

## The Western Australian Department of Justice has become the first employer in WA to be charged for failing to meet its obligations to manage employee psychosocial hazards in the workplace.

On 24 December 2022, the regulations supporting the *Work Health and Safety Act 2020 (WA) (WHS Act)* were amended to define and introduce specific duties in relation to psychosocial risks in the workplace. Specifically, under these changes, persons conducting a business or undertaking (PCBUs) are expressly required to eliminate psychosocial risks, or to minimise them so far as is reasonably practicable, using the same “risk assessment” approach applied to risks to physical health and safety.

Now, less than two years later, WorkSafe WA has announced that it has charged the state Department of Justice (DOJ) with breaching its duties under the *WHS Act* and the regulations to not expose workers to risks to their psychological health. This is the first time WorkSafe WA has commenced a prosecution in relation to psychosocial hazards under the current legislation.

Over the past few years, several jurisdictions in Australia, including WA, have incorporated specific reference to psychosocial hazards and the need to properly manage these hazards in their applicable work health and safety regulations. However, the duty to manage and address psychosocial hazards is not in itself new, as this already forms part of the primary duty of care under the *WHS Act* to ensure workers’ health and safety in the workplace, so far as is reasonably practicable. More recently, safety regulators in Australia have shown they are increasingly willing to focus on the measures PCBUs have implemented to eliminate or minimise psychosocial risks and target those who have not been compliant, including by initiating prosecutions.

In this case, the DOJ is facing charges of breaching sections 19 (“Primary duty of care”) and 31 (“Failure to comply with health and safety duty – Category 1”) of the *WHS Act*, with WorkSafe alleging that the DOJ failed to provide and maintain a safe work environment and, through that failure, caused serious harm to a female prison officer employed at the Bunbury Regional Prison.

More specifically, WorkSafe alleges the DOJ did not have proper procedures in place at the prison to deal with inappropriate behaviours like bullying, harassment, sexual harassment and victimisation, which resulted in the prison officer suffering a serious psychological injury.

Notably, WorkSafe issued the DOJ with an improvement notice in March 2023 requiring it to implement such procedures, after WorkSafe found that staff at the prison were repeatedly exposed to inappropriate comments and advances, bullying, intimidation and threats. However, according to WorkSafe, the DOJ failed to comply with the notice, even after being granted an extension of time.

As the charges relate to a Category 1 offence under the *WHS Act*, the DOJ is facing a potential maximum penalty of AU\$3.5 million if convicted. The matter is listed for first mention in the Bunbury Magistrates Court on 7 November.

This is potentially a significant landmark case, not just for WA, as it demonstrates that WorkSafe (and other safety regulators around Australia) are willing to treat contraventions that relate to psychosocial hazards with the same level of seriousness and gravity as those that relate to major risks to workers’ physical health and safety, as reflected in the level of charges laid and potential penalties that apply. (Under the *WHS Act* in WA, the only offence higher than a Category 1 offence is that of industrial manslaughter.) This reflects the increased awareness of the far-reaching impact psychosocial risks in the workplace (which include, but are by no means limited to, bullying and sexual harassment) can have on workers’ mental health, and the degree of harm that can be suffered as a result.

The outcome of this case should be quite telling in terms of outlining the extent to which the DOJ had a duty to control psychosocial hazards in what is an inherently dangerous and challenging work environment.

However, regardless of the outcome, this prosecution, the first of its kind in WA, should serve as a “wake up call” for PCBUs to recognise that they have a legal duty to manage potential risks to workers’ mental health, which includes a duty to assess the potential psychosocial risks that exist for their workers, and ensure they are taking appropriate measures to eliminate or minimise these risks.

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