MIND OVER MATTER: A CASE FOR REFORMING NEW ZEALAND'S ACCIDENT COMPENSATION LAW CONCERNING WORK-RELATED PSYCHOLOGICAL INJURY

Jack Christopher Whittam*

Abstract

Workers in post-industrial societies increasingly occupy jobs with greater risks of psychological injury than physical harm. At the same time, a growing body of research is recognising the untenability of treating psychological injury with less importance than physical harm. In response, Australia's workers' compensation law has evolved to serve this changing landscape by affording comprehensive cover to victims of work-related psychological injury. Conversely, New Zealand's accident compensation law offers limited cover to such victims – largely remaining an ignorant anachronism of yesteryear.

For victims of work-related psychological injury in New Zealand, the repercussions of this disparity are significant. Barred claimants are able to seek compensation under employment law or tort, but such avenues are fraught with obstacles. As a result, successful claims are seldom achieved. These victims then often have no choice but to resort to WINZ benefits – a welfare system evidenced to render victims less likely to return to work and more likely to face increased poverty and worsening health.

Soliciting guidance from Australian legislation, this article argues for the reform of accident compensation law in New Zealand to more liberally compensate for work-related psychological injury.

Keywords: Employment relations, accident compensation law, work-related psychological injury, wellbeing.

I. Introduction

Over the last century, legal and psychological discourse has increasingly recognised the untenability of treating psychological injury with less importance

* LLB, University of Canterbury. Solicitor at Lane Neave. With sincere thanks to Professor Annick Masselot for her guidance and constant enthusiasm, as well as Professor Stephen Todd for his review and helpful comments.

than physical injury.[1] As Coppins maintains, "a psychiatric condition may be equally, if not more, disabling than a physical injury".[2] At the same time, workforces in post-industrial societies have become increasingly comprised of work that is primarily cognitive in nature, rather than manual. As the type of work has changed, so too have the associated employment risks. As a result, New Zealand and Australian workers today are at far greater risk of psychological injury than ever. Yet while Australia boasts comprehensive compensation law that has evolved to recognise this changing landscape, law in New Zealand fails to afford victims of psychological injury comprehensive cover. It is for this reason that the OECD describes New Zealand and Australia's compensation law as creating an "inequitable divide" in the way it treats victims of work-related psychological injury.[3]

In order to pursue compensation, barred New Zealand claimants must then claim against their employer under employment law or tort. However, such avenues are fraught with obstacles, meaning successful claims are seldom achieved.[4] Where a victim of work-related psychological injury is unable to successfully claim under compensation law or against their employer, they will often have no option but to rely on social welfare. Yet overwhelming evidence shows victims on WINZ benefits are less likely to return to work and more likely to face increased poverty and worsening health.[5] Therefore, it is clear the limitations of current accident compensation law in New Zealand have significant repercussions on those excluded.

Seeking guidance from Australian legislation, this article seeks to determine whether accident compensation law in New Zealand should be reformed to more liberally compensate for work-related psychological injury.

To answer this question, the article first identifies the definition of work-related psychological harm under New Zealand and Australian law. Next, the article discusses how a stark increase in work-related psychological injuries can be attributed to the evolving composition of post-industrial workforces. The article then compares and contrasts accident compensation law in New Zealand and Australia, before systematically analysing how New Zealand law treats victims of work-related psychological injury. While the comprehensive nature of Australia's workers' compensation law means little relevant case law actually exists, this analysis will use Australia's codified compensation schemes as a touchstone against which New Zealand's compensation law can be assessed. The article then analyses

1 Ian Soosay and Rob R Kydd "Mental Health Law in New Zealand" (2016) 13 BJPSYCH 43 at 45.
2 Elizabeth Coppins "Psychiatric Injury in Employment" (LLB (Hons) Dissertation, University of Auckland, 1997) at 411.
3 OECD *Mental Health and Work: New Zealand Mental Health and Work* (OECD Publishing, Paris, 2018) at 16.
4 *Attorney-General v Gilbert* [2002] 2 NZLR 342 at 359.
5 Susan McAllister and others "Do different types of financial support after illness or injury affect socio- economic outcomes? A natural experiment in New Zealand" (2013) 85 Soc Sci Med 93 at 100.

the repercussions for claimants excluded under New Zealand law. Ultimately, the article aims to propose that New Zealand's accident compensation law should be reformed to more liberally compensate for work-related psychological injury.

II. Defining Work-Related Psychological Injury

To define work-related psychological injury, it is prudent to first recognise the scope of the legislation in which it is defined. In New Zealand, the Accident Compensation Act 2001 (ACA) broadly compensates victims for both work related and non-work related injuries. Conversely, Australia's workers' compensation Acts – as their names would suggest – solely compensate injuries suffered at work.[6] While Australia has a handful of additional schemes that compensate for the likes of car accidents and medical costs, many are restricted to those who are employed or to those who are not at fault.[7] Accordingly, New Zealand's scheme is unique in that it provides no fault injury cover for all New Zealanders, regardless of how the injury was suffered or whether the victim is employed.

While compensation for work-related psychological injury differs greatly under Australian and New Zealand law, the countries' definitions of such injury do not. Accordingly, these definitions are not contentious, but are nonetheless important to establish before analysing the jurisdictional disparities.

In New Zealand, the ACA defines mental injury as "a clinically significant behavioural, cognitive, or psychological dysfunction".[8] The Accident Compensation Commission (ACC) specifies that such dysfunctions are "clinically significant" if they meet the requisite criteria under a recognised diagnostic tool, namely the APA Diagnostic and Statistical Manual of Mental Disorders (DSM-5).[9] ACC further specifies that such injury is work-related where a "causal link" exists between the victim's work and the injury suffered.[10]

6 Workplace Injury Management and Workers Compensation Act 1998 (NSW); Workplace Injury Rehabilitation and Compensation Act 2013 (VIC); Workers' Compensation and Rehabilitation Act 2003 (QLD); Workers' Compensation and Injury Management Act 1981 (WA); Return to Work Act 2014 (SA); Workers Rehabilitation and Compensation Act 1988 (TAS); Return to Work Act 1986 (NT); Workers Compensation Act 1951 (ACT); Safety, Rehabilitation and Compensation Act 1988 (Cth); and Seafarers Rehabilitation and Compensation Act 1992 (Cth).

7 See, for example, the Queensland Compulsory Third Party (CTP) Insurance Scheme and the Safety, Rehabilitation and Compensation Act 1988, respectively.

8 Accident Compensation Act 2001, s 27.

9 "Mental Injury Assessments for ACC" (March 2019) ACC New Zealand <www.acc.co.nz>; and American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* (5th ed, American Psychiatric Publishing, Arlington (Virg), 2013).

