

DEVINE LAW AT WORK



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MENTAL HEALTH AT WORK

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As it has been estimated that one in five Australian adults will experience mental illness during the course of adult life, this means that in many and perhaps all aspects of our lives we will encounter not only mental health but also mental ill-health. We could experience it directly ourselves, or indirectly through our relationship with others. All around us are people who have been, are or may in the future be mentally ill. This can include our parents, siblings, children, other family members, our friends, our workmates and any one else we have contact with.

Mental health and mental illness plays a significant part in Australian workplace. Whether or not the mental illness suffered by members of the Australian workforce is directly caused by factors in the workplace, and it often is, the mental illness suffered by many members of the Australian workplace is capable of making a significant impact on it. To the extent to which workplace factors may cause or contribute to mental illness or other workplace risks, mental health or the lack of it is an important occupational health and safety (OHS) consideration.

All Australian employers are legally obliged, under both the common law and under OHS legislation to provide each of their employees with a safe workplace. While physical health has been the traditional focus of occupational health and safety legislation, this key obligation of all employers applies not only to the physical health of their employees but also their mental health.

Mental illness makes a significant impact on the Australian workforce in a range of different ways. Accordingly, mental health and the risk of mental illness deserve an equal status with physical health and physical illness when considering OHS issues in the workplace.

What is mental health and what is mental illness?

"Mental health" is defined as "a condition in which mental functions are successfully performed and there is no mental illness": *Macquarie Dictionary Online 2007*. "Mental illness" is defined as "any disorder of the mind which causes a person to behave so abnormally as to cause suffering to themselves or others": *Macquarie Dictionary Online 2007*.

Examples of mental illness include:

- Depression;
- Anxiety disorders – including Generalized Anxiety Disorder; Agoraphobia; Social Phobia; Obsessive Compulsive Disorder; Post Traumatic Stress Disorder, Acute Stress Disorder;
- Bipolar disorder;
- Borderline personality disorder;
- Personality disorder (sociopath, psychopath);
- Schizophrenia.



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Mental illness – the facts

The area of mental health is the subject of a number of myths and assumptions. Few of us have the benefit of an education in mental health/illness. Some important facts about mental illness are:

- anyone can develop a mental illness;
- one in five Australians will experience mental illness at some stage in their life;
- there are two broad categories of mental illness - psychotic and non-psychotic;
- a psychotic illness is one in which a person's thoughts, emotions and behaviour may be adversely affected – in acute form (e.g. schizophrenia), a person with a psychotic illness may lose touch with reality, including delusions and hallucinations and either elation or depression out of all proportion to their circumstances;
- a non-psychotic illness includes illnesses where a person experiences difficulty in coping with day to day living – this category includes phobias, anxieties, some forms of depression and eating disorders;
- the causes of mental illness are unclear – there is evidence of genetic predisposition to some forms of mental illness, however other factors causing or contributing to mental illness can include stress, bereavement, life threatening illnesses, accidents, unemployment, abuse, relationship breakdown, unemployment, social isolation;
- a person experiencing mental illness may have just one episode and then fully recover, or may experience an illness which recurs throughout his/her life;
- most mental illnesses can be effectively treated, either through therapy or medication or a combination of both;
- mental illness may be caused by physical dysfunction of the brain or other factors;
- stress may cause, prolong or be a symptom of mental illness;
- a person with a mental illness may suffer a great deal – not only from the illness itself but also from the treatment of others because of that illness (e.g. rejection, discrimination);
- a person with a mental illness is usually not a danger to others – even those with the more severe forms of mental illness will not usually be a danger provided that they are taking appropriate medication;
- effective management of or recovery from a mental illness will not usually be just a matter of will;
- with appropriate treatment, including any medication, a person with a mental illness will usually be able to function effectively;
- it is rarely appropriate for a person with a mental illness to be isolated – it is estimated that only one in one thousand people with a mental illness needs to be hospitalised without his/her consent;
- a pervasive stigma against mental illness remains in Australia.
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- it is rarely appropriate for a person with a mental illness to be isolated – it is estimated that only one in one thousand people with a mental illness needs to be hospitalised without his/her consent.

The source for this information is a publication of the Commonwealth Department of Health and Ageing: "Mental Illness: The Facts" which is available online at www.health.gov.au

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Overview

As it is estimated that one in five adults will suffer a mental illness during the course of their lifetime, this means that the majority of us will either know a person with a mental illness or be the person who suffers a mental illness. The person with a mental illness may be our boss, our co-workers, our clients/customers, our suppliers. In terms of those we work with, the mental illness(es) which they experience may be pre-existing or may be caused or aggravated by the workplace. Depending on the circumstances, including the nature of the mental illness, a person suffering from a mental illness *may* pose a risk to others at the workplace, however this is not usually the case.

In order to maximise physical and mental health, the working environment needs to be healthy itself – not just from the perspective of risks to physical illness and injury but also to mental illness.

What makes for a healthy workplace?

