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# The Tip of the Iceberg: Psychosocial Injury in the School Workforce

## Managing psychosocial hazards in schools

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*This paper is provided for educational purposes. It is not intended as legal advice.*

### 1 Introduction

- 1.1 Not unlike the duty of care owed to students, schools have a duty to ensure the health and safety of teachers and other school staff (including volunteers, and persons 'working' without receiving payment). Health and safety legislation (and common law) across Australia provides that this positive duty extends to the health and safety of employees in relation to psychological harm and injuries.
- 1.2 The school environment has a unique nature compared to other workplaces, which presents a number of unique hazards and risks in relation to the psychological health of employees. For example, the behaviour of children and young people, or the actions of parents who may seek to do no more than achieve the best very for a child, may present challenges.
- 1.3 Schools, in their capacity as employers, must ensure, so far as reasonably practicable, the health and safety of workers engaged, or caused to be engaged by the employer - and other workers whose activities in carrying out their work are influenced or directed by the employer - whilst at work.<sup>1</sup> The duty to eliminate (or minimise so far as reasonably practicable) psychosocial hazards is encompassed by this duty of care.<sup>2</sup>

### 2 A School's duty of care to employees

- 2.1 Work health and safety (and occupational health and safety) laws across Australia provides that a duty of care relationship between employers and employees exists at both common law and under legislation. A breach of duty of care arises from one party acting, or failing to act, in a manner inconsistent with that duty; and which results in an injury to the other party and causes them harm or to suffer a loss.
- 2.2 At common law, there is an implied duty of care in the employer-employee relationship. The High Court has expressed this as "a duty to take reasonable care to avoid exposing employees to unreasonable risks of injury".<sup>3</sup>
- 2.3 The relevant legislation establishing a statutory duty of care is as follows:
  - (a) *Occupational Health and Safety Act 2004* (Vic);
  - (b) *Work Health and Safety Act 2011* (Cth);
  - (c) *Work Health and Safety Act 2011* (NSW);
  - (d) *Work Health and Safety Act 2011* (Qld);

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<sup>1</sup> See for example, *Work Health and Safety Act 2011* (Cth) s 19.

<sup>2</sup> *Work Health and Safety Regulations 2011* (Cth) Div 11.

<sup>3</sup> *Hamilton v Nuroof (WA) Pty Ltd* (1956) 96 CLR 18, 25.

- (e) *Work Health and Safety Act 2020* (WA);
- (f) *Work Health and Safety Act 2012* (SA);
- (g) *Work Health and Safety Act 2012* (Tas);
- (h) *Work Health and Safety (National Uniform Legislation) Act 2011* (NT);
- (i) *Work Health and Safety Act 2011* (ACT).

In this paper, references will primarily focus on the relevant provisions of the Federal, State and Territory work health and safety legislation (the **Corresponding WHS Law**).

- 2.4 The Corresponding WHS Law provides that psychological health is encompassed in the definition of 'health'.<sup>4</sup> Further, matters relating to hazards and risks include the exposure to psychological hazards.<sup>5</sup> However, there are no specific regulations in relation to psychosocial hazards or risks.

#### *The Victorian position*

- 2.5 In Victoria, the *Occupational Health and Safety Act 2004* (Vic) is the principal legislation governing workplace health and safety. Similarly, there are no specific psychosocial safety regulations in place and the definition of 'health' includes 'psychological health'.<sup>6</sup>
- 2.6 Victoria's legislation provides that an employer "must, so far as reasonably practicable, provide and maintain for employees of the employer a working environment that is safe and without risks to health".<sup>7</sup> Therefore, Victorian schools – in their capacity as employers – must provide and maintain a working environment that is safe and without risk to *psychological* health, so far as reasonably practicable.
- 2.7 In 2022, the Victorian Government proposed the *Occupational Health and Safety Amendment (Psychological Health) Regulations*. The Victorian Government is yet to implement the proposed regulations, however.
- 2.8 If passed, these regulations will require Victorian employers to identify and eliminate psychosocial risk or, where it is not practical, reduce the risk so far as reasonably possible. Further, the Victorian reforms will implement a report requirement; employers with more than 50 employees will be required to report to WorkSafe Victoria twice yearly on 'reportable psychosocial complaints including bullying and sexual harassment'.

