

# LK GOVERNANCE UPDATE

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## DOUBLE-EDGED DYNAMICS: PSYCHOSOCIAL RISKS AND HAZARDS AND THE INTERPLAY WITH WORKPLACE INVESTIGATIONS

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Poor psychosocial workplace environments pose a \$6 billion challenge to the Australian economy.[1] Notwithstanding, compensation claims for workplace psychological injury claims have historically been treated very differently to physical injury claims, with a much lower success rate.[2]

The recent implementation of the *Work, Health and Safety (Psychological Risks) Amendment Regulations (Psychosocial Regulations) 2023 (SA)*[3] has rightly elevated the duties imposed on employers to protect the psychological health of workers to the same status as their physical health (the **2023 Regulations**). The 2023 Regulations serve as a call to arms to South Australian workplaces to proactively identify and manage psychosocial risks and hazards, so as to eliminate or minimise risks to psychological health so far as is reasonably practicable.[4] NSW, QLD, TAS, WA, ACT and NT have also implemented psychosocial risks and hazards WHS regulations which mirror the 2023 Regulations.[5]

### Workplace Investigations as a Control Measure

A key 'control measure'[6] to eliminate or minimise psychosocial risks[7] is a robust workplace investigation, arising from health and safety issues. The 2023 Regulations will likely mean that there is an increased need to investigate incidents and complaints, so as to comply with the primary duty on the part of a PCBU[8] to ensure the health and safety of its workers.

But caution must be exercised given the double-edged dynamics at play - whilst workplace investigations can arise from safety incidents and complaints, safety incidents and complaints can also arise from improperly managed workplace investigations.

Careful planning of a workplace investigation will ensure the integrity of the process and reduce the likelihood of accidental psychological injury.

## OBJECTIVE AND GUIDING PRINCIPLES

In planning a workplace investigation it is important to be clear on the underlying purpose.

A workplace investigation[9] is a process carried out to gather information and facts about a compliance concern or an incident that has occurred in the workplace. Its core purpose is to establish a sound factual basis on which an employer may rely to make decisions regarding their workers and workplace.

Three guiding principles arise from this objective. [10]

### (1) Procedural Fairness

Procedural fairness is the cornerstone of a fair, transparent and proper investigation. It is therefore essential that workplace investigations are conducted in a procedurally fair way. This encompasses:

- acting diligently and promptly in conducting the investigation;
- acting within the policies, procedures and regulatory framework that applies to the workplace;
- appointing a qualified and unbiased investigator; and
- providing participants with a fair and reasonable opportunity to respond to information (including new information that may arise in the course of the investigation).

Consideration should be given to appointing an *external* investigator where the incident concerns a senior employee or Board member, where the allegations are serious or complex, or where there is risk of litigation or the involvement of external regulators.

Where *external legal advisers* are appointed to conduct a workplace investigation, legal professional privilege may be claimed by the employer in respect of any investigation report and related communications where the dominant purpose test can be satisfied - that is, whether the communication is for the purpose of providing legal advice or for the use in existing or anticipated litigation. [11]

## (2) Safe Workplace

On the present state of the law, there is no separate and distinct duty of care which extends to the conduct of a workplace investigation and decision-making process.[12] However, an employer's general duty of care to provide and maintain a safe workplace extends to the treatment of employees during a workplace investigation.[13] Primarily, this obligation requires an employer to implement control mechanisms to provide adequate support to workers during a workplace investigation. This could include access to a support person or referral to an Employee Assistance Program.

A further aspect of a safe workplace investigation is the concept of proportionality. In short, the nature of the investigation should be *proportional* to the risks and circumstances. Relevant factors in determining proportionality include:[14]

- The level of risks involved;
- The seriousness of actual or potential psychological harm;
- The situation's complexity;
- The size of the business;
- The number of workers involved and/or affected; and
- The potential for the incident to re-occur.

