May 2022. As she outlines in her submissions, she navigated internal complaints and investigations, criminal proceedings and a human rights complaint all over many years.

TBG's need to make a workers' compensation claim did not arise until her sick leave entitlements were running low in early 2023. She promptly sought advice from me in late March 2023. Her application was lodged efficiently thereafter, and within 6 months of being advised of that entitlement. The claim was rejected due to a failure to make the claim within six months of the injury occurring. It was found by the Insurer that she did not have a reasonable cause to have lodged the claim out of time.

I assisted TBG with a review to the regulator of the Insurer's first decision. It was returned to the Insurer and rejected again. We are now approaching fifteen months of fighting to get her basic workers' compensation entitlements to support her treatment/rehabilitation and work incapacity.

Submissions

My submissions specifically relate to my experience with the Queensland workers' compensation system, which is the area in which I predominantly practice. However, for the Commission's benefit, I do make the general observation that the federal and various state systems of worker' compensation have many similarities and therefore I would anticipate similar limitations or issues.

I also make the distinction that my submissions do not relate to the other potential civil avenues of compensation, including under the *Sex Discrimination Act 1984*. However, I do make the observation that the various layers and intersections of the civil schemes do present additional challenges for victim/survivors, and those that represent them. In particular, I note that the timeframes are varied and often there are terms of settlement that will prevent further recovery under other avenues of compensation.

Summary of Issues

From my perspective there is one primary issue that confronts workers who experience sexual violence in their workplace injury claims which is the statutory time limitations imposed on victim-survivors to make claims for compensation. That is acutely demonstrated in TBG's story.

Whilst not specifically addressed in my submissions, I also acknowledge there are many initial barriers that prevent victim-survivors from even contemplating or engaging with the civil compensation systems. From my experience as an injuries lawyer I see those barriers to entry being a fear of not being believed; insufficient information about the justice process and associated support; and fear of consequences (in particular for workers losing their job or their professional reputation being impacted).

Unfortunately, it is the case that those who often have certain vulnerabilities are most targeted, and therefore already are predisposed to the barriers of the justice system, whether it be by virtue of their language, culture, socioeconomic status or their health. Overwhelmingly, the enquiries that cross my desk are young women who have experienced previous disadvantage

or trauma. We simply are not able to provide access to justice for victim-survivors, despite our best efforts.

Background to the Statutory Workers' Compensation Process

In Queensland there are two distinct parts to any worker's compensation claim, being the statutory claim phase (commonly referred to as a WorkCover claim) and a common law claim. The Queensland workers' compensation scheme is established by the *Workers' Compensation and Rehabilitation Act 2003* (Qld) ('WCRA'). The WCRA establishes a statutory framework that provides a social safety net for injured workers by providing weekly wage payments for periods of work incapacity and medical and rehabilitation expenses. It also provides for the pre-court procedures for common law claims for damages.

Statutory Claim

By way of very brief summary, the statutory phase is a no-fault scheme which provides for time off work and medical/rehabilitation expenses, usually until someone is fully fit to return to work or has otherwise reached maximum medical improvement. To be entitled to a WorkCover claim, an Applicant must meet certain criteria, including that they have sustained an injury during the course of employment.

There are also strict time limits for lodging a statutory claim, contained within section 131 of the WCRA:

*(1)An application for compensation for an injury is valid and enforceable only if the application is lodged by the claimant within **6 months** after the entitlement to compensation for the injury arises.*

(2)If an application is lodged more than 20 business days after the entitlement to compensation arises, the extent of the insurer's liability to pay compensation is limited to a period starting no earlier than 20 business days before the day on which the valid application is lodged.

...

(6)An insurer may waive subsection (1) or (2) for a particular application if the insurer is satisfied that a claimant's failure to lodge the application was due to—

...

(c)a reasonable cause. [emphasis added]

Common Law Claim

If a worker has an accepted statutory claim, they will also have a potential common law claim. In contrast to the statutory claim, a common law claim is concerned with providing for long-term compensation to a worker, in the way of damages for pain and suffering, treatment expenses and economic loss. In a common law claim, negligence must be established. Generally, the statutory time limit is **three years** from the date of an injury.

Time Limits

In my five years of practice I have had the pleasure of acting for many victim-survivors of sexual harassment and assault. Unfortunately, I have also had the displeasure of not acting for many more victims-survivors because of the above detailed time limits. It is of great devastation to me that the vast majority of people who cross my desk have missed at least one time limit in the claims process.