10 ACC New Zealand, above n 9.

Somewhat unhelpfully, Australian legislation does not define psychological injury. However, Safe Work Australia – ACC's Australian equivalent – specifies that psychological injury "includes a range of cognitive, emotional and behavioural symptoms that interfere with a worker's life and significantly affect how they feel, think, behave or interact with others".[11] As in New Zealand, Safe Work Australia uses the DSM-5 to identify the necessary level of diagnosis for the requisite injury.[12] Safe Work Australia outlines that such injury is "work-related" where work is "a significant, material, substantial or the major contributing factor to the injury".[13]

Accordingly, in both countries, work-related psychological injury includes DSM-5 recognised dysfunctions, such as depression, anxiety, and PTSD.[14] *Comcare v Mooi* affirms that emotions such as feeling upset, angry, or distressed will not fall within this definition.[15] As subsequent case law will evince, work-related psychological injury can arise from a range of workplace incidents such as bullying, overworking, and trauma.

III. Work-Related Injury in the 21st Century

The Law Commission maintains that with the rate at which society changes, it is "ambitious to expect social legislation to have a life of more than 15–20 years".[16] While workers' compensation law in Australia has adapted to the evolving nature of the workforce which it serves, compensation law in New Zealand appears to have disregarded this wisdom. Accordingly, the ACA is a remnant of an employment landscape of a very different era.

In the 20th century, Australia and New Zealand's workforces were, like most, largely comprised of manual labour.[17] In 1960, the New Zealand Department of Statistics reported that manufacturing and primary industries accounted for 58 per cent of New Zealand's GDP.[18] Yet, over the past few decades, technological advancements in computing and automation have seen a stark rise in the demand

11 "Workers' Compensation Legislation and Psychological Injury" Safe Work Australia <www.safeworkaustralia.gov.au>.

12 "Taking Action: A best practice framework for the management of psychological claims in the Australian workers' compensation sector" Safe Work Australia <www.safeworkaustralia.gov.au>.

13 Safe Work Australia, above n 12.

14 "Public Insurance Schemes: advocating for mental injury claimants" (December 2017) RANZCP <www.ranzcp.org>.

15 *Comcare v Mooi* (1996) 23 AAR at 165.

16 Law Commission *Adoption: Options for Reform* (NZLC, PP38, 1999) at 1.

17 Acemoglu D and P Restrepo "The Race Between Machine and Man: Implications of Technology for Growth, Factor Shares and Employment" (National Bureau of Economic Research working paper No 22252, June 2017) at 1.

18 Department of Statistics *The New Zealand Official Year-Book* (July 1960) at [12].

for cognitive labour. Accordingly, in 2014, manufacturing and primary industries accounted for just 23 per cent of GDP.[19] Moreover, Statistics NZ affirms that over the last decade, 68 per cent of job growth in New Zealand has come from cognitive labour.[20] In Australia, the equivalent statistic is 72 per cent.[21] By 2040, the Reserve Bank of Australia predicts that cognitive labour will account for 77 per cent of all labour, up from 52 per cent in 1986.[22] It is safe to assume a similar prediction can be made about the future of New Zealand's workforce.

As the composition of these countries' workforces continues to evolve, so does the nature of work-related injury. While New Zealand and Australian workers in the early 1900s were most at risk of physical injury, such as being crushed by heavy machinery, the increasing demand for cognitive labour means the majority of today's workers are instead at greater risk of psychological injury, such as depression as a result of overworking. It is for this reason that in 2019, Massey University reported that one in four New Zealand workers are currently experiencing work-related psychological injury.[23] Similarly in Australia, claims for work-related psychological injury have increased by 61 per cent in the last seven years.[24]

Accordingly, it is markedly clear that workers in both Australia and New Zealand are at greater risk of work-related psychological injury than ever before. However, as the following sections will evince, the disparity in the way each country compensates for such injury has significant consequences for claimants.

IV. Workers' Compensation Law in New Zealand and Australia

Despite sharing an almost identical definition of work-related psychological injury, as well as serving a very similar workforce, workers' compensation law in New Zealand and Australia differs immensely.

19 Department of Statistics, above n 18.

20 "Service industries drive GDP" (21 March 2019) Stats NZ <www.growthstats.govt.nz>.

21 Alexandra Heath, Head of the Reserve Bank of Australia Economic Analysis Department "The Changing Nature of the Australian Workforce" (Speech at CEDA – Future Skills: The Education and Training Pipeline, Brisbane, 21 September 2016).

22 "Service industries drive GDP" (21 March 2019) Stats NZ <www.growthstats.govt.nz>.

23 Tim Bentley "More than a Quarter of Workers Depressed – Study" (22 August 2019) Stuff <www.stuff.co.nz>.

24 Parliament of Australia *Report: Safety, Rehabilitation and Compensation Amendment (Improving the Comcare Scheme)* (16 June 2015).

A. Workers' Compensation Law in New Zealand

At the turn of the 20th century, New Zealand passed the Workers' Compensation for Accidents Act 1900, creating the Nation's first workers' compensation scheme. However, the scheme only covered the most hazardous occupations and the quantum of compensation was meagre.[25]

This "fragmented and capricious" law was addressed by Parliament in 1974, which subsequently passed the Accident Compensation Act 1972.[26] Based on a report by Sir Owen Woodhouse, known as the "Woodhouse Report", the Act created New Zealand's first comprehensive no-fault accident compensation scheme.[27] As the first of its kind worldwide, the scheme forged a "social contract" between citizen and state, whereby the citizen cedes the right to sue for personal injury, in exchange for comprehensive compensation.[28] This means that compensated claimants are barred from bringing a claim in common law, with the exception of exemplary damages.[29] Such damages are imposed to punish the employer, rather than to compensate for the injury.

Central to the scheme's original purpose was providing "compensation for *all* accidental injuries, irrespective of fault and regardless of cause".[30] As the Woodhouse Report maintained, "wisdom, logic and justice all require that every citizen who is injured must be included".[31] Accordingly, for 25 years the scheme compensated victims of both physical *and* psychological injury. However, in the early 1990s, the National Government became increasingly concerned that the rise in successful claims for psychological injury would bankrupt the scheme.[32] Despite strong criticism, the Government reformed the ACA in 1992 to significantly limit the circumstances in which a claimant can be compensated for work-related psychological injury.[33]

Today, under what academics consider a significantly "meaner and leaner" scheme,[34] claimants can only be compensated for work-related psychological injury under three narrowly defined categories.

25 "ACC – Our history" (12 December 2018) ACC <www.acc.co.nz>.
26 Royal Commission of Inquiry *Compensation for Personal Injury in New Zealand* [Woodhouse Report] (1967) at 48.
27 The Woodhouse Report, above n 26.
28 Accident Compensation Act 2001, s 3.
29 *Donselaar v Donselaar* [1982] 1 NZLR 97 at 11.
30 Royal Commission of Inquiry, above n 26, (emphasis added) at 48.
31 At 40.
32 Accident Compensation Corporation *Accident Rehabilitation and Compensation Insurance Bill: Briefing Notes* (1991) 15.
33 John Black, Stephen Harrop and John Hughes *Income Support Law and Practice* (Butterworths, Wellington, 1996) at [6007.7].
34 John Miller "Compensation for Mental Trauma Injuries in New Zealand" (1998) 3 AJDTS 1 at 1.