### 3 **Duty to manage psychosocial hazards**

- 3.1 In all states other than Victoria, schools must manage psychological risks in accordance with the Corresponding WHS Law.<sup>8</sup> This means, schools must take positive steps to manage psychosocial health risks inherent to a staff member's job, regardless of whether the employee has shown warning signs of mental illness.

<sup>4</sup> *Work Health and Safety Act 2011* (Cth) s 5, *Work Health and Safety Act 2011* (WA) s 5, *Work Health and Safety Act 2011* (Qld) s 5, *Work Health and Safety Act 2011* (NSW) s 5, *Work Health and Safety Act 2011* (SA) s 5, *Work Health and Safety Act 2011* (TAS) s 5, *Work Health and Safety (National Uniform Legislation) Act 2011* (NT) s 5, *Work Health and Safety Act 2011* (ACT) s 5.

<sup>5</sup> *Work Health and Safety Act 2020* (WA) s 5.

<sup>6</sup> *Occupational Health and Safety Act 2004* (Vic) s 5.

<sup>7</sup> *Occupational Health and Safety Act 2004* (Vic) s 21(1).

<sup>8</sup> *Work Health and Safety Regulations 2011* (Cth) reg 55C, *Work Health and Safety Regulations 2017* (NSW) reg 55C, *Work Health and Safety Regulation 2011* (Qld) reg 55C, *Work Health and Safety (National Uniform Legislation) Regulations 2011* (NT) reg 55C, *Work Health and Safety Regulations 2012* (SA) reg 55C, *Work Health and Safety Regulation 2011* (ACT) reg 55C, *Work Health and Safety Regulations 2022* (Tas) reg 55C.

3.2 Schools are required to meet their duties in ensuring the health and safety of all staff, and must eliminate or reduce psychosocial risks, so far as reasonably practicable. To achieve this, just as with other hazards in the workplace, schools are expected to adopt a risk management process. *This process is discussed at paragraph 7 'What are schools expected to do?'*

3.3 Of course, the unique nature of schools requires employers to balance a range of interests when considering outcomes in relation to upholding the duty of care owed to employees. Schools also owe a duty of care to students, and often schools will be required to balance the duty owed to staff, students, and combinations of both cohorts. For example, there may be circumstances where a particular student's behaviour towards a teacher poses a risk of psychological harm; whilst the school may owe a duty to protect that teacher from harm, it also owes a duty of care to the student, and additional duties if the student happens to have a disability. A strong reaction by the teacher to a student's behaviour may then also enliven the school's student protection framework (including reporting obligations). A complex scenario, indeed.

#### 4 **Best practice**

4.1 Safe Work Australia has published a model Code of Practice for managing psychosocial hazards at work. Queensland, New South Wales, Western Australia and Tasmania have adopted this Code of Practice as follows:

- (a) Managing the risk of psychosocial hazards at work code of practice 2022 (QLD)
- (b) Code of Practice for Managing psychosocial hazards at work (NSW)
- (c) Psychosocial hazards in the workplace (WA)
- (d) Managing psychosocial hazards at work (TAS)

4.2 The relevant Codes of Practice are binding on employers in these States, and can be used as evidence where there is a question regarding what is a known psychosocial hazard or risk, and can be relied upon in determining what is reasonably practicable in the circumstances in which the code relates to.<sup>9</sup>

#### 5 **What, then, is a psychosocial hazard?**

5.1 A psychosocial hazard is a hazard that may cause psychological harm (whether or not it may also cause physical harm), arising from or relating to:

- (a) the design or management of work;
- (b) a work environment;
- (c) plant at a workplace; or
- (d) workplace interactions or behaviours.<sup>10</sup>

5.2 Psychosocial hazards relating to workplace interactions or behaviours are not only about employees. In a school environment, psychosocial hazards can also conceivably arise from student behaviour, parent behaviour, or behaviours from any other members of the school

<sup>9</sup> *Work Health and Safety Act 2020* (QLD) s 275, *Work Health and Safety Act 2020* (NSW) s 275, *Work Health and Safety Act 2020* (WA) s 275, *Work Health and Safety Act 2020* (TAS) s 275.