In the past year, I have represented four other victim-survivors in their work injury claims, in addition to TBG. Three out of four of these people missed their WorkCover statutory time limit, which meant they had no access to the important safety net of paid time off work and treatment/rehabilitation expenses. I have no doubt that my clients are reflective of many other victim-survivors.

I note the Law Reform Commission Issues Paper (April 2024) points out that delay in the criminal justice process can be significant. My experience there is a common perception that the internal workplace investigations and criminal justice processes must be complete prior to seeking other avenues of compensation, including in sexual harassment claims, workers' compensation claims or victims of crime claims. That misconception is a great tragedy in my view. The consequences of the restrictive timeframes are that victim-survivors lack the support that is available in respect of wages and/or treatment, either early (when crucial) or altogether.

In TBG's case, she investigated multiple other avenues in respect of the allegations, including internal investigations, criminal charges and then later an Australian Human Rights complaint. In my view it is not reasonable to suggest that someone suffering from complex trauma and psychological symptoms could be expected to pursue each of these avenues all at once, and all within six months of the first event (noting the prolonged period of offending).

The six month timeframe to make a statutory claim is simply too restrictive. It is often the case that victims of discrimination, in particular, sexual harassment, take years before they obtain legal advice about their rights or are safe or mentally well enough to bring a complaint. Any amendments to increase the timeframe or otherwise clarify the 'reasonable excuse for delay' aspect, will in my view, provide much needed access to justice and support for victim-survivors.

The three-year common law timeframe is also restrictive. I compare the experiences of victim-survivors of child sexual abuse, who are no longer confronted with a three-year deadline to cope with their trauma, speak to others about it, and then have the courage to confront the legal system. My strong view is that laws responding to sexual violence to adults should be extended similarly.

Reasonable Management Action

A second area of concern is the number of situations where we are seeing an employer challenging acceptance of a statutory claim for compensation, often successfully, on the grounds of 'reasonable management action'. When this tactic is used successfully by employers it ultimately denies the worker access to weekly payments, payment for their treatment and to a statutory lump sum. It also prevents the worker from bringing a common law claim for compensation.

The relevant legislation is section 32 of the WCRA which defines the meaning of injury:

- (1) An ***injury*** is personal injury arising out of, or in the course of, employment if the employment is a significant contributing factor to the injury.

.....

- (5) Despite subsections (1) and (3), ***injury*** does not include a psychiatric or psychological disorder arising out of, or in the course of, any of the following circumstances—

- (a) reasonable management action taken in a reasonable way by the employer in connection with the worker's employment;

(b)the worker's expectation or perception of reasonable management action being taken against the worker;

(c)action by the Regulator or an insurer in connection with the worker's application for compensation.

We have seen a number of situations where a worker has been sexually harassed at work over a period of time, has struggled on and has initially been able to continue to work. There has then been some sort of event at work which would appear to be unrelated but in fact becomes the point at which the worker decompensates, becomes unwell and is unable to continue working. In some situations the worker's performance suffers as a result of their poor mental health due to the harassment and either formal or informal performance management commences. They make an application for statutory work cover benefits and the employer challenges acceptance on the grounds of reasonable management action. They allege that the psychiatric injury suffered by the worker was as a result of the performance management whereas the reality of the situation is that the injury was caused by the sexual harassment, with the management action simply being the point at which things are brought to a head, the worker decompensates and is unable to continue working.

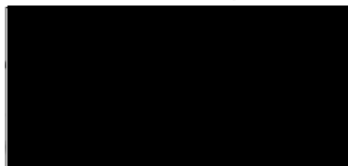

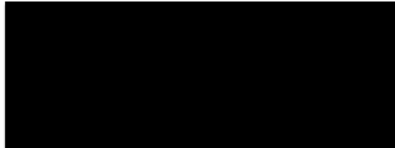
In other situations, we have suspected that the performance management has actually been commenced as a retaliation for allegations of sexual harassment that are made by the worker, although this can be difficult to prove.

The provisions in the legislation were introduced to address a potential flood of claims for psychiatric injury. The aim was to strike a balance between providing access to justice and financial benefits/compensation for individuals, whilst preventing a potentially excessive number of claims. However, the impact that the provision is having with regards to vulnerable victim-survivors of sexual harassment goes beyond this and is creating an unfair (and unintended) situation.

Conclusion

My submissions are based on the lived experience of the victim-survivors that I have the privilege to serve. I am grateful for the Australian Law Reform Commission's inquiry into these important issues within our justice systems, and for the opportunity to provide submissions.

I would be delighted to further discuss the matters raised directly in these submissions with the Commission.

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