

## TIP SHEET #1

# KNOWING THE LAW

## UNDERSTANDING YOUR RESPONSIBILITIES

Given that one in six working Australians will experience a mental health condition in their lifetime, we know that it is highly likely that in your role as a leader you will be responsible for managing a team member with a mental health condition.

Therefore, understanding your responsibilities is important to ensure that you are appropriately supporting a team member experiencing a difficulty with their mental health.

In understanding your responsibilities, and not withstanding the separate issue of causation, it is important for leaders to understand that their responsibilities are relevant if a team member is experiencing a mental health difficulty including a diagnosable illness:

- Prior to employment
- During employment
- Outside of the workplace
- Due to a workplace incident
- As a result of a longer-term workplace issue

**In fact, whatever the circumstances of a team member's mental health condition, an organisation's responsibilities extend to any team member with a mental health concern. Therefore, understanding your responsibilities is important to make sure that you are complying with all applicable requirements when supporting a team member with a mental health condition.**

To ensure you are doing this, there are six key areas of law that are important to know in relation to mental health in the workplace as explained in the next section.

However, it is important to note that the information provided here regarding understanding the law in relation to mental health is intended to be a general overview, and not legal advice and should not be interpreted in this way. Leaders are encouraged to seek appropriate counsel from human resource representatives or legal personnel (if available) if they do not feel they have the applied knowledge for lawfully managing the impact of mental health issues. Alternatively, contact Business Queensland or Fair Work Australia for free and confidential advice. In addition to the information provided, it is important to be fully aware of all relevant legislations and the requirements in your specific state or territory, as well as any relevant policies and procedures that your business may have..

# 1 WORK HEALTH AND SAFETY

You have a responsibility under Workplace Health and Safety (WHS) Acts and Regulations across Australia and at common law to provide a safe and healthy workplace. In fact, as a leader, you have a requirement to protect the health, safety, and welfare of workers and other persons who are at, or come into contact, with a workplace. This includes psychological health and safety.

As such, there is a responsibility, as far as is reasonably practicable, for businesses to provide safe and healthy places and systems of work, wherever work is performed.

In a nutshell, what this means is that the WHS Act and Regulations requires businesses to take action to prevent or lessen potential risks to the health and safety of workers.

Therefore, specifically and practically from a mental health perspective, businesses have the responsibility to assess and manage risk pertaining to psychological health and safety.

As part of the WHS Acts and Regulations requirement to assess and manage risk pertaining to psychological health and safety, businesses are required, as far as is reasonably practicable, to eliminate or minimise **psychosocial hazards**.

A psychosocial hazard is a hazard that arises from or relates to the design or management of work, a work environment, plant (e.g. equipment, machinery or appliances or tools) at a workplace, or workplace interactions or behaviours that may cause harm, whether or not it may also cause physical harm.

Some examples of psychosocial hazards are:

- Poor leadership practices and workplace culture.
- Poor or no policies and procedures.
- Unreasonable role and responsibility expectations.
- Inadequate support.
- Inappropriate and unreasonable behaviour.
- Poor organisational justice (e.g. unfair, inconsistent, or opaque decision making).
- Exposure to bullying, harassment, violence, aggression or discrimination.
- Exposure to traumatic events including vicarious and secondary trauma.
- Fatigue or burnout.

# 2 REASONABLE ADJUSTMENTS

Workplaces are required to make reasonable adjustments to the work environment and/or the employee’s role and responsibilities to enable an individual with a mental health condition to do their job (i.e., that is, to meet the basic inherent requirements of the job).

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A reasonable workplace adjustment is one that doesn’t cause an employer ‘unjustifiable hardship’.

Unjustifiable hardship is determined by considering the degree of disadvantage a workplace adjustment would cause to the worker, employer, or other workers. Examples of hardship for an employer might include the workplace adjustment causing financial, resourcing, or a competitive disadvantage to the business.

Examples of reasonable adjustments, assuming they do not cause unjustifiable hardship to the business are:

- 1 Providing flexible hours.
- 2 Allowing extra time to complete tasks.
- 3 Writing instructions down.
- 4 Using a checklist to keep the worker focused.
- 5 Having additional meetings to provide extra support.
- 6 Changing to part time work.
- 7 Additional sick leave allowances.
- 8 Setting up a different work space.
- 9 Reallocating responsibilities.
- 10 Working from home.

## **3** **INHERENT REQUIREMENTS**

The inherent requirements of a job are those responsibilities or skills that are essential to the role. An employer is required to determine if a worker with a mental health issue can meet the inherent requirements of the job, both with or without reasonable adjustment.

If a team member cannot meet the inherent requirements of the job, and no reasonable adjustment can be made, the next step is to explore alternative work placement options. If there are no other work options available, an organisation can end a person's employment.

When determining alternative options for a team member with a mental health condition, please contact your Human Resource representative for support if available. Alternatively, contact Business Queensland or Fair Work Australia for free and confidential advice.

## **4** **DISCRIMINATION LEGISLATION**

The Disability Discrimination Act 1992 (DDA) makes it unlawful to discriminate against, disadvantage in any way, harass or victimise someone on the basis of a disability or impairment. This includes mental health impairment or disability.

Failing to make reasonable workplace adjustments or genuinely search for work role alternatives may be viewed as discrimination.

Behaviour that could reasonably be seen to offend, humiliate, intimidate or distress someone, or sees them be treated unfavourably or unfairly in anyway due to their mental health issue are indicators of harassment and victimisation, and are unlawful.

# 5

## QUEENSLAND INDUSTRIAL RELATIONS ACT

The Queensland Industrial Relations Act 2016, directs that employers cannot take adverse action against a worker with a mental health condition.

Adverse action includes dismissal (if it is possible to make a reasonable adjustment and the worker can meet the inherent job requirements), unfair treatment, not employing a prospective worker, and not promoting or discriminating against a worker because of their mental health issue.

A worker may take action against an employer under the Queensland Industrial Relations Act if they perceive they have been the subject of adverse action and they believe this action is unlawful. Whilst not all adverse action is considered unlawful under the Queensland Industrial Relations Act, employers should be aware of how their obligations apply when dealing with mental health issues under the Queensland Industrial Relations Act 2016.

# 6

## PRIVACY OBLIGATIONS

The Commonwealth Privacy Act (1988) (Privacy Act) legislates for the protection of the privacy and confidentiality of an individual's personal information including health information in government agencies and in organisations with a turnover of \$3Mil or more.

Within the Privacy act, there are Privacy Principles which provide a broad set of guidelines for how an organisation regulates and deals with personal or private information as opposed to specific requirements and exemptions.

However, even in businesses not covered by the Privacy Act, when managing mental health issues, upholding the privacy of individuals is still paramount. This includes not disclosing any information about mental health concerns without their consent, and then only disclosed for the purpose it was disclosed.

It is also helpful to understand that as with any illness, you can only ask questions about a mental health condition to the extent that it is for a legitimate purpose (e.g., to implement reasonable workplace adjustments or comply with health and safety regulations) and this information cannot be adversely used.

The exceptions to these privacy obligations, which requires a reasonable assessment of the specific circumstances of an employee, are when disclosure will prevent or minimise an immediate threat to the individual or someone else, or if the disclosure is authorised by law.

If you or someone you know needs help contact **TIACS** on 0488 846 988 or your organisation's Employee Assistance Program (EAP), your GP or call: **LifeLine** on 13 11 14, **Kids Helpline** on 1800 551 800, **MensLine Australia** on 1300 789 978 or the **Suicide Call Back Service** on 1300 659 467.