In my view, some of the characteristics of a healthy workplace are an environment:

- in which health (both physical and mental) is a key priority for the employer and its management – for example, it is a term and condition of all contracts with managers that they take active steps to promote health in the workplace and take active steps to eliminate/minimise the risk of mental illness in the workplace;
- in which the place of ongoing and relevant education about (physical and mental) health is respected and reflected in workplace practices;
- in which managers and supervisors are trained to detect the early warning signs of physical and mental ill-health and in how to effectively respond to these early warning signs;
- which is free of physical dangers;
- in which there is the opportunity for employees to perform meaningful work;
- in which managerial staff are well trained in people management and have well developed emotional and social intelligence;
- in which people are rewarded appropriately for the effort expended by them; and
- in which there is zero tolerance of bullying, discrimination and harassment.





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Job Stress and the Rise of Psychological Injury

Ten years ago it was not unusual for workers compensation insurers to almost automatically knock back “stress claims”. However, this position has changed markedly. While stress claims remain a relatively small portion of workers compensation claims the cost of those claims is disproportionately high, the highest of any claim type. The global pharmaceutical company Glaxo-Smith Kline has found that employees with mental ill-health are likely to be absent from work 7.5 times longer than those with physical illnesses: “The Business of Health– The Health of Business”, a 2006 joint publication of the International Business Leaders Forum and the World Council for Sustainable Development, available online at www.ibif.org.

Comcare, the insurer and regulator of the Commonwealth worker’s compensation scheme, has reported that:

- the majority of psychological injury claims are the result of work related and other factors, not a major traumatic event or critical incident;
- contributing factors include: heavy workload and fast working pace; physically monotonous and repetitive work; management styles; interpersonal relationships – including harassment from co-workers and working alone; the risk of violence; work roles – including uncertainty about expectation and inadequate training; career concerns – including disciplinary action; organisational change – including poor communication about changes; environmental issues –including dangerous physical conditions.



Further, Comcare has identified the following as indicators of the workplace stressors: the rate of unplanned absences; other accident and injury records; levels of workplace conflict; increased use of staff support services (e.g. employee assistance program, counselling); dissatisfaction expressed through employee surveys; reduced performance and morale; and workers compensation claims. This source for this information is the Comcare report entitled “Preventing and Managing Psychological Injuries in the Workplace”, which is available online at www.comcare.gov.au.

Mental Illness and Workers Compensation – the Frontline

The first that an employer may know that there is a risk to an employee’s mental health may be when a workers compensation claim is lodged – unless there is an effective system for prevention/minimisation of mental ill-health in the workplace, the employer may find that it is only able to react to mental illness issues. While a mentally healthy workforce can only benefit an employer, mental illness in the workplace can have significant adverse consequences for an employer.

In September 2006 the Australian Safety and Compensation Commission published a “Compendium of Workers’ Compensation Statistics Australia 2003-2004”. In this document, which is available online at www.ascc.gov.au, it was reported that in the period 1996 to 2003:

- most nature classifications of injury or disease decreased, with the only notable exception being claims relating to mental disorders – for this classification there was a **70% increase** in compensated claims;
- mental disorder claims represented 5.6% of all workers compensation claims in Australia in 2002-2003;
- the **time lost in relation to mental disorder claims was greater** than for all other classifications;
- the median direct costs of new workers compensation claims by the **mechanism** of the injury or disease was highest for the category of mental stress, followed by sound and pressure, body stressing, falls, trips and slips and six other categories;



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- the median direct costs of new workers compensation claims by **nature** of the injury of disease was neoplasms (cancers and benign tumours), diseases of the respiratory system, diseases of the circulatory system, and mental disorders (with neoplasms having the highest median direct cost) and six other categories.

Keeping an open mind

While the presence of a mental health condition becomes evident when a workers compensation claim is made, mental health concerns may be manifested in more subtle ways as well in the workplace. Accordingly, it is important that employers and managers keep an open mind about whether a mental health issue is contributing to a workplace issue. As humans we are quick to judge without having all the facts. In the workplace we may assume that someone just has an "attitude problem" and be critical of same without considering what might be causing that. This is particularly important to bear in mind when there is a significant and sustained decline in an employee's performance and/or conduct.

While managers don't need to become mental health experts, they and their staff can benefit from the mental health resources available to them; several of these are listed at the end of this article. For example, Beyond Blue, which is the National Depression Initiative, a not-for-profit organisation which was initiated on a bipartisan basis by the Federal and State governments. It is an excellent resource for any person wanting to find out more about all forms of depression as well as anxiety and bipolar disorder. Beyond Blue's website at www.beyondblue.org.au contains a large amount of useful material, including facts sheets. This includes information to assist a person identify whether they or another person is suffering from depression or anxiety.

Beyond Blue advises that:

- the conduct of a person with depression or anxiety will often lead to others turning away from them, even giving up on them;
- in the workplace, it is common for people to believe that any depression or anxiety suffered by a workmate is that workmate's problem and that they should not interfere;
- most people with depression and/or anxiety will need someone else to help them get help;
- managers and supervisors need to be trained in recognising signs and symptoms of depression and anxiety so that they can be both confident and effective in responding to employees with such signs and symptoms.

