



Submission to the Safe Work Australia Review of Model Work Health and Safety Laws

National Mental Health Commission

April 2018

In Summary

The National Mental Health Commission (NMHC) notes the narrow focus on risks to physical health and safety in the model WHS framework, and calls for the following:

- a balanced focus on risks to psychological and physical health in the legislation, by highlighting psychological risks in a similar way to physical risks
- a new focus on stress, bullying and harassment in the framework
- the development of model Codes of Practice that focus on risks to psychological health, including a Code specifically for the management of risks to psychological health and safety, and
- the adoption of a uniform national framework for workplace mental health to supplement the model WHS framework.

About the National Mental Health Commission

The NMHC's purpose is to provide insight, advice and evidence on ways to continuously improve Australia's mental health and suicide prevention systems and to act as a catalyst for change to achieve those improvements. This includes increasing accountability and transparency in mental health through the provision of independent reports and advice to the Australian Government and the community.

The NMHC seeks to engage with people with a lived experience of mental health issues, including carers and other support people, in all areas of our work. We affirm the right of all people to participate in decisions that affect their care and the conditions that enable them to live contributing lives. Diverse and genuine engagement with people with lived experience, their families and other support people adds value to decision-making by providing direct knowledge about the actual needs of the community, which results in better targeted and more responsive services and initiatives.

Overview – Context of Submission

The NMHC is committed to improving mental health outcomes for all Australians. In 2013, the NMHC established the Mentally Healthy Workplace Alliance (MHWA) which aims to make sure all people in the workplace, including those who experience mental health difficulties, their families and those who support them, are supported.

The MHWA is a national approach by business, community and government to encourage Australian workplaces to become mentally healthy for the benefit of the whole community and businesses, big and small. This includes minimising harm, promoting protective factors and



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having positive cultures that are conducive to mental wellbeing. It also recognises that a mentally healthy workplace – as noted by economic analyses¹ – is also very good for business.

In addition to the NMHC, MHW members include: the Australian Chamber of Commerce and Industry, Australian Industry Group, The Australian Psychological Society Ltd, beyondblue, the Black Dog Institute, Business Council of Australia, Comcare, Council of Small Business Australia, Mental Health Australia, Safe Work Australia, SANE, SuperFriend, Australian Council of Trade Unions and the University of NSW.

Although the NMHC does not have any particular comment on the efficacy of the model WHS laws in practice, we do have some broader comments on the construction and application of the law with respect to psychological or mental health. Australia's legal framework for WHS is clearly of great relevance to our efforts to ensure all people in the workplace are supported.

As posed by Question 5 in the discussion paper, our submission focusses on the effectiveness of the model WHS laws in supporting the management of risks to psychological health in the workplace.

Model WHS laws and the management of risks to psychological health in the workplace

Under the model WHS laws framework (the framework), persons conducting a business or undertaking (PCBUs) have a duty to protect workers from psychological hazards as well as physical hazards. This is achieved by including 'psychological health' under its definition of 'health' in section 4 of the model Act. The NMHC understands that the express reference to psychological health was new to most jurisdictions.

While this was perhaps the simplest way to ensure that the same overarching duties apply in relation to psychological health as to physical health, this is the only reference to psychological hazards in the entire body of the WHS legislation. In addition to the scant mention of psychological hazards or risks, we note:

- The definitions of 'serious injury or illness' for the purpose of determining notifiable incidents in section 36 of the Act lists numerous physical injuries but no psychological injuries.
- All of the 'further duties' of PCBUs (set out in section 20 – 26 of the Act) concern certain types of inherently physically dangerous work.
- The 'specific work activities and hazards' identified in the Regulations for which control measures to fulfil WHS duties are specified – are almost exclusively focussed on hazards or work activities of a physical nature. For example: demolition work, diving work, general electrical safety, construction, hazardous chemicals and asbestos.
- Similarly, all categories of 'high risk work' set out in Schedule 3 of the Regulations are evidently based on risks to physical safety.

¹ For example, a 2014 report by Price Waterhouse Cooper 'Creating a mentally healthy workplace: Return on investment analysis' assessed the average return on investment across all Australian industries and actions for investing in a mental health initiative in the workplace at 2.3. [see https://www.headsup.org.au/docs/default-source/default-document-library/research-by-ricewaterhouse-coopers.pdf?sfvrsn=3149534d_2]





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- The model Codes of Practice (Code) are also heavily focussed on physical risks, with the vast majority of the 24 Codes applying to particular physical hazards, risks or controls. Although one Code – *How to Manage Work Health and Safety Risks* – applies to all risks, there is no Code that applies specifically to psychological risks or safety.