On a sliding scale of proportionality, workplace investigations can range from a preliminary inquiry, investigation on the papers, or a full investigation where evidence is gathered and assessed on the civil standard of proof. But regardless of the type of investigation undertaken all investigations must be undertaken with procedural fairness.

## (3) Confidentiality

An employer's general duty of care to provide and maintain a safe workplace extends to preserving confidentiality and appropriately handling personal and sensitive information during a workplace investigation.[15]

Workplace investigations will be considered to be a genuine operational reason for an employer to require employees to provide sensitive / personal information, so long as that collection is proportionate.

Otherwise, the facts and details of an investigation should be kept confidential as far as possible and disclosed only on a 'need to know' basis, and all participants should be instructed to maintain confidentiality.[16]

## Workplace Psychological Injury

The existence, scope and content of the duty of care owed by employers when undertaking and making decisions arising from workplace investigations is "*fragmented and unsettled*"[17] and is "*an area ripe for further consideration*"[18] under Australian law.

The High Court has yet to decide a case where psychological injury resulted from a workplace investigation, disciplinary process, or suspension or termination of employment.

Whilst the High Court initially granted special leave to appeal in *Govier v Unitingcare Community*, it subsequently withdrew special leave during the appeal hearing on the basis that the contract of employment had never been introduced into evidence.[19]

*Govier* concerned a psychological injury (PTSD and a serious depressive order) which had been suffered by the employee due to a physical altercation with a co-worker, and the subsequent aggravation of that injury during the course of a workplace investigation which ultimately led to the employee's termination.

The Queensland Court of Appeal determined that an employer's duty of care *did not* extend to psychological injury suffered during workplace investigations or as part of disciplinary processes.[20]

More recently, on 7 March 2024 the High Court of Australia granted special leave from the decision of the Victorian Court of Appeal in *Vision Australia Ltd v Elisha*. [21]

*Elisha* concerned the workplace investigation of an incident between an employee and a member of hotel staff during an overnight stay, which led to the termination of the employee for serious misconduct. The employee commenced proceedings claiming that the employer had breached his contract of employment (or alternatively had been negligent) and that he had suffered psychological injury as a result of the employer's implementation of the processes leading to, and resulting in, his termination of employment.

The Victorian Court of Appeal dismissed the employee's cross-appeal and affirmed the Supreme Court's decision that the employer *did not* owe a duty of care to the employee to avoid psychological injury in the investigation process which led to the termination of his employment.[22]

It is hoped that the High Court will soon bring certainty and coherency to this unsettled area of law.

## Looking Ahead

The 2023 Regulations have brought clarity and precision to the duties owed by a PCBU to its workers, to proactively identify and manage psychosocial risks and hazards so as to eliminate or minimise risks to psychological health so far as is reasonably practicable.

As these obligations have been brought into sharper focus, it can be expected that there will be both (a) an increased need to conduct workplace investigations concerning psychosocial risks and hazards; and (b) an increase in the number of formal legal claims concerning psychological injury in the workplace, including as a result of the workplace investigation process.

The legal landscape will continue to evolve through the course of 2024, with the *Elisha* appeal to be heard by the High Court post-June 2024 and the *Fair Work Legislation Amendment (Closing Loopholes) Act 2024* to commence in August 2024.<sup>[23]</sup> The latter brings with it the concept of a 'right to disconnect,' which has a close relationship to the psychological health of workers.

In the meantime, the time is ripe to review the WHS standards, policies and procedures of your organisation (including those concerning workplace investigations and disciplinary processes), to ensure that they are up to date, clear and accessible.

[1] Burns, Kylie, 'Liability for Workplace Psychiatric Injury in Australia: New Coherence and Unresolved Tensions' (2023) 45(2) *Sydney Law Review* 157.

[2] Productivity Commission 2020, *Mental Health*, Report no. 95, Canberra.

[3] 'Health' is defined to include psychical and psychological health: see s.4 under the *Work Health and Safety Act 2012* (SA).