<sup>10</sup> *Work Health and Safety Regulations 2011* (Cth) s 55A, *Work Health and Safety Regulations 2017* (NSW) reg 55A, *Work Health and Safety Regulation 2011* (Qld) reg 55A, *Work Health and Safety (National Uniform Legislation) Regulations 2011* (NT) reg 55A, *Work Health and Safety Regulations 2012* (SA) reg 55A, *Work Health and Safety Regulation 2011* (ACT) reg 55A, *Work Health and Safety Regulations 2022* (Tas) reg 55A.

community. Identifying psychosocial hazards – which this paper addresses below - may mean considering those parts of an employee's duties and responsibilities that could conceivably expose a school employee to psychological harm. This may include, for example, where an employee is:

- (a) exposed to child abuse or vicarious trauma;
- (b) dealing with violence or aggression (whether perpetrated by other staff, or by student, parents or other members of the school community).

5.3 Other common psychosocial hazards that could apply in a schools context include:

- (a) Job demands;
- (b) Low job control;
- (c) Poor support;
- (d) Lack of role clarity;
- (e) Poor organisational change management;
- (f) Inadequate reward and recognition;
- (g) Poor organisational justice;
- (h) Traumatic events or material;
- (i) Remote or isolated work;
- (j) Poor physical environment;
- (k) Violence and aggression;
- (l) Bullying;
- (m) Harassment including sexual harassment;
- (n) Conflict or poor workplace relationships and interactions.

5.4 It is important that schools, as employers, are aware of how one's work and environment (including low workloads, workplace interactions, and any other relevant incidents or circumstances) can contribute to an employee's sense of emotional or psychological wellbeing. In this respect, schools should establish a reporting system that encourages staff to report psychological hazards or risks in the workplace.

## **6 Is reasonable management action a psychosocial hazard?**

6.1 Conceivably, poor management practices – including change management, performance management, workplace investigations and disciplinary processes – could negatively impact an employee's mental health and wellbeing; and as such constitute a psychosocial hazard. This is not surprising, and aligns with observations from the Fair Work Commission in cases decided under its anti-bullying jurisdiction.

6.2 At the same time, one is ultimately employed to perform certain duties and responsibilities. Like all employers, schools are entitled to hold staff accountable for their conduct and

performance; particularly where such matters may affect student learning, student safety and wellbeing, or staff safety and wellbeing. Change may also be uncomfortable, but necessary.

- 6.3 School leaders remain entitled to lead, direct and control how work is done. Further, they are still able to implement changes in the workplace. Reasonable management action taken in a reasonable manner is not a psychosocial hazard.
- 6.4 At the same time, schools are expected to ensure psychosocial hazards associated with management action are eliminated or minimised so far as is reasonably practicable.

## **7 What are Schools expected to do?**

- 7.1 Schools in any State or Territory must ultimately eliminate or minimise psychosocial risks so far as reasonably practicable. Just as with other hazards in the workplace, schools can do this by adopting a risk management process which essentially involves four steps:
- (a) Identify Hazard.
  - (b) Assess Risk.
  - (c) Control Risk.
  - (d) Review control measures.

### Identifying hazards:

- 7.2 Schools must identify all psychosocial hazards that arise from the work carried out within the school. Schools are encouraged to be aware of common hazards, and also have policies and systems in place for less common but serious incidents (eg sexual or physical assault).
- 7.3 It should be noted that whilst some hazards by themselves can cause serious harm (eg experiencing workplace violence), oftentimes a combination of psychological hazards will together, cause harm.
- 7.4 Some workers might be at a greater risk from psychological hazards due to barriers. For example:
- (a) Limited experience in the workplace;
  - (b) Literacy or language barriers to understanding safety information;
  - (c) Power imbalance, stigma or otherwise that provide a perceived barrier to safety issues;
  - (d) Previous exposure to hazards.
- 7.5 Schools are encouraged to consult with staff; observe staff member's work and behaviours; review information; and encourage the reporting mechanism to their staff to assist in identifying hazards.

