

MENTAL HEALTH

SPECIAL ISSUE



ILLUSTRATIONS BY CAROLYN RIDSDALE

Eliminating mental health hazards

The fictitious firm, Hope & Associates, embarks on understanding its obligations under occupational health and safety law in managing the risks of mental harm in its workplace. **BY CHRIS MOLNAR**

SNAPSHOT

- This article follows the story of the fictitious law firm, Hope & Associates, which is concerned about mental health in its workplace.
- The firm embarks on a journey to understand what OHS law requires it to do to manage mental health hazards.
- The journey begins – journeys begin – with a memo.

Imagine the managing partner of Hope & Associates, Kate Stuckworth, in the firm's impressive boardroom as she reflects on the future of her firm. A macchiato, freshly made from the firm's new espresso machine, sits neatly in front of her.

"We have done well," she thinks. "Our revenue is up, we have more partners and the market is growing." But Kate is unsettled. "We have high absentee rates, partners and employees complain about bullying, and one lawyer is on extended leave due to stress. We can and should do better," she concludes, sipping her coffee.

Kate presses the extension number of the firm's latest associate, Amy Truefields, and, after

a request to come to the boardroom, Amy enters.

"Amy, I am troubled. The firm does very well but there is all this talk about mental health. We are lawyers and we comply with the law, so I need to understand, as a starting point, what needs to be done legally under OHS legislation," Kate says.

"I would like you to draft a memo identifying the legal obligations of the firm to look after the mental health of its employees under the legislation. This is an important memo and it may change the way the firm thinks about mental health so please spend some time on it. Thank you."

A week later, Amy returns to the managing partner with the memo.

"Kate, here is the memo. I have identified your key obligations. They are extensive."

"Thank you, Amy. You have done well. This is an excellent starting point."

As Amy leaves the boardroom, Kate considers how she will implement change in the firm to ensure compliance with the law. "We will need to think about that."

Amy's memo is set out here.

MEMORANDUM

To: Kate Stuckworth, Managing Partner, Hope & Associates

From: Amy Truefields, Associate, Hope & Associates

Subject: Mental Health and Legal Industry Employers – Legal Obligations under the *Occupational Health and Safety Act 2004* (Vic) (OHS Act)

The OHS Act and the Regulations made under that Act, federal and state discrimination laws,¹ and the common law (duty of care) are the sources of legal obligations on employers in managing mental health issues in the workplace.

This memo focuses on key obligations under the OHS Act.

Occupational Health and Safety Act 2004 (Vic)

The principal duty of Hope & Associates to its employees under the OHS Act is imposed by s21(1), which requires the firm to provide and maintain, so far as is reasonably practicable, a working environment that is safe and without risks to health. Health is defined in s5 as including psychological health.

Particularly relevant to the legal profession are the requirements under s21(2)(d) to provide, so far as is reasonably practicable, adequate facilities for the welfare of its employees and under s21(2)(e) information, instruction, training or supervision as is necessary to enable its employees to perform their work in a way that is safe and without risks to health.

A breach of the OHS Act or its Regulations gives rise to criminal liability, with some breaches treated as indictable offences and others heard summarily. A maximum of 9000 penalty units can be imposed on a body corporate or 1800 penalty units on a natural person for a breach of the principal obligation: s21(1) of the OHS Act. →

Employers may also be subject under s111 to an improvement notice requiring them to remedy a contravention or a prohibition notice under s112 to stop them from carrying on an activity.

The principal duty extends under s22(1) requiring Hope & Associates, so far as is reasonably practicable, to monitor its employees' health, monitor workplace conditions and provide information to its employees concerning health and safety. Further, s22(2) requires an employer, so far as is reasonably practicable, to keep health and safety information and records, and employ or engage suitably qualified people to provide advice on health and safety.

Section 35 requires Hope & Associates to consult, so far as is reasonably practicable, with its employees in respect of health and safety matters in the workplace, such as hazard identification or assessment, or decisions about controlling risk in the workplace.