The first category of cover for work-related psychological injury is where a worker is a victim of a certain sex-related offence.[35] Pursuant to schedule 3 of the ACA, such offences include all major sex crimes, including grooming, indecent assault, and sexual violation. By virtue of s 21, victims of these offences will receive cover regardless of whether the offence causes any physical injury. While the perpetrator need not be charged or convicted of the crime for the victim to receive compensation, the victim must establish a causative link between the psychological injury and the specified crime.[36]

The second category of cover is found in s 26(1)(c) of the ACA and provides cover for "mental injury suffered by a person because of physical injuries suffered by the person". This section was the primary mechanism introduced in the 1992 reform that allowed Parliament to significantly reduce the scheme's cost. By limiting compensation to psychological injury caused by physical injury, the scheme now excludes claimants who experience 'pure' psychological injury.

While the ACA offers little guidance as to the necessary degree of causation between the physical harm and the resulting psychological injury, the Court in *Geerders* outlined that the claimant must prove, on a balance of probabilities, that the psychological injury was "directly caused by the physical injury suffered".[37] In *Ambros*, the Court affirmed that "a risk of causation will not suffice", but instead the court must be able to draw a "robust inference of causation".[38] Additionally, the physical injury must be suffered by the claimant themselves, rather than someone whom the claimant witnesses.[39]

Pursuant to s 21B, the final category of cover for work-related psychological injury is where a worker suffers such injury as a consequence of being exposed to a traumatic workplace event. This category of compensation was added in 2008, following lobbying from a number of industry unions whose workers were disproportionately suffering psychological injury from experiencing traumatic events. In particular, Parliament heard from the Rail and Maritime Union, who told countless stories of train drivers being denied compensation despite witnessing railway suicides.[40] Similarly, the Bank Workers' Union shared stories of workers being denied compensation despite witnessing the injury of colleagues in armed robberies.[41] Under s 21B, these workers are now compensated for such events. However, due to Parliament's concerns that the amendment would impose a

35 Section 21.
36 Section 21(5).
37 *Accident Compensation Corporation v Geerders* DC Wellington 188/2004, 8th July 2004 at [44].
38 *ACC v Ambros* [2008] 1 NZLR 340 (CA) at [66]–[70].
39 *Queenstown Lakes District Council v Palmer* [1999] 1 NZLR 549.
40 (17 June 2008) 647 NZPD 16583.
41 Above n 40.

"substantial cost burden" on employers, s 21B contains a number of conditions.[42] Firstly, the claimant must have experienced, heard, or seen the event directly, rather than through a secondary source such as television, CCTV, or radio.[43] Secondly, the cause of the injury must have been a single sudden event, or a series of events that together constitute a single incident or occasion.[44] Finally, the section applies a subjective approach to causation, whereby it must be reasonably expected that the event would cause psychological injury to people generally.[45]

Accordingly, it is markedly apparent that claimants suffering work-related psychological injury are afforded only limited cover under New Zealand law. As the following section will evince, these narrow categories of compensation contrast greatly with the broad cover provisions of Australia's workers' compensation law.

B. Workers' Compensation Law in Australia

Between 1882 and 1885, all Australian states adopted the Employment Liability Act 1880 from the United Kingdom, creating Australia's first workers' compensation scheme. However, the Act still required the claimant to prove negligence on the part of their employer, meaning the scheme failed to provide any significant benefit to injured workers.[46] It was not until 1926 that New South Wales introduced Australia's first "no fault" workers' compensation scheme.[47] Similar to ACC, the scheme was a form of compulsory insurance funded by employers and the taxpayer. However, unlike today's ACC scheme, the scheme provided comprehensive cover for work-related injury, regardless of whether the injury was physical or psychological in nature.[48] It was this scheme that formed the blueprint for other comprehensive workers' compensation schemes developed around Australia. Today, Australia has 11 workers' compensation schemes in total, comprised of eight Acts governing each of the country's states,[49] and three Commonwealth Acts governing Government

42 Above n 40.
43 Section 21B(6).
44 Section 21B(7)(b).
45 Section 21B(2)(b).
46 "Comparison of Workers' Compensation Arrangements in Australia and New Zealand" (October 2006) Safe Work Australia <www.safeworkaustralia.gov.au>.
47 Workers' Compensation Act 1926 (NSW).
48 Section 6.
49 Workplace Injury Management and Workers Compensation Act 1998 (NSW); Workplace Injury Rehabilitation and Compensation Act 2013 (Vic); Workers' Compensation and Rehabilitation Act 2003 (Qld); Workers' Compensation and Injury Management Act 1981 (WA); Return to Work Act 2014 (SA); Workers Rehabilitation and Compensation Act 1988 (Tas); Return to Work Act 1986 (NT); and Workers Compensation Act 1951 (ACT).

employees,[50] seafarers,[51] and defence force personal.[52] The key features of these Australian Acts are assessed hereafter.

Firstly, unlike the cost cutting measures New Zealand took in the 1990s to limit compensation for psychological injury, these Australian schemes continue to compensate for such injury. While these schemes do not cover accidents that are not work-related, they cover all Australian employees, as well as most contractors.[53] Despite each scheme's nuances, the test for whether work-related psychological injury is compensable is relatively similar under each Act. Essentially, in each jurisdiction, a claimant can be compensated for "a physical or mental injury arising out of, or in the course of, the employee's employment".[54] This includes the exacerbation of a pre-existing mental illness.[55] These Acts all adopt a subjective approach to causation, meaning there is no requirement that a claimant's reaction to the workplace event was "rational, reasonable and proportionate".[56] Accordingly, psychological injury arising from "a flawed perception of events" is still compensable.[57]

Secondly, under all 11 Australian Acts, an explicit exclusionary provision exists whereby no compensation is payable if the work-related psychological injury is caused by "reasonable administrative action" taken by the employer.[58] Such administrative action includes "dismissal, retrenchment, transfer, performance appraisal, disciplinary action or deployment".[59] The burden of proof falls on the employer to prove this defence.[60] In *Irwin*, the Court affirmed that whether the action is "reasonable" is an objective question of fact, determined by asking "has the employer adopted procedural fairness in its dealings with the injured worker?"[61]

Finally, while New Zealand compensation law bars successful claimants from bringing a claim in common law, this statutory bar does not exist in Australia. Accordingly, if the degree of permanent impairment is significant enough, a claimant is also able to seek damages in common law. However, claimants are unable to receive both statutory compensation *and* common law compensation, meaning