### Assess Risk:

- 7.6 Once a psychosocial hazard has been identified, a school should assess the risk that the hazard creates. A risk assessment should be carried out with employees. If an employer already knows how to control the risk effectively, controls can be implemented without undertaking a risk assessment.

- 7.7 In assessing the risk of harm, a school should consider the duration, frequency and severity of the hazard or risk.
- 7.8 Rather than assessing psychological hazards in isolation, these should be considered both individually and collectively.

Control Risks:

- 7.9 Once a psychosocial hazard has been identified and the risk has been assessed, schools *must* eliminate the risk, if it is reasonably practicable to do so. If the risk cannot be eliminated, it must be minimised so far as reasonably practicable.
- 7.10 Schools should identify as many control measures as they can and consider which of these are the most effective and are reasonably practicable in the circumstances.
- 7.11 Cost is a matter to be taken into account and weighed up with other relevant matters to identify what is reasonably practicable, but this must only be done after assessing the extent of the risk and the ways of eliminating or minimising it
- 7.12 Control measures may need to be tested in order to ensure these are effective and suitable in the respective workplace.

Review Control Measures:

- 7.13 Control measures should be reviewed to ensure these are remaining effective and are working as planned. In the event the control measure is not working effectively, it must be reviewed, modified or replaced.
- 7.14 Risk management processes and outcomes should be recorded within the school. This allows schools to demonstrate they have met their work health and safety duties and will assist in monitoring and reviewing the hazards identified and controls effected.

## **8 What happens if a School gets it wrong?**

- 8.1 Breaches of occupational or work health and safety can result in a range of consequences; including most practically harm to staff, absences, and workers' compensation claims.
- 8.2 However, breaches can also lead to criminal prosecution. The Model uniform legislation provides for three categories of criminal offences.
- (a) Category 1: where a duty holder, without reasonable excuse, engages in conduct with gross negligence or are reckless as to the risk to an individual of death or serious injury or illness.<sup>11</sup>
- (b) Category 2: where a duty holder fails to comply with a health and safety duty that exposes a person to risk of death or serious injury or illness.<sup>12</sup>
- (c) Category 3: where a duty holder fails to comply with a health and safety duty.

<sup>11</sup> *Work Health and Safety Act 2011* (Cth) s 31, *Work Health and Safety Act 2011* (WA) s 31, *Work Health and Safety Act 2011* (Qld) s 31, *Work Health and Safety Act 2011* (NSW) s 31, *Work Health and Safety Act 2011* (SA) s 31, *Work Health and Safety Act 2011* (TAS) s 31, *Work Health and Safety (National Uniform Legislation) Act 2011* (NT) s 31.

<sup>12</sup> *Work Health and Safety Act 2011* (Cth) s 32, *Work Health and Safety Act 2011* (WA) s 32, *Work Health and Safety Act 2011* (Qld) s 32, *Work Health and Safety Act 2011* (NSW) s 32, *Work Health and Safety Act 2011* (SA) s 32, *Work Health and Safety Act 2011* (TAS) s 32, *Work Health and Safety (National Uniform Legislation) Act 2011* (NT) s 32.

- 8.3 Further, under the Corresponding WHS Law, and corresponding Victorian laws, other enforcement options also include improvement notices, prohibition notices and non-disturbance notices.
- (a) Improvement notices: An inspector may issue a school with an improvement notice if there is a reasonable belief the school has, is or will likely contravene work health and safety legislation.<sup>13</sup>
  - (b) Prohibition notices: An inspector may issue a prohibition notice to a school if they reasonably believe that an activity is occurring (or may occur) at a school that involved or will involve a serious risk to the health or safety of a person arising from immediate or imminent exposure to a hazard. If a school is issued a prohibition notice and fails to comply, the maximum penalty is \$100,000 for an individual and \$500,000 for a body corporate.<sup>14</sup>
  - (c) Non-disturbance notice: an inspector may issue a non-disturbance notice if they reasonably believe that it is necessary to facilitate the exercise of their compliance powers.<sup>15</sup>

