Mental health in the workplace:
prevention beats cure

Most managers find dealing with mental health issues in the workplace difficult. SUE BARNES, Partner of FCB Workplace Law and head of the healthcare industry team, talks to MICHELE GROW, Chief Executive Officer (CEO) of Davidson Trahaire Corpsych, about the benefits of a preventive approach to mental health issues.

All the evidence indicates that the incidence and cost of mental health issues in Australian workplaces is increasing. This trend is particularly apparent in the healthcare sector, which has the highest number of both 'serious' workers' compensation claims and 'mental stress' claims of any industry.

Due to limited government resources and an ageing population, employers, especially those in the healthcare sector (where the problem is so prevalent), are going to find themselves bearing the bulk of the cost of mental illness, particularly when the causes can be linked to the workplace environment. This has the potential to become very costly for employers.

The key question for employers is how to respond to a problem that is becoming even more prevalent. Should you simply focus on the issue from a legal perspective and ensure you are well prepared to defend any claims?

A recent study indicates that every dollar spent on a mental health program returns $2.30. In many industries, the return is significantly higher.[1] Does this mean that it makes commercial – and not just cultural – sense for businesses to look at the issue of mental health in the workplace from a broader perspective? As an employer, should you adopt a more holistic approach to reduce the chances of your workers developing mental health problems in the first place?

The size of the problem

At FCB Group, our healthcare team often works on matters that involve situations where an employee hasn't had their mental health cared for in a workplace setting. Eventually, this leads them to bring a workers' compensation claim against their employer.

The available statistics paint a bleak picture, demonstrating that mental health issues are having an adverse impact on workplaces all over Australia. According to Safe Work Australia,[2] the average time a worker takes off for a mental stress claim is 11.8 weeks. Interestingly, the median time off work for *all* claims is just 5.3 weeks.

In addition, work pressure accounts for around one-third of all psychological injury claims. Bullying and harassment make up around another 24% of claims. Alarmingly, 6.8% of the Australian workforce experiences bullying in the workplace. This compares with the world average of 1–4%.[3]

Another concerning statistic is the finding that 70% of employees with a mental health issue caused by work don't bring a workers' compensation claim. Instead, they keep working.[4] It is almost impossible to quantify the economic cost of employing a worker whose 'lights are on but is not at home'. However, various sources estimate that presenteeism costs employers in Australia between $6 and $16 billion each year.

A wide range of claims and remedies are available to employees

Aside from workers' compensation, there are a myriad of legal avenues that an employee can pursue if an employer fails to take sufficient care of their mental health, or if workplace conditions cause or contribute to a mental illness. These are illustrated in the diagram below.
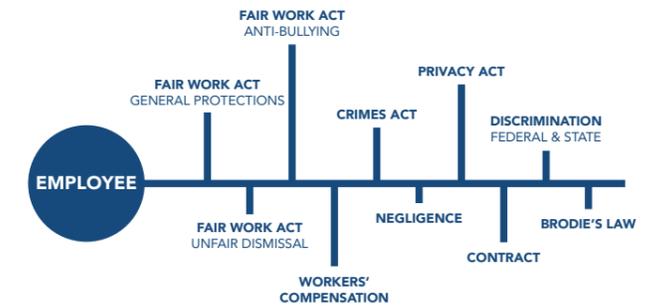
Employers also need to be aware that damages in mental health cases are often substantial. In some cases, employers are facing payouts in excess of $1 million.

Although it was an extreme case, the trend towards large sums being awarded in damages was demonstrated in *Nationwide News Pty Limited v Naidu*.[5] Mr Naidu was subjected to bullying by his manager. His employer prohibited bullying and was aware of the situation Mr Naidu was facing, but it did nothing to remedy the problem. After examining the facts in detail, the court held that Nationwide News failed to take the necessary steps to ensure that the appropriate standard of care for Mr Naidu's psychological health was maintained. Consequently, he was awarded $1.9 million. In another case, on 17 December 2015, the Supreme Court of Victoria awarded Kate Matthews, a female construction worker, $1.36 million in compensation for bullying and sexual harassment that caused her serious psychiatric illness.