50 Safety, Rehabilitation and Compensation Act 1988 (Cth).
51 Seafarers Rehabilitation and Compensation Act 1992 (Cth).
52 Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988 (Cth).
53 "Comparison of Workers' Compensation Arrangements in Australia and New Zealand" (2019) Safe Work Australia <www.safeworkaustralia.gov.au> at 61.
54 Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988 (Cth), s 5A.
55 Emma Reilly "The mental injury exception to workers' compensation claims" (2010) 101 PCD 31 at 32.
56 *Attorney Generals Department v K* [2010] NSWWCCPD 76 at [52].
57 *Leigh Sheridan v Q-Comp* [2009] QIC 12, 191 QGIG 13 at 8.
58 Safe Work Australia, above n 53, at 90–92.
59 Reilly, above n 55, at 32.
60 *Department of Education & Training v Sinclair* [2004] NSWWCCPD 90 at [23].
61 *Irwin v Director General of School Education* (8 June 1998, unreported) at [14].

that any statutory compensation received prior to a successful common law claim must be repaid, or will be deducted from the quantum of common law damages.[62]

Accordingly, it is markedly evident that despite serving very similar workforces, the extent to which New Zealand and Australian law compensate for work-related psychological injury differs considerably. As the following section will evince, this disparity has significant consequences for claimants and has created notable unease in the New Zealand judiciary.

V. Analysis of Compensation under Workers' Compensation Law

As with any argument for statutory reform, the greatest rationale for change often comes from the way in which the respective piece of legislation treats the individuals it serves. In the argument at hand, the case for reforming the ACA is supported by the way in which the Act arbitrarily denies compensation to claimants, contrasting greatly with Australia's liberal approach. Drawing on New Zealand case law, this section will analyse this disparity, ultimately highlighting the "inequitable divide" that exists in the treatment of Australian and New Zealand claimants.[63]

Of note is that the comprehensive cover afforded to Australian workers means claims for psychological injury across the Tasman are seldom litigated. As a result, very little relevant Australian case law actually exists. Notwithstanding, this analysis will use Australia's comprehensive compensation law as a touchstone against which New Zealand's compensation law can be assessed.

This analysis can be distinguished into three sections, based on the shortcomings of the ACA's three categories of cover for work-related psychological injury, as discussed above.

A. Shortcomings of Section 21: Psychological Injury Caused by Sex Crimes

Before discussing its limitations, it is important to recognise that s 21 has been successful in compensating a significant number of victims of sex crimes. Since 2010, ACC has paid out over $636 million to compensate over 193,000 victims for psychological injury caused by sexual assault.[64] While the majority of this injury arises in a domestic context, a number of cases affirm this section's relevance to

62 "Comparison of Workers' Compensation Arrangements in Australia and New Zealand" (2019) Safe Work Australia <www.safeworkaustralia.gov.au> at 131–134.
63 OECD, above n 3, at 16.
64 ACC New Zealand, above n 9, at 14.

work-related injury. By way of example, in *P v AG* the claimant was compensated under s 21 for psychological injury from being sexually assaulted by a colleague in the Royal New Zealand Air Force.[65] However, this special category of cover addresses only a very small portion of the psychological injury faced by workers in the 21st century.[66] In particular, s 21 excludes a number of crimes as explored hereafter.

Firstly, s 21 does not compensate for sexual harassment. This means that workers who suffer psychological injury from being subjected to conduct such as sexually inappropriate comments or gestures are denied compensation under the Act. This shortcoming has long since been opposed by the Green Party, as well as a number of NGOs, such as HELP NZ and Project Restore.[67] In 2018, it was reported that the Minister for ACC was in "informal discussions" about extending cover to compensate for sexual harassment, yet Parliament has been silent on the matter since.[68] At the same time, research continues to affirm that the psychological effects of sexual harassment "are often similar to forms of sexual abuse". [69] Notwithstanding, the ACA continues to deny compensation to all but those subjected to the most severe sexual offences. While some argue it is more appropriate for sexual harassment to be compensated under the Employment Relations Act 2000 ("ERA"), the Employment Relations Authority has received just 19 sexual harassment claims since 2016, a figure which reflects "gross under-reporting".[70] Accordingly, the ACA presents an important mechanism for victims of sexual harassment to receive compensation, without the difficulty and cost of litigating under the ERA.

Moreover, one can question why s 21 covers psychological injury caused by certain sex crimes, but not psychological injury caused by non-sexual crimes, which can still have significant psychological consequences. In 1996, the Court in *AB v ARCIC* addressed this anomaly by rationalising that s 21 concerns a "recognised situation of social concern" because "it is notorious that profound psychological consequences can follow sexual assault".[71] Importantly, this article in no way questions the profound consequences of sexual assault. However, one can question the tenability of using what was deemed to be of social concern in the 1990s as the only yardstick by which Parliament decides which crimes should be compensable today. Psychology today has a far greater understanding of the plethora of causes

65 *P v AG* HC Wellington CIV-2006-485-874, 16 June 2010.
66 Barbara Disley *Report of the Sensitive Claims Pathway Review* (Talking Works, September 2010) at 31.
67 John Anthony "Government Considers ACC Support for Workers Traumatised by Sexual Harassment" Stuff <www.stuff.co.nz>.
68 Anthony, above n 67.
69 Marie Lynore "Are women safe in the New Zealand workplace? A study of sexual harassment policies and procedures" (BA (Hons) Dissertation, University of Massey, 2005) at 9.
70 Anthony, above n 67.
71 *AB v ARCIC* [1996] NZDC 118.

of psychological injury.[72] Accordingly, it is entirely conceivable that a claimant could suffer significant psychological injury because of a non-sexual crime, such as racial harassment,[73] or the abetting of suicide.[74] Yet under the ACA, the victims of such crimes are excluded from compensation. Accordingly, the Act theoretically concedes that these crimes are not of social concern.

Conversely, in Australia, cover is contingent on the existence of psychological injury, not its cause. This principled approach means that, apart from where psychological injury is caused by reasonable management action, workers suffering the same degree of injury will be compensated equally, regardless of cause. By limiting compensation to a handful of crimes that were deemed to be of social concern in the 1990s, s 21 of the ACA fails to recognise the multiplicity of causes of psychological injury in the 21st century.

B. Shortcomings of s 26(1)(c): Psychological Injury Caused by Physical Injury

The first and most obvious shortcoming of s 26(1)(c) is that it excludes workers who experience recognised psychological injury in the absence of physical injury. Prior to the introduction of this limiting section, the courts awarded compensation to a wealth of claimants suffering pure psychological injury. By way of example, in *ACC v E* in 1992 the claimant was covered after suffering a nervous breakdown from participating in a particularly intensive management course.[75] Ironically, in awarding this compensation, Gault J asserted that "it would be a strange situation if cover under the Act … were to depend upon whether or not some physical injury however slight also is sustained".[76] Yet that same year, s 26(1)(c) was added, making that hypothetical "strange situation" a grim reality.

