

Joint submission of

Dr Carlo Caponecchia and Dr Anne Wyatt

Background

This submission argues for a more comprehensive and meaningful inclusion of psychosocial issues in the model WHS legislation. We outline the reasons why psychosocial issues should be explicitly included, as well as highlighting why current and other proposed strategies are inadequate alone and provide examples where psychosocial issues could be added to the legislation as it stands.

This submission is most relevant to the terms of reference of the review parts 6 and 8c:

6 The review will be evidence-based and propose actions that may be taken by [WHS](#) ministers to improve the [model WHS laws](#), or identify areas of the [model WHS laws](#) that require further assessment and analysis following the review.

8 The review will consider whether

*...
c. the framework of duties is effective at protecting workers and other persons against harm to their health, safety and welfare and can adapt to changes in work organisation and relationships*

(Accessed 11 April 2018 from <https://www.safeworkaustralia.gov.au/law-and-regulation/model-whs-laws/review-model-whs-laws/review-model-whs-laws-terms-reference>)

Psychosocial hazards can be difficult to understand, which is at least in part why they have for so long been considered last in WHS regulation and practice.

Psychosocial hazards are usually defined as “aspects of job content, work organization and management, and environmental, organizational conditions that have the potential for psychological and physical harm” (Cox, 1993; See also ILO, 1986). “Hazards” in this context are defined as sources or situations that could cause harm.

Justification

There are a number of reasons why psychosocial hazards should be given more explicit and comprehensive coverage in Australia’s model WHS legislation.

1. Burden of injury

Psychosocial hazards contribute to psychological injuries, which are known to have formed a significant proportion of compensated injuries in Australia across many years. Notwithstanding the particular (unfortunate) nomenclature of TOOCS, “mental disorders” were the most common nature of diseases, among all diseases in serious claims in Australia in 2015-16 (SWA, 2018), with “mental stress” being the sixth most common mechanism of injury or disease in serious claims in the same time period. While the numbers of claims with mental disorders being given as the nature of injury has not really increased as a proportion of claims from 2000-01 to 2015-16, the median length of time off work for mental disorders has increased by 43% (11 weeks to 16 weeks). This is the highest increase in time lost for all injuries. The median amount of compensation paid has increased by 99% in the same period.

Of course, compensation data does not represent the true burden of injury, nor the full extent of the effect of any particular hazard on the community. This is for a number of reasons including under-reporting and mis-reporting, compensation requirements and failure to qualify for compensation, exclusion of sole traders etc.

The sheer contribution of psychosocial hazards to the total number of serious workplace injuries in Australia justifies more comprehensive inclusion of them in the WHS laws.

2. Lack of action

The injury data, limited as it is, has not changed for many years. Indeed, the median cost associated with psychosocial injury has only increased. This suggests that despite wide recognition that psychosocial issues are part of WHS responsibilities, awareness, prevention activities and regulatory activities have been both late and largely ineffective. Research has consistently indicated that employers remain confused about psychosocial issues, their responsibilities, and how to take action (Leka et al., 2015; Kunyk et al 2016).

The lack of meaningful action to address these hazards justifies more comprehensive and explicit inclusion of them in the model WHS laws.

3. Relationship to other hazards and hazardous tasks

It is now well known that psychosocial hazards affect other hazards and hazardous tasks in contributing to injury. The most widely researched of these are musculoskeletal disorders, which have been shown to be affected by psychosocial variables (e.g. Macdonald & Evans, 2006; Lang et al., 2012; for example, psychosocial issues of workplace culture, or workload, affecting the nature of the manual task). However, there is no reason to think that psychosocial issues, such as control and autonomy; work load pace and schedule; role conflict and ambiguity; quality of relationships, supervision and support; and workplace cultures do not affect other hazards and work tasks by affecting the manner in which work is designed and undertaken. Psychosocial issues of work design affect all workplaces and all work tasks.

4. Relevance to every industry

Regardless of injury data, differences in compensation schemes, or biases in reporting, psychosocial hazards can affect every single worker in Australia. This is independent of their industry, their job tasks, their patterns of work, the equipment they use, or the physical work

environment which they inhabit. Psychosocial hazards are possible wherever people are employed. These hazards are not industry specific. There may, of course, be particular industries where particular psychosocial hazards are more likely to occur. Further, there are industry sectors where psychosocial hazards are likely to represent a more significant proportion of the total hazards to which workers may be exposed, relative to other types of hazards (e.g. industries without plant). However, the point is these hazards are domain general.

