

# Preventing Mental Harm in the Workplace

*WHS Committee Member Training 26 July 2017*

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## Introduction

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As indicated in the previous paper, mental health and stress claims in the workplace are on the rise and, consequently, the importance of implementing safe systems of work, in order to reduce employee exposure to mental harm in the workplace and ensure compliance with the *WHS Act* is now more important than ever.

This paper seeks to identify certain mechanisms which can be implemented within a workplace, to ensure compliance with the *WHS Act* and prevent employee exposure to mental harm within the workplace, taking into account workplace realities and practicalities.

## 1. The Need for Practicality

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In SafeWork Australia's Fact Sheet, titled "Preventing Psychosocial Injury under Work Health and Safety Laws" ("The Fact Sheet"), the following are identified as potential hazards/risks of psychological injury occurring in the workplace:

- Environmental factors: exposure to poor air quality, high levels of noise and extreme temperatures;
- Organisational elements: job demands and control, the level of support, work place relationships and role ambiguity; and/or
- Individual aspects: individual differences resulting in susceptibility to harm, which may be more prevalent in workers with disabilities, illnesses and new/young workers<sup>i</sup>.

Similar factors are also identified in SafeWorkSA's "How to Manage Work, Health and Safety Risks Code of Practice" ("The Code of Practice").

The Fact Sheet then goes on to stipulate certain control measures workplaces can implement to focus on each of the three-abovementioned areas of concern.

However, what both documents fail to do is adequately address the issue of how each of the numerous control measures suggested can possibly be addressed by employers in a way that is reasonably practicable.

Under the *WHS Act*, duties imposed to ensure the health and safety of employees require the duty holder to either eliminate the risk(s) (insofar as is reasonably practicable) or, if it is not reasonably practicable to eliminate the risk, to minimize the risk(s) (insofar as is reasonably practicable).<sup>ii</sup>

The *WHS Act* identifies a number of different variables considered when determining what is ‘reasonably practicable’; they are:

- The degree of harm that might result from the hazard/risk;
- The knowledge or what ought to have reasonably known by the PCBU;
- The availability/suitability of ways to eliminate/minimize the risk; and
- The costs associated with eliminating and/or minimizing the risks.<sup>iii</sup>

I will now identify practicable systems of work, which can be realistically implemented to assist in the prevention of mental harm within the workplace.

## 2. Pre-employment

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In the previous paper, we touched on an employer’s common law duty to avoid risk of harm to employees. It is important to note that the High Court has determined that, whilst it is well known that stress can bring about some psychiatric injuries, the common law *does not* impose an overarching duty on all employers to recognize that all employees are at risk of psychiatric injury from stress at work<sup>iv</sup>.

Rather, the common law duty of care will only be ‘activated’ if a psychological injury to a particular employee is reasonably foreseeable. In other words: was there any information known, or which reasonably ought to have been known, by the employer which would indicate that that particular employee was vulnerable to developing such an injury?<sup>v</sup>

This question is, of course, to be determined on a case-by-case basis in accordance with the specific circumstances.

The case above demonstrates the importance of an employer identifying potential mental health hazards at the outset of employment, through the use of effective screening mechanisms.

Apart from requiring prospective employees to undergo psychiatric or psychological assessment, an effective measure which can be implemented by employers is to require all prospective employees to undergo a pre-employment questionnaire, which they sign upon completion, stipulating:

1. Whether they are aware of any (and if so, what) physical and/or psychological health conditions which may adversely affect their performance;
2. Whether or not they have previously suffered any (and if so, what) injuries at work and, if so, whether those injuries were the subject of a Workers Compensation claim; and
3. That in the event they provide untruthful/inaccurate representations, regarding any such conditions or claims, this will give rise to the employer being entitled to summarily dismiss the employee without notice.

Whilst there is no legal obligation on an employee to disclose information about a disability<sup>vi</sup>, such a strategy does impose a positive obligation upon the employee to disclose requested information if it may adversely affect their job performance and requires them to be honest about any previous claims.

It is well known that past behaviour and history is a predictor of future behaviour and events. Consequently, if a prospective employee discloses a history of mental health conditions, especially those which have occurred at work, that are likely to adversely affect their performance, then this process enables the employer to deem them inappropriate and/or unsuitable for the position.

If no such disclosure is made by the prospective employee, the employer is entitled to proceed on the assumption that the employee is able to do the work they were originally contracted to do.<sup>vii</sup>

Furthermore, the employer is also able to argue they were not aware of any information, which would make worker X more vulnerable, as they did not disclose any such information when asked to do so.

Lastly, it also enables the employer to terminate employment of worker X if any information is later identified which would make them more vulnerable, provided the worker would have been aware of at the time and, consequently, should have disclosed that information.

This therefore eliminates an injury occurring to the worker, which may have been reasonably foreseeable by the employer, once information regarding certain vulnerabilities had become known by the employer.

### 3. Identifying Potential Hazards in the Workplace

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It is crucial for employers, managers, supervisors, and workers to ensure they know how to identify potential hazards and how to act appropriately in addressing and responding to any hazards identified.