[4] See LK Governance March 2023: *Making Psychosocial Safety a Priority* (Claire Clutterham).

[5] *Work Health and Safety Amendment Regulation 2022* (NSW); *Work Health and Safety (Psychosocial Risks) Amendment Regulation 2022* (Qld); *Industrial Relations Regulations Amendment (Work Health and Safety) Regulations 2022* (WA); *Work Health and Safety Regulations 2022* (TAS); *Work Health and Safety Amendment Regulations 2023 (No 1)* (ACT); *Work Health and Safety (National Uniform Legislation) Amendment Regulations 2023* (NT). In 2022, the Victorian government released an exposure draft of the *Occupational Health and Safety Amendment (Psychological Health) Regulations* for public consultation. As at the date of writing the proposed regulations have not been made by the Governor in Council.

[6] Reg 5, *Work Health and Safety Regulations 2012* (SA): "Control measure in relation to a risk of health and safety, means a measure to eliminate or minimise risk."

[7] Reg 55A, *Work Health and Safety Regulations 2012* (SA): defines 'psychosocial risk' as "... a risk to the health or safety of a worker or other person arising from a psychosocial hazard." Reg 55B defines 'psychosocial hazard' as: "... a hazard that (a) arises from or relates to – (i) the design or management of work; or (ii) work environment; or (iii) plant at a workplace; or (iv) workplace interactions or behaviours; and (b) may cause psychological harm (whether or not it may also cause physical harm)".

[8] PCBU = Person Conducting a Business or Undertaking.

[9] If the investigation relates to disclosable conduct for the purposes of the *Public Interest Disclosure Act 2013* (Cth) then separate and particular considerations will need to be applied.

[10] See further, Safe Work Australia, *Managing Psychosocial Hazards at Work – Code of Practice* (July 2022).

[11] *Peter Tainsh and Markus Wellner v Co-Operative Bulk Handling Ltd* [2021] FWC 3381.

[12] *Potter v Gympie Regional Council* [2022] QSC 9; *Govier v Uniting Church* [2017] QCA 12; *New South Wales v Paige* [2002] NSWCA 235.

[13] *Hayes v Queensland* [2016] QCA 191; *Robinson v State of Queensland* [2017] QSC 165.

[14] See further, Safe Work Australia, *Managing Psychosocial Hazards at Work – Code of Practice* (July 2022).

[15] *Campbell v Woolworths Ltd* [2017] NSWCC 213.

[16] Again, for completeness, different standards and requirements apply if the investigation relates to disclosable conduct; specific advice should be sought in these circumstances.

[17] Adriana Orici, 'Unsystematic and Unsettled: A Map of the Legal Dimensions of Workplace Investigations in Australia' (2019) 42(3) *UNSW Law Journal* 1075.

[18] Burns, Kylie, 'Liability for Workplace Psychiatric Injury in Australia: New Coherence and Unresolved Tensions' (2023) 45(2) *Sydney Law Review* 157. For a discussion of recent case law see *Ackers v Cairns Regional Council* [2021] QSC 342; *Potter v Gympie Regional Council* [2022] QCA 255; *Vision Australia Ltd v Elisha* [2023] VSCA 754.

[19] *Govier v Unitingcare Community* [2017] HCATrans 183; *Govier v Uniting Church in Australia Property Trust (Q)* [2018] HCATrans 65.

[20] *Govier v Uniting Church in Australia Property Trust (Q)* [2017] QCA 12, applying *New South Wales v Paige* [2002] NSWCA 235.

[21] *Elisha v Vision Australia Ltd* [2024] HCASL 60 (M98/2023); *Vision Australia Ltd v Elisha* [2023] VSCA 754.

[22] The Court of Appeal allowed the appeal on liability, overturning the Supreme Court's decision to award damages of \$1.5million on the grounds of remoteness.

[23] August 2024 is the commencement date for business that employ more than 15 employees. For businesses that employ less than 15 employees the commencement date is August 2025.

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