It is important to not only bear in mind that a mental health condition may be contributing to the employee's inadequate performance and/or conduct, but also to keep in mind that mental illness, whether actual or perceived, is a disability for the purposes of anti-discrimination and industrial legislation. Accordingly, it is important to ensure that an employee is not unlawfully discriminated against. There are a range of laws that an employer must comply with in such a situation. This includes the obligation to ensure that an employee with a perceived or actual disability is not dismissed because of the disability, unless the employer can demonstrate that the disability prevents the employee from performing the inherent requirements of the role and that no reasonable accommodation of the disability would enable the employee to perform those inherent requirements.

I recently assisted a client in a matter which illustrates the complexity of the issues which can arise in the workplace where mental health *may* be a factor. The employee concerned was performing poorly. This decline had arisen suddenly a few months earlier after several years of employment. He was the subject of a performance improvement process and one of the issues explored with him was whether there were any health issues contributing to why he was not performing adequately, based on comments made by him and the fact that he could not explain the decline. He chose not to offer anything in this regard until one hour before a meeting in which he was to be dismissed, when he resigned because of a 'medical condition' and attributed his inability to perform adequately due to the medication he was taking for that condition. While he did not disclose the condition, because he said he was trying to come to terms with it, he did disclose the medication which was for a mental health condition. In view of this information and the employee's incoherent manner, I advised my client not to accept the employee's resignation and, for the time being, not to proceed with the dismissal, as my client did not yet have sufficient information with which to determine whether the employee was competent to resign or whether the alleged medical condition had, as he said, contributed to his inability to perform. It appeared to me that my client might either be at risk of breaching relevant law or be at risk of a constructive dismissal claim and I was focused on assisting them in protecting against these possibilities.



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My client commenced a process of gathering relevant information, in particular medical opinion. As the employee was uncooperative, directions and warnings were required. As the employee continued not to cooperate his employment was terminated by my client on the ground of his failure to meet performance requirements and to obey the directions given. My client got the same result as it had planned (dismissal) but by a method which complied with its obligations under anti-discrimination and industrial law.

PROMOTING MENTAL HEALTH AT WORK

In my view, the key to promoting mental health in the workplace is to begin with an understanding that *any* person may suffer a mental illness and that is as much an every day reality for the community as physical illnesses such as heart disease and cancer. Other steps include:

- ongoing and relevant education across the workforce about mental health and mental illness;
- monitoring of workplace practices, absenteeism and work performance;
- appropriate support programs – e.g. Employee Assistance Program (“EAP”) or other access to a counsellor;
- easy access to a range of relevant medical practitioners with expertise in physical health and psychological health;
- making it a responsibility of managers and supervisors to ensure that employees are not exposed to particular risks;
- regular assessment of risks to both physical and mental health;
- recruitment practices – keeping in mind individual resilience;
- assessment and monitoring of team resilience;
- life skills programs;
- review, measurement and evaluation.

There is no single or simple method of promoting good mental health or responding to mental illness in the workplace. It requires commitment to the hard work of people management, an appreciation of the complexity and diversity of people, thought, and access to relevant expertise.

CONCLUSION

Whether we are working in the private sector, public sector or not-profit-sector, whether we are in management or advising management, health at work is of fundamental significance in our every day work. This is not only because of the risk of large penalties being imposed if we are found to have breached OHS legislation but also because of the very significant costs to individuals, to employing organisations and to society at large if the physical and mental health of Australian workers is not at an optimum.

We should be interested in the mental health of ourselves and of those with whom we work – because it is an interest we have in common. The health and well being of the people in an organisation necessarily impact on the organization itself and the other people in that organisation.

Keeping an open mind about whether or not mental health is a factor in an employee's declining performance or conduct provides us with the means to manage workplace issues and achieve legal compliance much more effectively.

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FURTHER INFORMATION

Beyond Blue—www.beyondblue.org.au

Comcare—www.comcare.gov.au

Lifeline—www.lifeline.org.au (13 11 14)

Mental Health Association of NSW Inc—www.mentalhealth.asn.au

Mental Health at Work— www.mhis.org

SANE Australia—www.sane.org



Devine Law at Work is a law firm and consultancy which specialises in Australian workplace law and workplace relations and is in the business of helping people work together for better results. Elizabeth Devine founded Devine Law at Work in 2002 to realise an ambition to practice workplace law in a holistic manner; bringing together skills and expertise in the law, adult education, communication (including negotiation, conflict resolution and facilitation) and business development. Elizabeth has practiced law for 17 years and has specialised in workplace law and workplace relations for 12 years. Elizabeth is passionate about enhancing the knowledge of others about workplace law and regularly presents to a broad range of corporations and business, professional and industry groups. A professional speaker and enthusiastic educator, Elizabeth is well known for her engaging, easily understood and approachable style.