As a result, New Zealand is left with legislation that arbitrarily rejects the well documented fact that significant psychological injury can occur in the absence of a physical manifestation.[77] As *ACC v E* foreshadowed, "it would create major difficulties should it be necessary to separate physical and mental injuries".[78] Unsurprisingly, these difficulties are now a reality. By way of example, in *Teen*, the claimant developed pain in her neck from her job as a data entry clerk.[79] After complex

72 Ian Soosay and Rob R Kydd, "Mental Health Law in New Zealand" (2016) 13 BJPSYCH 43 at 45.
73 Harassment Act 1997, s 9.
74 Crimes Act 1961, s 179.
75 *Accident Compensation Corporation v E* [1992] 2 NZLR 426 at 426.
76 At 434.
77 Ari Väänänen, Michael Murray and Anna Kuokkanen "The Growth and Stagnation of Work Stress: Publication Trends and Scientific Representations 1960–2011" (2014) 27(4) History of the Human Sciences 116 at 126.
78 *Accident Compensation Corporation v E*, above n 75, at 434.
79 *Teen v Accident Compensation Corporation and Telecom Ltd* [2002] NZACC 244.

debate, the Court determined the pain was fibromyalgia, a chronic pain syndrome. Such pain is caused by a disorder of the central nervous system, meaning it was unable to be identified as a physical injury. Accordingly, the claimant was denied cover. Conversely, in *Ward*, the claimant suffered an almost identical injury to the claimant in *Teen.* However, because the pain was caused by arthritis – a recognised physical injury – the claimant was covered.[80] Ultimately, these cases expose the arbitrary distinctions created by s 26(1)(c), whereby claimants experiencing almost identical pain are treated differently depending on the cause of the injury. It is these inequities that highlight the appeal of the principled approach afforded to claimants under Australian law. Because Australian law looks to the existence of the injury and its connection to employment, rather than its cause, such law would afford compensation to the arguably deserving claimant in *Teen.*

Moreover, even where a New Zealand claimant is able to point to physical injury as the cause of psychological injury, *Geerders* shows that where other contributing factors are also responsible for the injury, s 26(1)(c) is difficult to satisfy.[81] As a result, cases where claimants are unable to point to physical injury as the *sole* cause of psychological injury are seldom compensable.[82] By way of example, the claimant in *Geerders* suffered a thoracic back injury while working as a real estate agent.[83] As a result, he developed clinical depression, which his ACC review officer affirmed had a causal connection to the workplace accident. However, because the claimant's depression was also attributable to other stressors, such as separating from his wife and losing his job, the Court ruled that the claim fell outside of s 26(1)(c). Similarly, in *Hornby*, the Court accepted a causal link between the claimant breaking her arm and suffering from increased anxiety.[84] However, in applying *Geerders*, because there was also evidence of a lesser pre-existing mental illness, her claim was denied.[85]

More recently, however, the judiciary has made a significant departure from the strict causation requirement established *Geerders*. In 2018, the High Court in *W v ACC* overruled *Geerders*, maintaining that its approach to s 26(1)(c) was ignorant to the inherent reality that psychological injury can seldom be solely attributed to one physical event.[86] Accordingly, Collins J said that a "but for" test should instead be

80 *Ward v Accident Compensation Corp*oration [2019] NZACC 154. However, the claimant was ultimately denied ongoing entitlement, because after two years, his pain was no longer deemed to be related to his original injury.
81 Geerders, above n 37, at [50].
82 *Hornby v Accident Compensation Corporation* [2009] NZCA 576.
83 *Geerders* above n 37.
84 *Hornby*, above n 82.
85 *Hornby*, above n 82.
86 *W v Accident Compensation Corporation* [2018] 3 NZLR 859.

applied to s 26(1)(c), by asking "but for" the physical injury, would the psychological injury have eventuated? Under this new test, Collins J affirmed that:[87]

> … physical injury [doesn't] have to be the sole cause of the mental injury … the physical injury [just] had to be a cause of the mental injury in some genuine or meaningful way.

In this case, the Court awarded compensation to an adult claimant who developed a number of psychological conditions after learning she was assaulted as a baby.[88] This was despite the fact her psychological conditions were also attributable to other stressors, such as her recreational drug dependency, her attempted suicide, and her cousin's successful suicide.[89]

While the case did not concern workers compensation per se, the Court's overruling of *Geerders* can be admired for the equality it affords to claimants who suffer psychological injury where physical injury is not the *sole* cause. Such an approach is consistent with the fact that modern science and psychology now recognise that psychological injury can be just as debilitating, if more debilitating, than physical injury.[90] However, academics have subsequently criticised this decision for its inability to be reconciled with Parliament's intention when enacting s 26(1)(c).[91] When enacting this section, Parliament indicated that this contraction of cover was intended to exclude all but the most direct cases of psychological injury caused by the physical injury.[92] Accordingly, the Court's interpretation in *W v ACC* creates a "significant disjuncture" between judicial treatment and Parliamentary intention.[93]

Therefore, while it is clear the judiciary has a strong appetite to expand the arbitrarily narrow scope of s 26(1)(c), such a significant expansion of law in New Zealand is a job for Parliament, not the judiciary. Accordingly, the judiciary's discomfort with the confines of current accident compensation law in New Zealand gives even greater rationale for its reform and highlights the appeal of the comprehensive compensation afforded to claimants under Australian law. Under such law, the claimant in *W v ACC* would have received compensation without the judiciary having to create such a "disjuncture" between Parliamentary intention and judicial treatment.

87 At 861.
88 At 866.
89 At 866.
90 Ian Soosay and Rob R Kydd "Mental Health Law in New Zealand" (2016) 13 BJPSYCH 43 at 45.
91 Andrew Beck "ACC Litigation: A New Approach" [2018] NZLJ 146 at 2.
92 (24 March 1992) 523 NZPD 158.
93 Tiffany Buckley "The link between physical and mental injury: a redundant paradigm for determining compensation under the Accident Compensation Act" (LLB (Hons) Dissertation, Victoria University of Wellington, 2020) at 19.

C. Shortcomings of s 21B: Psychological Injury Caused by a Traumatic Event

When adding s 21B to the ACA in 2008, Parliament asserted that "the bill will close the gap for those workers who may in the past have been deprived of fair compensation".[94] Accordingly, Parliament's intention was clear – by providing cover to workers for psychological injury caused by a traumatic event, workers who fell outside the scope of the two aforementioned cover provisions would no longer be unfairly deprived of compensation. However, Parliament's intentions were futile. In the first year following the reform, 57 claims under s 21B had been declined, while just two had been accepted.[95] To this day, the narrow wording of 21B means the section continues to exclude all but a handful of claimants. Accordingly, s 21B is far from the silver bullet Parliament intended. Perhaps even more ill-founded was the assertion of Darien Fenton MP, the main proponent of the bill, that s 21B "brings New Zealand into line with the cover offered to workers in other overseas jurisdictions, including most Australian states".[96] As the following analysis will show, 21B continues to exclude a wealth of deserving claimants, all of whom would receive compensation under Australian law.