Your legal obligations as an employer

From a strictly legal perspective, the primary reason for advocating a proactive and systematic approach to mental health in the workplace is because health and safety laws in Australia require both businesses and their officers to do so. This duty is a strict liability, meaning it is not negotiable. An accident or injury doesn't need to occur for a business to be liable; rather, a risk need only exist.

What does this mean in practice for employers or managers?

If a business and its officers haven't taken all reasonable steps to identify and minimise health risks, they will have failed in their duties to their employees. Health risks are not confined to physical health risks. The rules apply equally to psychological health risks.

What can happen if an employer or manager breaches their duty of care to their employees?

Under the various work health and safety (WHS) legislative regimes in Australia, your business can be fined up to $3 million for a breach of duty of care, and any officers can be fined $600,000 or face imprisonment for up to five years.

How can employers and managers meet their duty of care?

As an employer or a manager, to meet your duty of care, you need to assess psychosocial risks such as work stressors, leadership styles, work systems and work characteristics. You also need to ensure that there are resources and/or processes for managing those risks. Finally, you need to respond to employee concerns and provide training.

Healthcare under the microscope

In 2015, the healthcare sector came under intense media scrutiny following the release of the Royal Australasian College of Surgeons Expert Advisory Group report into the extent of discrimination, bullying and sexual harassment in the practice of surgery. The report found that 49% of fellows and trainees reported being subjected to discrimination, bullying or sexual harassment at the hands of surgeons or surgical consultants.

Separately, the Australian Workplace Barometer Report formally identified three industries, including health and community services, as 'high risk'. By this, they meant that the levels of psychosocial risk are high, particularly in respect of high job demands, low job resources and unfavourable health outcomes.

There is no doubt that we should all be concerned about the social and economic costs of mental health problems triggered by conditions in the workplace. However, as an employer, you have additional, pragmatic reasons to minimise the risk of problems arising. The cost of preparing for and defending claims will be high. In addition, if you have to defend a claim, you need to consider whether the reputation of the business will be damaged, especially if the case attracts media attention. Even if you are successful in defending a claim, an accusation can still tarnish the reputation of a business.

So, what can an employer do to reduce the incidence of mental health issues in the workplace?

Q & A WITH MICHELE GROW

Michele Grow is CEO of Davidson Trahaire Corpsych (DTC).

DTC is the largest provider of employee assistance programs (EAP) in Australia. It is also the Australian licensee of the beyondblue National Workplace Program.

Sue: What are the key factors required to preserve the mental health of employees in Australian workplaces?

Michele: Regrettably, the words 'mental health' still carry a degree of stigma in Australia and, while more organisations are working to change this, people either won't disclose an issue, or think it may not impact on them. As a result, I prefer to talk about mental 'fitness' rather than mental 'health', because I think it's important to see it as something that needs to be maintained rather than fixed. In addition, it is something that will touch everyone. Basically, there are five primary issues that can adversely affect our mental fitness:

- stress;
- mental health;
- bullying;
- change; and
- conflict.

Sue: Of those, which has the most impact on mental fitness in workplaces?

Michele: One of the biggest ticket items is 'change'. It's an interesting area. Over the last two years, DTC's EAP metrics have shown that calls from employees concerned about change have increased by 70%. In this respect, an organisation's attitude and approach to change in the world of work can be very significant. Many employees are suffering from 'change fatigue'. At the same time, organisations are under pressure to change and keep changing.

The problem is that change is something that's very difficult for senior managers to balance, because there doesn't seem to be an end in sight. You have downsizing, new technologies, new processes, increasing stress, increasing workload and longer work hours. When all of these factors are combined, employees are likely to be time poor, less productive and less engaged, and to suffer increased exposure to workplace risk. Ironically, this is the antithesis of what organisations are setting out to achieve.

Sue: Can you talk about how stress is impacting on the productivity of workers?

Michele: The statistics speak for themselves:

- One in five Australians experience moderate to severe stress at work.
- Fatigue is four times more likely to result in a workplace accident than drugs or alcohol.

- Job stress increases the risk of depression and anxiety by two to three times.
- Of 2,000 British public servants studied in 2012, those working 11 hours per day were found to be between two and five times more likely to suffer depression than those working eight hours per day.