The OHS Act requires, in effect, a systemic risk management approach by Hope & Associates to eliminate, so far as is reasonably practicable, risks to the mental health and safety of its employees in the workplace, and, if that is not reasonably practicable, to reduce those risks so far as is reasonably practicable: s20(1) of the OHS Act.

Hope & Associates now has access to a wealth of information and advice to assist its risk management of hazards affecting mental health in the workplace.² Indeed, under s20(2)(c) what a person knows, or ought reasonably know, about the hazard or risk

and any ways of eliminating or reducing the hazard or risk are matters to be taken into account in determining what is reasonably practicable.

The ready availability of recent research and risk

a three level classification of job stress interventions. Primary preventive interventions are seen as proactive, with the aim of preventing the occurrence of mental illness in the workplace.³ These interventions most closely align with the risk management approach of an employer required under the OHS Act.

Primary interventions address the "sources of stress"⁴ and would include, in a legal context, proper job design, reasonable work hours and expectations, workplace training, a workplace free from discrimination, harassment and bullying, effective policies, and a supportive workplace culture led by the example of the partners and management.

Secondary interventions target the individual, aiming to change an "individual's response to stressors"⁵ in the workplace by modifying or controlling their approach to stressful situations through, for example, yoga or meditation classes.

Tertiary interventions are "reactive",⁶ dealing with the problem of stress once it is present through, for example, counselling, rehabilitation and return to work programs.

It is important to understand that while all three interventions may be necessary in a workplace, the interventions are on a scale from most effective to least effective, with primary interventions the most effective.⁷ The Tristan Jepson Memorial Foundation Psychological Wellbeing: Best Practice Guidelines for the Legal Profession (TJMF Guidelines) are a valuable source of potential primary interventions tailored to the legal profession at four levels of implementation: basic, standard, advanced and best practice.

Reduced risk of claims

The adoption of a risk management approach to the potential for harm to mental health should reduce the risk of legal claims against Hope & Associates for mental illness arising from the workplace in other areas, specifically:

- WorkCover claims under the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) seeking weekly compensation for loss of earnings and medical and like benefits;
- claims for discrimination or harassment on the basis of disability, including mental disability, as prohibited by the *Disability Discrimination Act 1992* (Cth) and *Equal Opportunity Act 2010* (Vic), and seeking remedies including injunctions and compensation;
- claims of unlawful adverse action based on mental disability as proscribed by s351 of the *Fair Work Act 2009* (Cth), and seeking remedies including injunctions, compensation and penalties; and
- claims at common law for negligence, seeking damages based on, for example, the employer's vicarious liability for bullying and harassment by other employees, and the employer's breach of duty of care relating to workplace safety. A common law action could also be brought for the breach of the employer's implied duty in the contract of employment relating to workplace safety.

Recommendations

My recommendations for Hope & Associates are as follows:

- the firm should form a workplace health and safety



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management strategies to deal with hazards affecting mental health in the workplace means that an employer in the legal industry will have less ability to argue that it was not reasonably practicable to eliminate or reduce the risk.

The potential types of hazards to mental health in a workplace are many and varied. They include excessive hours, humiliating behaviour, bullying, unreasonable expectations, lack of training, discrimination, sexual harassment, adverse attitudes to parental responsibilities and part-time work, poor work processes, including grievance processes and incident management, inadequate equipment and hostile cultures.

In 2006 VicHealth released its report "Workplace Stress in Victoria: developing a systems approach". The report adopts

committee (WHS Committee) composed of partners, management, lawyers at different levels, and secretarial and administrative staff. The committee should meet regularly to consider safety in the firm, make recommendations to the partners and consult widely within the firm;

- in conjunction with the WHS Committee, the firm should sign up to and audit itself against the TJMF Guidelines and identify any gaps. The audit would include a staff survey to identify hazards, a review of existing policies including safety, bullying, discrimination, flexible work conditions and grievances, and an assessment of existing training and education. Compliance with the OHS Act should also be audited.