One could argue that this observation in itself should have meant that psychosocial hazards were prioritised among other hazards, and that they were meaningfully and consistently addressed in legislation, the practice of regulation, and implementation of WHS duties much earlier than they have been. Psychosocial issues have not been prioritised thus far in WHS practice, and the reasons for this are well-documented (e.g. Johnstone, Quinlan & McNamara, 2011; Leka, Wassenhove & Jain, 2015). This problem can and should be re-dressed now, with the opportunity for legislative reform.

Existing strategies and alternatives

Guidance material on workplace bullying exists in all Australian jurisdictions, with some differences in the exact documentation between states and territories. We consider that this guidance material should remain in place should psychosocial issues be more explicitly referred to in the model legislation. Guidance alone is not sufficient, nor is legislation without guidance.

Similarly, we understand that there may be plans for the development of guidance on psychosocial issues at work, by Safe Work Australia. We welcome the development of such guidance, or Code of Practice. However, the need for any such guidance simply reflects the extent of the problem and supports that duties in relation to this type of hazard should be more explicit in the legislation.

We caution against the suggestion which may be made by some that these problems should be treated as mental health or mental health promotion. Mental health promotion is something in which Australian organisations have been participating in more in recent years. This is a positive development as it helps to de-stigmatise mental health conditions in the community, normalise talking about mental health, and normalise seeking assistance. However, mental health promotion is quite different from what organisations are required to do under current WHS legislation. WHS principles require prevention of harm, which in relation to mental or psychological harm, involves identifying and controlling (as far as reasonably practicable) exposures that may be present in the workplace that may present a psychological risk to people. This is very different to encouraging people to seek help or encouraging them to talk to each other about their mental health, or even to providing them with tools or strategies to improve their mental health (such as resilience, stress management, mindfulness, exercise, meditation etc). Changes in legislation (or in guidance or similar) need to reflect the requirements of WHS, which are preventative in nature.

Suggested changes to the model WHS law

Part 1.

The following are our suggested changes concerning psychosocial hazards (additional words are presented in yellow highlighting).

A. Use of the qualifier “physical and psychological” before the word “health”

Despite the definition included in the current model laws that indicate that health includes physical and psychological health, many people do not interpret the word “health” in work health and safety contexts to include psychological health. In order to overcome this, it is recommended that in many parts of the Bill (Act) where the word “health” is used, it is qualified by the phrase “physical and psychological”. Examples of Sections where this may apply include but are not limited to: 3(1)(a); 19(1); and 19(2); 19(3).

B. Similarly, there needs to be the addition of words that imply psychological working environment or working culture.

For example, Section 3(1)(a) would read:

3(1)(a) protecting workers and other persons against harm to their physical and psychological health, safety and welfare through the elimination or minimisation of risks arising from work [or from specified types of substances or plant]; workplace culture and (...)

C. As well, there needs to be an opportunity to denote that behaviours can be hazardous and hence it would be appropriate for Section 3(2) to read:

3(2) In furthering subsection (1)(a), regard must be had to the principle that workers and other persons should be given the highest level of protection against harm to their physical and psychological health, safety and welfare from hazards and risks arising from work [or from specified types of substances, behaviours or plant] as is reasonably practicable.

D. Management of risks at Section 17 should read:

17 Management of risks

A duty imposed on a person to ensure health and safety requires the person:

- (a) to eliminate risks to physical and psychological health and safety, so far as is reasonably practicable; and
- (b) if it is not reasonably practicable to eliminate risks to physical and psychological health and safety, to minimise those risks so far as is reasonably practicable.

E. Primary duty of care to include...

Division 2 Primary duty of care

19 Primary duty of care

(1) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, the **physical and psychological** health and safety of:

- (a) workers engaged, or caused to be engaged by the person; and
 - (b) workers whose activities in carrying out work are influenced or directed by the person,
- while the workers are at work in the business or undertaking.

(2) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, that the **physical and psychological** health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking.

(3) Without limiting subsections (1) and (2), a person conducting a business or undertaking must ensure, so far as is reasonably practicable:

(a) the provision and maintenance of a **physical and psychological** work environment without risks to health and safety; and

(b) the provision and maintenance of safe plant and structures; and

(c) the provision and maintenance of safe systems of work; and

(d) the safe use, handling and storage of plant, structures and substances; and

(e) the provision of adequate facilities for the welfare at work of workers in carrying out work for the business or undertaking, including ensuring access to those facilities; and

(f) the provision of any information, training, instruction or supervision that is necessary to protect all persons from risks to their physical and psychological health and safety arising from work carried out as part of the conduct of the business or undertaking; and

(g) that the **physical and psychological** health of workers and the conditions at the workplace are monitored for the purpose of preventing illness or injury of workers arising from the conduct of the business or undertaking.