It is revealing to discover that one in two Australian workers cites work stress as the reason they don't have a healthy lifestyle.

Sue: What causes stress in a workplace?

Michele: Well, it comes down to four factors: the employee, the job, the organisation and change. One of the challenges is that employees come to work 'fully loaded', meaning they don't leave their life behind when they walk in the door. Any issues an employee might be experiencing with family, health or finances are part of how they will present at work. This means that anything an organisation can do to help its employees manage their broader work-life-health journey is a plus. Having an EAP in place is a good start, as it provides support for a whole range of issues as well as being proactive. Anything else you can do to help your employees will also reap rewards, whether it's encouraging proper nutrition, having a policy where employees aren't required to respond to emails after a certain hour of the evening, conducting seminars on improving sleep, or running a course for parents and spouses on coping with teenagers. Obviously, raising awareness about mental health is paramount.

Sue: Are managers in Australia appropriately equipped to deal with workers with mental health issues?

Michele: No. This is a big part of the problem. In many cases, managers simply don't have the skills, confidence or appropriate level of resilience to manage mental health issues in the workplace. Businesses that want to get the biggest bang for their buck from training their people need to invest in their managers, especially middle managers. Managers generally know when there is an issue or at the very least that 'something may not be right'. Training in mental health awareness, in how to have a sensitive conversation with an employee and in how to refer someone for support should be the absolute minimum provided to every manager.

Sue: Do you have any final suggestions for reducing mental health problems in Australian workplaces?

Michele: It's important to realise that, as a senior executive or manager, the behaviour you walk past is the behaviour you're prepared to accept. There is no point having policies in place if they aren't the lived experience for the workplace.

Sue: Why is tolerating poor behaviour so problematic?

Michele: Well, the kind of behaviour you turn a blind eye to reflects the culture of the entire business or organisation. In order to increase the mental fitness of their employees, employers need to understand that it is these small pieces of the puzzle – the seemingly isolated or unimportant incidents – that ultimately make up the big picture of what is happening across the organisation. Achieving positive change doesn't necessarily require a large investment of time or funds; the actions of individuals can have an impact. The single most effective strategy in dealing with poor workplace behaviour is to 'have the courage to act'. This means addressing problematic behaviours where and when we encounter them. When poor behaviour is tolerated, it has a nasty habit of being replicated, so it's important to deal with the problem as soon as possible. Letting people know that their comments, behaviour, manner or approach are unhelpful, unacceptable or contrary to the values of the organisation will go a long way in effecting change – but only if all managers and employees have the courage to act consistently.

TIPS

LEGAL TIPS FOR PREVENTING MENTAL HEALTH ISSUES IN THE WORKPLACE

✓ Adopt a proactive and progressive WHS-based risk assessment approach to mental health.
✓ Design and implement clear policies and procedures on bullying, harassment, equal employment opportunity and grievance handling.
✓ Provide regular training.
✓ Manage, and work to reduce, any risks that you identify.
✓ Ensure that psychosocial risks are reported, and responded to, in an appropriate manner.
✓ Take immediate steps to investigate and consider complaints. Ask the following questions:
  - Are you the best person to investigate the complaint?
  - Do you have legal professional privilege over an investigation report?
✓ Constantly monitor and review key events in your workplace. These include:
  - where bullying claims are substantiated;
  - where there is absenteeism; and
  - when exit interviews indicate problems that need to be investigated. ■

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1. beyondblue, National Mental Health Commission and the Mentally Healthy Workplace Alliance, *Creating a Mentally Healthy Workplace: Return on Investment Analysis, Final Report*, March 2014, PricewaterhouseCoopers, 2014.
2. *Work-Related Mental Disorders Profile 2015*.
3. Australian Workplace Barometer: Report on Psychosocial Safety Climate and Worker Health in Australia (AWB Report).
4. Australian Bureau of Statistics (ABS), *Work-Related Injuries, Australia, July 2013 – June 2014*, cat. no. 6324.0, ABS, Canberra.
5. (2007) 71 NSWLR 471.