Early detection of mental health hazards can go a long way in preventing a situation deteriorating and/or a worker developing a mental disorder/psychological injury<sup>viii</sup>.

Unfortunately, it is rather unlikely a worker will promptly (if at all) inform an employer, supervisor, manager, and/or colleague about any of the difficulties they may encounter or, specifically, the effect it may be having upon them. The worker themselves may not even recognize that something is having an adverse effect on their mental health until it is too late.

Thus, it is imperative that all members of staff are aware of and are on the lookout for signs of job stress and/or distress.

There are three key mechanisms, which can be utilised by employers and management to identify and track potential mental harm hazards in the workplace, namely:

1. Review: incident reports, Worker's Compensation Claims, patterns of absenteeism, sick leave, staff turnover and staff complaints;
2. Observe: deteriorating work performance, employee interactions; and
3. Seek feedback: one on one discussions with employees, surveys, and focus groups.

Each of the abovementioned mechanisms can be utilised to not only identify the potential hazards but also to control them.

It may also be advisable for employers to send certain staff members, such as management, supervisors, team leaders and Work Health and Safety Representatives and/or committee members to mental health seminars.

As many of you are no doubt aware, Lifeline is an Australian organization aimed at assisting Australians who are experiencing personal crisis.

We know that Lifeline Adelaide offers a variety of workplace training, such as Mental Health First Aid, safeTALK and Mental Health Aware. Providing courses such as these to a number of staff members will assist in a vast number of employees being able to identify risks to mental health and address them effectively and efficiently; thus assisting with the prevention of mental harm in the workplace.

Of course, how many staff can attend and the regularity of such training will be determined in accordance with what is reasonably practicable within the workplace.

#### 4. Customary Methods of Practice

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An element of providing safe systems of work is ensuring the workplace has standards with respect to the handling of specific matters, which may affect workplace health and safety.

Safe systems of work should always reflect the importance of eliminating the potential hazards (where it is reasonably practicable to do so). However, mental health hazards are unlike physical hazards, in that they are not as easy to identify, nor remove. Thus the mechanisms must focus more addressing ways in which the hazards can be minimized (insofar as it is reasonably practicable to do so).

In the context of potential psychological injuries, workplaces should ensure they have appropriate mechanisms in place to deal with bullying and the management of complaints.

With respect to a mechanism to control bullying, it is important to ensure the concept of bullying is unambiguously defined; in other words, what is acceptable behaviour and what is not. Again, any such mechanism needs to take into account the diversity within workplaces and individual differences; some people may be more sensitive than others and, of course, cyber bullying needs to also be differentiated and dealt with too.

A mechanism to address bullying is ineffective if a workplace does not have an appropriate complaints management and handling process. Any such mechanism should identify a step-by-step process including how an individual may make an initial 'informal' complaint, the filing of a formal complaint and how and by whom the complaint will be dealt with. Of course, each step of the process should also identify the potential ways in which the complaints can be resolved; such as warnings, mediation, interviews and investigations and the process for review of decisions.

A complaints management process should implement the most effective and efficient way to deal with any complaints raised (not just those pertaining to bullying), as matters, which are drawn out or delayed, can cause obvious further distress for individuals involved.

In saying this, however, a workplace should ensure the process complies with procedural fairness. The fundamental requirement of procedural fairness is to permit a person, against whom allegations have been made, to have a fair and adequate opportunity to consider, receive advice and respond to any such allegations.

Thus, the process should ensure that, prior to approaching and advising an alleged wrongdoer of any allegations, there is merit in the complaint and particulars of the alleged offending behaviour have been ascertained and are provided to the alleged wrongdoer in an appropriate manner.

Of course, it goes without saying that the handling of any complaints should be dealt with discreetly and should remain confidential.

Whilst there is no specific requirement that written policies and/or procedures be put into place it is advisable to do so, especially regarding bullying and the management of such complaints. Written policies/procedures will ensure consistency in the approach taken.

In saying this, however, it is important to note that a court or tribunal will not consider written policies/procedures, which are not followed/implemented, as the “safe system of work”. Instead, they will look to the usual, customary method of carrying out the operation (i.e. the procedure(s) actually used and operated at the place of work)<sup>ix</sup>.

Therefore, to ensure compliance with the *WHS* Act, safe systems of work must not only be provided but closely implemented.

Research conducted in 2014 shows that, whilst 81% of organizational leaders indicate that their workplace has one or more policies/procedures to support mental health, 35% of employees did not know that such resources exist and/or did not have access to them<sup>x</sup>.

Thus, if a workplace elects to document their customary method of practice, they should also ensure employees are made aware of the existence of any such documents; otherwise the document and process is rather redundant.

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## 5. Return to Meaningful Work

In the earlier paper, we briefly touched on the obligation imposed on the Return to Work Corporation and employers (by the *RTW Act*) to provide injured employees with return to work services and plans; aimed at returning the worker to the community and workforce in a timely manner.