Part 2.

We also suggest a range of other related changes be considered.

A. Definitions

Further detailed and robust definitions are required, for example at Division 3 Section 4:

- a. There needs to be an **operational** definition of *Safe System of Work* (which does not appear in any work health and safety legislation).
- b. There also needs to be a definition of **psychological working environment** or work culture (or similar).

B. The Meaning of “Workplace” at Section 8

- a. Needs to be broadened to include all times, places, contexts and circumstances where and in which people are “at work”.

C. External agency

The need for an external agency to which alleged on-going psycho-social hazards, or at least alleged bullying, can be reported that provides for state public servants and others not covered by FWA needs to be assisted.

D. Competency based training

Compulsory, approved, competency-based training for all stakeholders including Regulatory Inspectors and health and safety representatives to include comprehensive material about psycho-social health and safety.

E. Non-disturbance notices

Non-disturbance notices (Section 199) should include prohibition of deleting the in-house email correspondence of someone who alleges they are being bullied at work.

F. Inspector powers

Inspectors should be able to require external, impartial investigations to be undertaken as part of improvement notices in relation to alleged work place bullying activities.

Conclusion

This submission has outlined reasons for why psychosocial hazards should be more comprehensively and explicitly included in the model WHS legislation.

We realise the full extent of what this means for employers and regulators. Managing psychosocial hazards has been described as requiring a

“seismic shift in the activities and culture of both regulators and those they regulate” (Lippel & Quinlan, 2011 p.544).

We understand that these proposals will likely be opposed by many interest groups and may be ignored.

However, we wish to point out that the suggestions made here for reform to the WHS legislation do not constitute new requirements. These are not additions, or new provisions. Our suggestions are merely a clearer articulation of the duties which already exist in the legislation and are largely not addressed through organisational risk management activities, regulation, prosecution or social censure. Explicit recognition of the duty to protect psychological health, by identifying, assessing and controlling psychosocial hazards will result in meaningful preventative action to better protect the physical and psychological health, safety and wellbeing of a wide range of Australians.

Expertise

Dr Carlo Caponecchia has a PhD in psychology and has taught safety at undergraduate and postgraduate levels for over 12 years. He is a Senior Lecturer at the School of Aviation at the University of New South Wales. His research interests are in human factors and safety, with a range of projects across industrial domains spanning psychosocial hazards at work, risk perception identification and management, and human error. He is a member of the International Commission on Occupational Health, the Human Factors and Ergonomics Society of Australia and a Board member of the International Association on Workplace Bullying and Harassment. He is a member of the Standards Australia Technical Panel SF-001, which is currently dealing with the adoption of ISO 45001. Carlo is also part of the SafeWork NSW MSD consultative committee, chiefly for his expertise in psychosocial hazards. Carlo provides a range of consulting and speaking services to the public and private sector, as well as providing courts in various jurisdictions with expert opinion reports on psychosocial issues and the provision of safe systems of work.

Dr Anne Wyatt has practised for over thirty-eight years as an occupational health, safety, management and education academic and consultant. She has a background in the health sciences and education. She holds a Master degree and a Doctorate in occupational health and safety as well as a Graduate Diploma in Criminology from Sydney University. She is a qualified Workplace Mediator. Dr Wyatt is regularly called as an expert witness in workplace bullying and more general occupational health and safety legal matters. She is a member of three professional associations: The Human Factors and Ergonomics Society of Australia, The International Association on Workplace Bullying and Harassment and the Safety Institute of Australia. Until December 2010, when the School was closed, Dr Wyatt was a Visiting Fellow at the School of Risk and Safety Sciences, Faculty of Science, The University of NSW. She was the founding editor (1985-2010) of the CCH peer reviewed *Journal of Occupational Health and Safety (Australia and New Zealand)*.

Together Dr Caponecchia and Dr Wyatt have provided teaching, consultancy and professional development services related to psychosocial hazards to a range of clients, including the Fair Work Commission. They jointly worked on several research projects with Safe Work Australia related to the development of the initial National guidance (then code of practice) on workplace bullying prevention. Together they authored “*Preventing workplace bullying: An evidence based guide for managers and employees*” (2011, Allen & Unwin) as well as a range of research papers on psychosocial hazards.

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