

Episode 2: Summary

Episode name: WHS: What about Mental Health?

Guest(s): Michael Tooma

What area(s) of law does this episode consider?

Michael discusses mental health in the legal profession and in the workplace generally, in the context of health and safety.

Why is this topic relevant?

When you think of workplace health and safety, you might think of industrial accidents causing physical injury at construction sites and other high-risk workplaces; mental health risks may not immediately come to mind. However, increased awareness of the mental health impacts of unsafe work practices over the past decade, amplified by the current COVID-19 outbreak which can include prolonged periods of self-isolation and working from home, have forced the Australian community to acknowledge and address the issue of mental health in all workplaces, including law practices.

A discussion on mental health would be incomplete without addressing the issues of sexual harassment and bullying, from which the legal profession is not immune. A 2019 report by the Victorian Legal Services Commissioner found that 61% of female respondents and 10% of male respondents reported being sexually harassed. Further, 81% of respondents who stated that they had experienced sexual harassment also said that they did not report it. Both bullying and sexual harassment are highly destructive and can have a huge impact on one's wellbeing and mental health.

What legislation is considered in this episode?

The *Work Health and Safety Act 2011* (NSW) (**WHS Act**) is the main piece of legislation that governs workplace health and safety in New South Wales. Every Australian state and territory, other than Victoria, has adopted 'harmonised' WHS legislation in substantially similar terms to the model WHS law developed by Safe Work Australia.

The Act is touched on in the episode when explaining a 'PCBU', or 'person conducting a business or undertaking', defined in section 5 of the Act. A PCBU includes public and private companies, partnerships, sole traders, government departments, associations and cooperatives.

Under section 19 of the WHS Act, a PCBU has 'a primary duty of care to ensure, so far as is reasonably practicable, the health and safety of workers'.

What are the main points?

- There is no 'one size fits all' approach to mental health that is appropriate for all workplaces. All individuals have their own lives, needs and concerns, and at a minimum, employers should adopt a more holistic approach when considering the mental health of their employees.

- Psychosocial health is an emerging issue of concern; before COVID-19, 1 in 5 Australians have taken time off for mental health issues. This is in part recognition of a fact that people are recognising issues that have been previously undiagnosed.
- In a profession where performance is often measured by billable hours – sometimes to the exclusion of any other metric – the pressure to adopt unsafe work practices can begin as early as law school and builds throughout one’s career. A majority of the legal profession measure performance through billable hours, and rewards recording a large number of billable hours – including volumes that are unachievable without overwork. While some firms offer mental health first aid courses and employee assistance programs, Michael Tooma argues that sweeping and fundamental changes to our work practices are needed.
- Challenges in the workplace are healthy. Under-stimulation can be as dangerous as over-stimulation. A healthy, productive level of stress is called ‘eustress’. But too much stress – ‘distress’ – is unhealthy. Michael Tooma suggests that one model for ensuring challenges are health and sustainable is to follow periods of intense work with periods of rest and lighter work, rather than trying to maintain a constant level of ‘eustress’ indefinitely.
- Organisational justice refers to an employee’s perception of their workplace’s decisions and behaviours; it can include perceptions around procedural fairness, procedures, consultation and communications as well as how managing poor and underperformance is managed. These perceptions impact the employees own perception toward the organisation and can influence mental health.
- Law firms, and employers more widely, in the midst of COVID-19 have been forced to trust their employees while they work from home. This shift has forced employers to challenge previously held mindsets that working from home reduces productivity.
- A lot can be said about a workplace by its tone and culture. Michael discusses the saying, *‘the standard you walk past is the standard you accept’*. He describes bullying as a cultural issue, although the same can also be said for sexual harassment. There is a culture of silence in the legal profession and law firms need to set an acceptable standard, encouraging bystanders to speak up and call out bad behaviour.

What are the practical takeaways?

- People don’t talk about mental health, but it’s important to understand that everyone has good days and bad days.
- There is a very high instance of mental illness amongst lawyers.
- Sleep deprivation can be as damaging as working whilst under the influence of alcohol.
- A holistic approach to mentally safe work practices is recommended. This involves active engagement rather than stringently following practices, procedure, systems and processes. Since no one size fits all, sitting down, listening and having a

conversation with your employees or co-workers is the first step if you want to understand their mental health needs.

- Workplaces should actively encourage positive mental health and self-care habits, such as healthy eating, exercise and downtime.
- When discussing flexible work options, employers should be mindful that different people may work more productively at different times. Some people may work better in the mornings or evenings, or may even want to work four long days, or six short days, instead of five. Fixed mindsets on working hours need to be challenged.
- Approach mental health as a performance issue, not a compliance issue.

Show notes

[Tooma, Michael "Michael Tooma on Mental Health" 2020](#)

[The ABC radio program on the Goldilocks Effect](#)

[International Bar Association Report: 'Us Too? Bullying and Sexual Harassment in the Legal Profession'](#)

[Office of the Legal Services Commissioner – Information Sheet on Inappropriate Personal Conduct in a Law Practice](#)