In addition, the firm should:

- identify any required changes to systems, processes, policies, training and review mechanisms;
- ensure that partners and senior management are made aware of, and accept, their obligations and the need for any change;
- to the extent that change is required, consult with its employees on the rationale for, and the extent of, the changes. Any feedback should be taken into account;
- implement any required changes;
- undertake an ongoing risk management approach, involving the identification of hazards, a risk analysis of those hazards and steps to eliminate the hazards, as far as is reasonably practicable, and, if that is not reasonably practicable, to reduce those risks so far as is reasonably practicable; and
- review the implementation of changes and compliance with the OHS Act at regular intervals.

Conclusion

This memo outlines the legal obligations of Hope & Associates for the health and safety of its employees under the OHS Act.

Furthermore, there are potentially non-legal benefits in improving health and safety in a workplace, including higher job satisfaction, higher retention, higher productivity, fewer absent days, and reduced injury and illness rates. These outcomes reduce costs and increase revenue, with an overall expected increase in profit. A non-discriminatory workforce should also promote a diverse workforce, maximising the range of available knowledge, skills and abilities.

The case for a safe workforce is compelling.

Amy Truefields 2015 ■

Chris Molnar is a partner at McKean Park and an LIV workplace relations accredited specialist.

1. *Disability Discrimination Act 1992* (Cth), *Equal Opportunity Act 2010* (Vic).

2. "Workplace Stress in Victoria: developing a systems approach", Report to the Victorian Health Promotion Foundation, May 2006; "Mental Health and the Legal Profession: A Preventative Strategy, Final Report", LIV, 11 September 2014; "Officewise – A guide to health & safety in the office", Worksafe Victoria, January 2006; "Preventing work-related stress", Worksafe Victoria, June 2009; "Reducing stress in the workplace", VicHealth, March 2012; "Tristan Jepson Memorial Foundation Psychological Wellbeing: Best Practice Guidelines for the Legal Profession", Tristan Jepson Memorial Foundation; www.headsup.org.au.

3. "Workplace Stress in Victoria, Developing a systems approach", Report to the Victorian Health Promotion Foundation, May 2006; p21.

4. Note 3 above.

5. Note 3 above.

6. Note 3 above.

7. Note 3 above. "Preventing work-related stress", Worksafe Victoria, June 2009; "Reducing stress in the workplace".

Judging stress

Given the impact of judicial decisions on people's lives, courts have a duty to consider and promote judicial wellbeing. **BY CARLY SCHREVER**

Former judge of the High Court, Michael Kirby, was the first Australian judicial officer to speak publicly about the idea of judicial stress calling it "an unmentionable topic" and pointing to the "traditionally stress denying" culture of the judiciary.¹ Indeed, in 1997, a number of his fellow judges vehemently condemned his drawing attention to the issue, with one superior court judge accusing him of "jumping on the stress band wagon", which was likely to "release howls of derision" from the public and the profession, and saying that "judges need adrenaline or pressure to produce their best work".² After responding to these comments, Justice Kirby, and the Australian judiciary generally, remained silent on the topic for the next 15 years.

The reluctance of judges and the courts to discuss judicial stress is understandable.

Judicial office is a privileged position, and the complaints of the privileged are not typically met with great public sympathy. More than this, the judicial function imposes superhuman expectations on judicial officers to represent perfect wisdom, temperance and insight, and restore justice and truth to complex and broken human circumstances. It is perhaps unthinkable that those who stand in judgment on others might themselves be human, and subject to human vulnerabilities. In their concern to preserve public confidence in the courts, judges may not have felt free to explore the psychological impact of judicial work. →

SNAPSHOT

- Judicial officers are uniquely placed at the crossfire of risk factors for work-related stress, and their wellbeing is an important community concern.
- Judicial stress is under-researched, meaning that very little is known about the nature, prevalence, severity and sources of judicial officers' work-related stress.
- The Judicial College of Victoria, in conjunction with Victorian courts, is undertaking four important initiatives to support judicial wellbeing.