## 9 Case analysis: *Kozarov v State of Victoria* [2022] HCA 12

- 9.1 The High Court's judgment in the case *Kozarov v State of Victoria* [2022] HCA 12 clarified the manner in which courts assess whether an employee's risk of psychiatric injury in the workplace is reasonably foreseeable to an employer, and therefore – whether the employer has a relevant duty of care to proactively reduce the risk of injury.
- 9.2 The appellant, Ms Kosarov, claimed common law damages for psychiatric injuries she sustained as a result of performing her duties as a prosecutor in the Specialist Sexual Offences Unit (**SSOU**).
- 9.3 The court observed that the State of Victoria had a duty to take proactive measures to reduce Ms Kozarov's risk of psychiatric injury from the commencement of her employment. This was because Ms Kozarov's work was "*inherently and obviously dangerous to the psychiatric health*" of Ms Kozarov, such that the SSOU had a duty of care to "*be proactive in the provision of measures to enable the work to be performed safely*".
- 9.4 The Court observed that the State of Victoria had knowledge of this duty in the form of their policy on vicarious trauma that recognised vicarious trauma as 'an unavoidable consequence of undertaking work with survivors of trauma,' and as a 'process [that] can have detrimental, cumulative and prolonged effects on the staff member'. The terms within this policy showed that the State of Victoria "had a lively appreciation of [the employee's] serious risk" to psychiatric injury.
- 9.5 At the very latest, the duty to reduce Ms Kosarov's risk of injury was engaged in August 2011. This was because the range of 'signs' elicited by Ms Kozarov were sufficient to alert the SSOU of psychological hazards and therefore, triggered the State of Victoria's duty to proactively reduce Ms Kosarov's risk of injury by taking reasonable steps.
- 9.6 The State of Victoria breached its duty of care by omission, in its failure to offer Ms Kozarov a rotation outside of the SSOU in late August 2011. An analysis of the facts and expert evidence supported that Ms Kozarov's psychiatric injury would have been avoided had she rotated out of the SSOU in late August 2011.

<sup>13</sup> *Work Health and Safety Act 2011* (Cth) part 10, div 1.

<sup>14</sup> *Work Health and Safety Act 2011* (Cth) part 10, div 2.

<sup>15</sup> *Work Health and Safety Act 2011* (Cth) part 10, div 3.



- 9.7 It remains necessary for employers to enquire: “Having regard...to the magnitude of the possible harm and the degree of probability of its occurrence and, on the other hand, to the burden of alleviating action, what steps would a reasonable person in the position of the employer have taken in response?”
- 9.8 The question of causation is fact-dependant, of course; a careful and holistic analysis of each case is critical to determine the probability of the avoidance of harm had the employer discharged the relevant duty.

## **10 Case Analysis: Court Services Victoria**

- 10.1 In October 2023, Court Services Victoria was convicted and fined \$379,157 for having a workplace culture that contributed to the suicide of one worker and a number of other staff taking stress leave. This decision highlights the need for employers to comply with the duty to provide and maintain a working environment that is safe and without risks to health (including psychological health), and the legal consequences of failing to do so.
- 10.2 Court Services Victoria pleaded guilty to one charge of failing to provide and maintain a safe workplace, and admitted it failed to conduct any adequate process to identify risks, or any adequate risk assessment of the risks to the psychological health of employees at the Coroners Court.
- 10.3 The Magistrates’ Court heard that between December 2015 and September 2018, workers at the Coroners Court were at risk from exposure to traumatic materials, role conflict, high workloads and work demands, poor workplace relationships and inappropriate workplace behaviours.
- 10.4 A number of complaints were made by staff throughout this period that included allegations of bullying, favouritism and cronyism, verbal abuse, derogatory comments, intimidation, invasions of privacy and perceived threats to future progression. This led to a number of staff taking leave after reporting feelings of anxiety, PTSD, stress, fear, and humiliation.