The model law's narrow focus on physical hazards and risks creates the impression that physical health is the primary concern of WHS law. Psychological health, while subject to the same duties, feels very much an afterthought. Notwithstanding that Safework Australia have in recent years published guidance material on mental health in the workplace, psychological injury and bullying and harassment; in our view the narrow focus on physical health in the model law is problematic.

As you will be aware, work-related psychological injuries are a major concern. As well as the negative impact on the affected employees, the long periods away from work come at a significant cost to employers. In Australia, each year²:

- 7,500 Australians are compensated for work-related psychological injuries, equating to around 6% of workers' compensation claims.
- compensation paid for these claims is approximately \$480 million per year
- compensation payment per claim was \$23,600 compared to \$8,700 for all claims
- typical time off work was 14.8 weeks compared to 5.3 weeks for all claims

As one in five people in Australia experience mental illness each year and nearly one in two (45%) will experience it in their lifetime, the overall impact of mental illness on the workplace is much greater than suggested by compensable psychological injuries. Indeed, in 2014 Price Waterhouse Cooper estimated the total cost of mental health-related absenteeism, presenteeism and compensation claims on Australian workplaces at \$11 billion per year. We also note that while serious injury claims and fatalities have reduced since the introduction of the model WHS law, reported rates of workplace stress and mental health issues are increasing.³

Our main concern with the narrow focus of the model law on physical health risks is that it appears to reinforce a common misconception that physical hazards and risks are more important and warrant greater attention than risks associated with psychological injury and illness (i.e. stress, bullying and harassment etc). In addition to being incorrect and counterproductive to efforts to improve the management of risks to psychological injury and illness, this perception does not help to reduce the stigma attached to mental illness in the workplace.

Furthermore, the inadequate attention paid to psychological safety in the model laws is also arguably inconsistent with the object of the model Act to provide for a *balanced* framework to secure the health and safety of workers and workplaces.⁴

² Data from Safe Work Australia's report: *Work-related Mental Disorders Profile 2015* at <https://www.safeworkaustralia.gov.au/doc/work-related-mental-disorders-profile-2015>

³ 2018 Review of the model WHS laws – Discussion paper, Marie Boland, February 2018, pg.13

⁴ Section 3, Model WHS Act





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In our view the model WHS law could therefore be improved through a more balanced focus on psychological as well as physical risks and hazards. Specifically, the NMHC recommends:

- highlighting psychological risks in a similar way to physical risks in the legislation
- expanding the definitions in section 4 of the model WHS Act to include, for example, definitions of psychological illness and psychosocial risks
- a new focus on stress, bullying and harassment in the framework, and
- consideration to be given to the inclusion of relevant psychological injuries or illnesses in the definitions of ‘serious injury or illness’ in section 36 of the Act and/or included as a ‘prescribed serious illness’ in section 699 of the Regulations.

Another issue with the model WHS framework is that it fails to set out a minimum standard for the treatment of workers’ psychological safety at work. Some Australian organisations have previously called for the adoption of the *National Standard of Canada for Psychological Health and Safety in the Workplace* – a voluntary set of guidelines, tools and resources focused on promoting employees’ psychological health and preventing psychological harm due to workplace factors.⁵ The Canadian Standard provides an evidence-based, auditable approach to undertaking management of psychological health and safety.

While the adoption or development of such a standard appears to be outside the scope of this review, in our view the development of practical guidance on how to achieve standards of psychological health and safety under the model laws is necessary. To this end, the NMHC calls for the development of a model Code of Practice for the management of risks to psychological health and safety. Given the diverse nature of psychological hazards (and the fact that psychological health, risks or safety are not even mentioned in the current Regulations), this may not be an easy task. However for these same reasons a well-drafted Code setting out clear expectations of minimum requirements would be of immense benefit to the many businesses and employers who are looking for guidance on managing mental health in their workplaces.

Similarly, the NMHC calls for the development of a national framework for workplace mental health. We note that it is a strategic priority of the MHWa to develop and implement a national uniform Workplace Mental Health Framework. This framework would bring together existing resources to ensure a national approach to mental health in the workplace, including by providing implementation guidelines as well as guidance to all employers, industry and government. The MHWa is in the preliminary stages of developing the framework.

While the NMHC does not have the expertise in WHS or the operation of the model law in practice to have formed a view on the ideal mix or interrelationship between: a ‘balanced’ model law, new Codes that focus on risks to psychological health and the adoption of a uniform national framework for workplace mental health – in our view these actions have the potential to provide much greater clarity and practical guidance to PCBU, officers and workers on how to satisfy their duties in relation to risks to psychological health and would send a strong message that these risks are just as worthy of attention as risks to physical health.

⁵ For example, Unions NSW called for the adoption of the Canadian standard in its submission to a review of the NSW WHS Act in 2014.