This analysis of case law can be distinguished into three diagnostic categories, based on the three most common types of injury experienced by claimants who are denied compensation under s 21B.

The first category of psychological injury that has failed to be addressed by s 21B is work-related PTSD. As aforementioned, s 21B was enacted primarily in response to the lobbying of a number of trade unions whose members were being denied cover for PTSD. Since the enactment of s 21B, this provision has compensated a handful of these types of workers.[97] However, the main barrier to claiming for PTSD under s 21B is that the traumatic event must have been a single sudden event, or a series of events that together constitute a single incident or occasion.[98] To avoid any doubt, s 21B explicitly states that psychological injury caused by "gradual process" is not compensable.[99] Accordingly, a number of claimants suffering work-related PTSD continue to be denied compensation under the Act.

By way of example, in *KB v ACC,* a police officer made a claim after suffering PTSD from attending a particularly traumatic suicide.[100] However, the Court denied

94 (11 December 2007) 644 NZPD 13879.
95 Office of the Minister of Labour, memorandum to the Cabinet Legislation Committee "Injury Prevention, Rehabilitation, and Compensation Amendment Bill 2009", 23 September 2009.
96 Above n 94.
97 *Mazengarb's Employment Law* (looseleaf ed, LexisNexis) at [IPA21B.6].
98 Section 21B(2)
99 Section 21B(2).
100 *KB v ACC* [2013] NZACC 41.

compensation, reasoning that the psychological injury was instead attributable to "a significant number of traumatic events in the course of her work".[101] Similarly in *MHF v ACC*, a nurse suffered PTSD following the suicides of two of her patients.[102] The claimant was denied cover, because the suicides together constituted "multiple events".[103]

Moreover, in *Brickell*, the claimant was denied compensation for PTSD caused by 15 years of filming and editing traumatic content as a video photographer for the New Zealand Police.[104] Despite being heard prior to the enactment of s 21B, this claim would still be excluded under s 21B because the injury was attributable to gradual process.

Significantly, in this case, McGechan J rhetorically questioned:[105]

> If the plaintiff had fallen over and cracked his skull on a box of videos the outcome would have been governed by ACC. Should it be different because the contents of the box caused a psychiatric condition?

In doing so, McGechan J addressed the anomaly that still prevails under the Act, whereby, even with the addition of s 21, the ACA continues to provide comprehensive cover for physical injury, but only limited cover for psychological injury. It is for this reason that trade unions such as the New Zealand Professional Firefighters Union ("NZPFU") continue to fervently lobby for the expansion of cover under the ACA, because their workers continue to suffer PTSD without compensation.[106] In 2020, the NZPFU launched a popular public petition to "amend ACC legislation to recognise cumulative trauma in emergency service workers".[107] The support garnered by the petition provides compelling evidence that further reform is needed to afford equality to *all* victims of work-related psychological injury.

A second common category of psychological injury that has failed to be addressed by s 21B is work-related stress. In *Gilbert*, a probation officer for the Department of Corrections was hospitalised with a stress induced coronary artery disease, forcing him to retire 14 years early.[108] Because the Court found the stress was attributable to a gradual process of "additional pressure of workload, office dysfunction, and inadequate resources", rather than a single event, the claimant was barred from

101 At [24].
102 *MHF v MidCentral District Health Board and Accident Compensation Corporation* [2020] NZACC 18.
103 At [22].
104 *Brickell v AG* (2000) 5 NZELC 96,077.
105 At [158].
106 "Public petition to amend ACC legislation to recognise cumulative trauma in emergency service workers" (4 March 2020) New Zealand Professional Firefighters Union <www.nzpfu.org.nz>.
107 New Zealand Professional Firefighters Union, above n 106.
108 *Attorney-General v Gilbert* [2002] 2 NZLR 342.

compensation.[109] Similarly in *Jeffrey*, the claimant developed a major depressive disorder from the stress of working in a supermarket for three weeks without a day off.[110] The Court had no option but to deny compensation, because the depression was the result of "a gradual process of mental stress caused by work overload".[111] Accordingly, it is clear the narrow scope of s 21B also significantly disadvantages those suffering genuine psychological injury as a result of work-related stress.

This "gradual process" exclusion means that s 21B is grossly incompatible with the reality that workplace stress is seldom caused by a one-off event. Statistics from SafeWork Australia show that under Australian law, where recognised psychological injury from work-related stress is compensable, 32 per cent of accepted psychological claims concern work-related stress. This percentage amounts to almost 3,000 victims a year.[112] Accordingly, this frightening statistic alludes to just how many victims likely suffer stress-induced psychological injury without compensation in New Zealand.

The narrow wording of s 21B has also excluded a number of meritorious claims for workplace bullying. In *OCS*, the claimant suffered manic episodes as a result of being bullied by her colleagues in her job as a cleaner.[113] While the manic episodes began after an incident in which a colleague "squashed" her face, the Court maintained that this triggering incident was "no more than an event forming an integral element of a reasonably long-running pattern of bullying".[114] As such, the squashing incident was deemed a "final straw event", rendering it incompatible with the notion of a single traumatic incident under s 21B.[115]

As with work-related stress, because of this single incident requirement, s 21B is incompatible with the reality that workplace bullying is seldom a one-off event. In Australia, where workplace bullying is compensable, 24 per cent of accepted psychological claims concern workplace bullying, amounting to just under 1800 victims a year.[116] As with work-related stress, this statistic alludes to just how many victims likely suffer workplace bullying without compensation in New Zealand.

Cumulatively, these common law examples of deserving claimants being denied compensation for PTSD, stress, and bullying expose the extremely narrow scope of cover afforded to claimants under s 21B. Moreover, the rationale behind each decision exposes the arbitrary way in which s 21B determines which claimants are covered

109 At 360.
110 *Jeffrey v Progressive Enterprises Ltd and Accident Compensation Corporation* [2015] NZACC 004.
111 At [57].
112 "Work-related Mental Disorders Profile" (2015) Safe Work Australia <www.safeworkaustralia.gov.au>.
113 *OCS Ltd v TW and Accident Compensation Corporation* [2013] NZACC 177.
114 At [80].
115 At [80].
116 Safe Work Australia, above n 112.

and which are not. By way of example, one can ask why a police officer suffering PTSD from attending a sole suicide would be covered, but an officer suffering PTSD from being present at *multiple* suicides would not? Similarly, why could a cleaner who suffers manic episodes from one incident of bullying receive compensation, but where the incident is the final trigger in a long line of bullying, the cleaner will not?