The *RTW Act* also stipulates that an employer must provide suitable employment (for which the worker is fit and medically cleared to complete) to an injured worker ready to return from a period of incapacity.<sup>xi</sup>

The suitable work must be the same as, or equivalent to the work previously performed by the worker immediately prior to the incapacity; in so far as is reasonably practicable.<sup>xii</sup>

Whilst not specifically stated in the legislation, an employer should always ensure that the work provided is meaningful; an injured worker returning to work should not be discriminated against as a result of their injury.<sup>xiii</sup>

Total or partial loss of a person's mental functions and/or disorders that affect a person's thought processes, perception of reality, emotions or judgment are described as "Disabilities" under the *Disability Discrimination Act 1992*<sup>xiv</sup>.

Consequently, a worker with a psychological injury may potentially fall within this category and be afforded protection under the legislation. Thus, employers must also ensure that reasonable adjustments are made, upon the worker returning to meaningful work.<sup>xv</sup> Such adjustments may include:

- Flexible working arrangements (i.e. a gradual return to work); and
- Modifying the workstation.<sup>xvi</sup>

Research indicates that, within the first 3 months of returning from injury, the setting of recovery expectations and the perceived support received from an employer (and, of course management/supervisors) have profound effects on the employee's long-term health (especially their mental health) and return to work outcomes.<sup>xvii</sup>

Indeed we have also seen this in a number of the claims we have managed. There have been a number of instances where a worker has returned to work, however, the workplace has failed to provide them with a workspace and/or any duties. Of course, in many instances, this creates and/or exacerbates the worker's levels of stress and can cause difficulties in the worker's successful return to work and their overall mental health.



Thus, by enabling injured workers to return to meaningful work employers can limit the possibility of employee exposure to mental health hazards.

## 6. Review

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None of the abovementioned measures are truly effective in preventing mental harm within the workplace if they are not reviewed and updated.

SafeWorkSA's Code of Practice indicates that reviews should occur in the following circumstances:

- When there is an incident (i.e. someone is exposed to a hazard);
- A new hazard is identified;
- Prior to any significant change in the workplace; and
- At the request of Work, Health Safety Representatives and/or Committee members.<sup>xviii</sup>

Of course, any requests for review must be reasonable.

## Concluding Remarks

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What is evident from the examples provided here today is that preventing mental harm in the workplace is not as simple as the SafeWork Australia Fact Sheet might have you believe. Practical realities and restrictions need to be considered.

The most effective way for employers to prevent mental harm is to Review, Observe and seek Feedback. However, preventing mental harm is not only the responsibility of the employer, management or supervisors. It requires a collective approach, from all members of staff.

As members of Work Health and Safety Committees, you have the responsibility and ability to assist in ensuring your mental health and that of your colleagues.

I hope the abovementioned services and the two papers presented today provide all of you with helpful support and information, which will enable Uniting Communities to maintain a mentally healthy workplace.

## References

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- <sup>i</sup>Safe Work Australia, *Preventing Psychological Injury under Work Health and Safety Laws Fact Sheet* (May 2014), page 2.
- <sup>ii</sup>*Work, Health and Safety Act 2012*, s17.
- <sup>iii</sup>*Ibid*, Section 18.
- <sup>iv</sup>*Koehler v Cerebos (Australia) Ltd* (2005) 222CLR44.
- <sup>v</sup>*ibid* [40].
- <sup>vi</sup>Australian Human Rights Commission (*Worker's with Mental Illness: A Practical Guide for Managers*) (2010), page 9.
- <sup>vii</sup>Above n vi, [40].
- <sup>viii</sup>Safe Work Australia <<https://www.safeworkaustralia.gov.au/topic/mental-health>>.
- <sup>ix</sup>*Cullen v State Rail Authority*, (1989) 31IR207, page 219; *Inspector Davies v Supercoat Feeds Pty Ltd (Unreported, Industrial Court of NSW, 1997)*, paragraph 16.
- <sup>x</sup>Beyond Blue and TNS, *State of Work Place Mental Health in Australia*, (2014), page 1.
- <sup>xi</sup>*Return to Work Act 2014*, s 18.
- <sup>xii</sup>*Ibid*.
- <sup>xiii</sup>SafeWork Australia, *Worker's Compensation Legislation and Psychological Injury Fact Sheet* (May 2014), page 3.
- <sup>xiv</sup>*Disability Discrimination Act 1992*, s4.
- <sup>xv</sup>*Ibid*, s 5.
- <sup>xvi</sup>Safe Work Australia <<https://www.safeworkaustralia.gov.au/topic/mental-health>>.
- <sup>xvii</sup>Dr Peter Cutton, *Workplace Psychological health and wellbeing: an overview of key trends*, InPsych – the bulletin of the Australian Psychological Society Limited (December 2014) 9, page 10.
- <sup>xviii</sup>SafeWorkSA, *How to Manage Work Health and Safety Risks –Code of Practice Fact Sheet* (Jan 2017), page 2-3.