Even the judiciary themselves have wrestled with the unprincipled outcomes afforded by s 21B. In what has been described as a "watershed decision",[117] *MC v ACC* took an unequivocally broad interpretation of the meaning of single incident under s 21B(7).[118] In doing so, the case provided compensation for PTSD suffered by a soldier from witnessing several traumatic incidents over a four-month tour, including a fatal aircraft crash and multiple missile attacks.[119] By awarding compensation, the Court showed a willingness to recognise the "constellation of traumatic stressors" as a series of events amounting to a single incident.[120] This watershed decision presents a significant departure from the approach seen in the likes of *OCS*, in which the judiciary declined to recognise a series of events concerning bullying as amounting to a single incident.

While such a generous interpretation can be commended for the compassion it affords to victims of psychological injury, commentators have since criticised the decision for its inability to be reconciled with Parliamentary intention.[121] One can hardly see how a series of events over a four-month military tour can be seen as a single incident, regardless of how generous an approach is taken. Accordingly, as with the criticism of *Geerders*, such a significant departure from established law is a job for Parliament, not the judiciary. Notwithstanding, the judiciary's laudable appetite to expand the scope of s 21B provides considerable rationale for the Act's reform.

Accordingly, when Parliament asserted that reforming the ACA in 2008 would "bring New Zealand into line with the cover offered to workers in most Australian states", they could not have been more mistaken.[122] While Australian law boasts comprehensive compensation for victims of psychological injury, this analysis of New Zealand law exposes significant limitations in the ACA's ability to compensate the individuals it serves. The inequitable and arbitrary outcomes afforded to claimants in these cases are evidence of an unprincipled approach to compensation that is

117 Max Towle "Ex-soldier wins 'watershed' post-traumatic stress case" (2 November 2016) RNZ <www.rnz.co.nz>.
118 *MC v ACC* [2017] DCR 59.
119 At [14].
120 At [23].
121 Cara Crawford "Mental Injury Cover at the Margins" (LLB (Hons) Dissertation, University of Otago, October 2017) at 20.
122 (11 December 2007) 644 NZPD 13879.

remnant of a very different employment landscape. It is for this reason that 7 per cent of successful work-related claims in Australia concern psychological injury,[123] while in New Zealand, the equivalent statistic is only 3 per cent.[124] Accordingly, New Zealand and Australian claimants continue to face a "grossly inequitable divide".[125]

VI. Consequences for Excluded Claimants

This inequitable divide outlined in part V creates significantly different consequences for victims of work-related psychological injury in each country. For Australian claimants, this frequently looks like compensation, rehabilitation, and a relatively expeditious return to work.[126] For New Zealand claimants, the consequences of exclusion are far less promising.

Once excluded from the ACA, a worker then has the right to bring a claim against their employer.[127] Where the worker is an employee, such claims are most frequently made under the ERA as a personal grievance for unjustified disadvantage.[128] The disadvantage in question is the employer's failure to meet their obligations under the Health and Safety at Work Act (HSWA).[129] However, as the CA recognised in *Gilbert*, bringing any of these claims against an employer presents "formidable obstacles".[130]

Firstly, the ERA imposes a 90 day time limit on bringing personal grievance claims. This creates inherent difficulties for workers who experience a delay between the relevant incident and the manifestation of the psychological injury. By way of example, in *Brickell*, the claimant did not present symptoms of PTSD until nine years after he finished filming the traumatic content.[131] Additionally, where the psychological injury is "causally complex", the worker will often face "significant evidentiary hurdles".[132]

Moreover, litigating such disputes is almost always costly, stressful, and time consuming, meaning that pursuing compensation can often worsen the claimant's already impaired psychological health.[133] Additionally, studies note that those suffering psychological injury are significantly less likely to engage in such disputes

123 "Mental Health" (21 November 2019) Safe Work Australia <www.safeworkaustralia.gov.au>.
124 "ACC Injury Statistics 2018/2019" (March 2019) ACC <www.acc.co.nz>.
125 OECD, above n 3, at 16.
126 Safe Work Australia, above n 112.
127 *Queenstown Lakes District Council v Palmer* CA83/98 [1998] NZCA 190.
128 Employment Relations Act 2000, s 103(1)(b).
129 Health and Safety at Work Act 2015.
130 *Attorney-General v Gilbert* [2002] 2 NZLR 342 at [87].
131 *Brickell*, above 104, at [3].
132 Dawn Duncan "Beyond Accident: A Model for the Compensation of Work-Related Harm in New Zealand" (PhD Thesis, Victoria University of Wellington, 2019) at 22.
133 Alex Collie "The Mental Health Impacts of Compensation Claim Assessment Processes" (Paper presented by Insurance Work and Health Group, Monash University, 2008) at 59.

in the first place, due to their adversarial and complex nature.[134] Even if successful, the quantum of compensation awarded is seldom comparable to ACC cover. This is because unlike ACC cover, which compensates for treatment, rehabilitation, and loss of future earnings, such common law claims usually only compensate for lost wages,[135] and "humiliation, loss of dignity, and injury to feelings".[136]

Finally, if the worker is not an employee, such as a contractor, they are unable to make a personal grievance claim under the ERA. While the worker could still bring a tort claim for negligence, breach of contract, or breach of statutory duty, commentary of such claims maintains that "common law remains ill-equipped to compensate psychiatric injury".[137] As a result, very few of these claims have successfully been made in New Zealand.

If a victim of work-related psychological injury is unable to receive compensation under the ACA or successfully sue their employer, and has no private insurance, they will often have no option but to resort to social welfare. Concerningly, a study comparing ACC cover and WINZ payments found overwhelming evidence that victims relying on social welfare took much longer to return to work and were the "most vulnerable for decline into poverty and ill health".[138] Accordingly, it is clear that the limitations of current accident compensation law in New Zealand have significant repercussions for those excluded.

VII. Recommendations for Reform

Having established that a grossly inequitable divide exists between New Zealand and Australian workers' compensation law, there exists a strong case for legislative reform. This article contends that the ACA should be amended to mirror the provisions of Australian law that provide comprehensive cover to victims of work-related psychological injury.

In effect, this would mean that ss 21, 26(1)(c), and 21B are replaced with a blanket provision that provides cover for all recognised mental injury arising out of, or in the course of, a claimant's work. Additionally, the amendment would include the exclusionary provision seen under Australian law, whereby a claimant is not covered if the psychological injury was caused by "reasonable administrative action". This exception would ensure businesses in New Zealand retain reasonable autonomy in

134 "Public Insurance Schemes: Advocating for Mental Injury Claimants" (December 2017) RANZCP <www.ranzcp.org>.
135 Employment Relations Act 2000, s 128.
136 Section 123(1)(c)(i).
137 Crawford, above n 121, at 35.
138 McAllister, above n 5, at 100.

their management of human resources, while recognising that employees are still safeguarded against unreasonable administrative action by the ERA.

This article recommends that two changes should be made when adopting this Australian provision. Firstly, unlike under Australian law, any remaining right to sue should be extinguished where a claimant is compensated. This is consistent with the rest of the ACA, and recognises the founding principles of the scheme, in that the ACA creates a social contract that abolishes the common law right to sue for damages.[139] This change also recognises that the claimant should receive a sufficient quantum of compensation without the need to litigate further. As they can now, a compensated claimant would still be able to bring an action against an employer for exemplary damages.

Secondly, this article contends that unlike under current New Zealand or Australian law, this new provision should apply to *all* workers, not just employees. This would be consistent with the definition of worker in the HSWA, which includes, inter alia, homeworkers, contractors, trainees, and volunteers.[140] While this would inevitably incur greater costs, it recognises that some of New Zealand's industries most at risk of psychological injury are significantly comprised of workers who are not employees. By way of example, volunteers make up over half of the New Zealand Fire Service.[141] Accordingly, this expansion would afford equal treatment and security to all workers, including those who work for no financial gain.

Inevitably, any expansion of cover will incur greater costs. It is these financial implications that create the strongest argument against such reform. However, there are a number of considerations that mitigate these concerns.

Firstly, because the injury suffered must still be a recognised DSM-5 impairment and must be work-related, it is unlikely this expansion of cover will open the floodgates too wide. Currently, the comprehensive nature of Australia's workers' compensation schemes mean that, annually, their proportion of compensated claims for work-related psychological injury compared with physical injury is two times greater than in New Zealand.[142] Accordingly, if the ACA was reformed, we could broadly expect the number of work-related claims for psychological injury in New Zealand to double. Because work-related claims for psychological injury in New Zealand account for just 1.8 per cent of total claims, this expansion is unlikely

139 Section 3.
140 Section 19.
141 Department of Labour *Legislative Options for Expanding Cover for Work-Related Conditions*, Paper 1, "Mental Injury Caused by a Work-Related Traumatic Event" (07/67318, 18 May 2007) at 2.
142 Safe Work Australia, above n 123; and "ACC Injury Statistics 2018/2019" (March 2019) ACC <www.acc.co.nz>.

to cost any more than an additional 2–3 per cent.[143] Accordingly, such reform would only impose a relatively small addition to the scheme's total cost.

Moreover, while the expansion may increase costs to employers and independent contractors in the form of slightly higher levies, this increased cost should be recognised as a redistribution of money already being spent elsewhere.[144] This is because the reform would reduce costs incurred by employers litigating personal grievance claims, as well as costs incurred by the tax payer in providing social welfare to victims who are refused compensation. Additionally, this redistribution would likely reduce costs to the public health system, as well as costs associated with absenteeism and presenteeism. Acknowledging this redistribution is crucial, because the OECD estimates that mental health conditions currently cost New Zealand 5 per cent of our nation's GDP.[145] Therefore, although such reform will inevitably increase the scheme's cost, this will be largely offset by savings in other areas of the economy.

As a final consideration, it is worth noting that current compensation law in New Zealand disproportionately disadvantages females and Māori people. With regard to gender, this is because jobs in female-dominated industries, such as administration and social work, typically have risk profiles associated with psychological injury.[146] Additionally, Australian statistics show that "women are three times more likely than men to have a claim caused by work-related harassment".[147] As a result, women are disproportionally disadvantaged by the Act's failure to compensate for work-related harassment.

With regard to ethnicity, a 2011 study found that Māori workers are at greater risk of developing a psychological injury from work-related stress than other ethnicities.[148] Accordingly, the ACA's limited cover for work-related stress disproportionately disadvantages this ethnic group. This concern was echoed by the OECD in 2018, who "explicitly identified Māori as particularly impacted by the current limits of ACC cover".[149]

143 "Mental Injury Claims under the Accident Compensation Act 2001 from 2014 – 9 June 2019" (22 July 2018) (Obtained by a request under the Official Information Act 1982).

144 Rod Vaughan "Leading Lawyers back ACC Revamp" (23 November 2018) Auckland District Law Society <adls.org.nz>.

145 OECD, above n 3, at 26.

146 SafeWork Australia *Work-Related Mental Disorders Profile 2015* (SafeWork Australia, 2016).

147 SafeWork Australia *The Incidence of Accepted Workers' Compensation Claims for Mental Stress in Australia* (April 2013) at 12.

148 Amanda Eng and others "Ethnic differences in patterns of occupational exposures in New Zealand" (2011) 54 American Journal of Industrial Medicine 410.

149 Duncan, above n 132, at 118, referring to OECD *Mental Health and Work: New Zealand Mental Health and Work* (OECD Publishing, Paris, 2018) at 10.

Therefore, by amending the ACA to compensate all victims of work-related injury, this reform will collaterally improve the experience of these equity groups who have been disproportionately disadvantaged by the Act to date.

As a final observation, the scope of this article has intentionally been limited to victims of work-related psychological injury. However, a number of the arguments made inevitably provide rationale to expand cover to *all* victims of psychological injury. Under the ACA, victims of almost all physical injuries are eligible for compensation, regardless of whether or not the injury was suffered at work.[150] Accordingly, one can question whether cover should be afforded to *all* victims of psychological injury, irrespective of where suffered. Rationale for this notion was illustrated in 2019 when a plumber driving to a job was witness to a murder during the Christchurch mosque shootings.[151] Upon developing PTSD, the plumber was compensated under s 21B of the ACA.[152] However, uninjured mosque attendees who developed PTSD after witnessing *multiple* murders were denied compensation, simply because they were not working.[153] Such an arbitrary and inequitable disparity in treatment is difficult to rationalise. While beyond the scope of this article, this example alone suggests the strength of an argument for reform that is even more wide reaching than the one proposed by this paper.

VIII. Conclusion

When the ACC scheme was created in 1972, Parliament's intentions were unambiguous – "logic and justice require that *every* citizen who is injured must be included".[154] However, while Australia's workplace compensation law has retained comprehensive cover since its inception, New Zealand's scheme today is but a shadow of its former self. As a result, the ACA arbitrarily excludes a concerning number of virtuous claims. Yet in an employment landscape where workers are more at risk of psychological injury than ever, the inequitable treatment of victims of psychological injury is increasingly untenable.

Accordingly, this article recommends that Parliament reform the ACA to mirror the comprehensive cover afforded to victims of work-related injury under Australian law. Such reform would boast a principled approach that will ensure victims are afforded early intervention, giving them the best chance at rehabilitation and

150 Section 20.
151 David Williams "Ministers vetoed ACC extension for terror victims" (16 July 2019) Newsroom <www.newsroom.co.nz>.
152 Williams, above n 151.
153 Williams, above n 151.
154 The Woodhouse Report, above n 26, at 40 (emphasis added).

returning to work. While expansion is not without fiscal concerns, any associated cost is a small price to pay to afford parity to victims of psychological injury and champion the mental health of New Zealand workers for generations to come.