Explanatory paper for public consultation on the draft code of practice managing the risks to psychological health

SAFEWORK NSW

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Dr Peta Miller throughout the development of this paper.

Contents

Executive summary

Through the public consultation process, including a public comments submission form, comments are sought on the New South Wales (NSW) draft Code of Practice Managing the risks to psychological health (draft code). Including the:

- **Legal clarity -** how clearly it explains the legal duties under WHS laws
- **Content -** is there enough information, and
- **Effectiveness -** is the information useful and practical.

This explanatory paper provides information about some aspects of the draft code that may help inform public comments. Throughout the paper, relevant questions from the public comment submission form are noted.

Psychological health is captured by the *Work Health Safety Act 2011* (WHS Act 2011). To meet the primary duty of care (WHS Act 2011 s.19) duty holders must manage work-related risks to the psychological health of their workers or those impacted by their business or undertaking. The caveat 'so far as is reasonably practicable' limits this duty.

The draft code of practice is one part of the WHS legislative framework. Codes of practice are not mandatory, and duty holders may follow other approaches if they can demonstrate that by following these, they can meet or exceed the minimum safety standards.

The draft code aims to:

- support compliance with the existing primary duty of care as it applies to psychological risk management
- provide guidance around the existing duties and obligations
- include known information about particular psychosocial hazards, risks to psychological health and control measures, and
- help in determining what is reasonably practicable by providing a reasonable and practical approach to managing these risks.

Because codes are admissible in court, they are written in a particular stylised way. A court may have regard to a code as evidence of what is known about a hazard or risk and may rely on the code in determining what is reasonably practicable.

This paper briefly notes the intention and issues in the draft code. This includes the rationale for particular terms, including why these may differ from and are more limited than those used by mental health advocates.

The paper notes specific existing legal requirements and how these apply to the management of risks to psychological health. Common psychosocial hazards, risks to psychological health and control options described in the draft code reflect what is consistent with SafeWork NSW, other Australian and international WHS regulator advisory material and the empirical evidence.

The role of poor behaviour as a source of psychological risk is raised. The requirement to identify if work design and management may be contributing to poor behaviour, and to control these are noted. Where non-work factors are the likely underlying cause, the employers' duty is limited to making reasonable adjustments and balancing these against the need to protect other workers from harm arising from the poor behaviours of others.

The importance of WHS management systems to record, investigate and respond to complaints, risks to psychological health, and incidents is emphasised.

The hierarchy of control model is familiar to most employers. It remains an effective way to ensure appropriate focus is given first to eliminate psychosocial hazards and then control psychological risk through minimisation before using lower order controls. The second level of the hierarchy, minimisation, includes substituting a hazard for a less hazardous option. Work design and redesign is a form of substitution and will be the most widely used strategy at this level. Administrative controls remain important, but because they rely on behaviours should only be used to support the other control measures.

Purpose of this explanatory paper

This paper provides information that may help inform comments on the draft Code of Practice Managing the risks to psychological health.

Where the term employer is used, it means the person conducting the business or undertaking (PCBU) and the officer(s) of that organisation.

What is meant by psychological health, injuries, and mental health?

If workplace risks are not effectively managed, then work-related psychological injuries or mental disorders can occur. These are diagnosable conditions that include a range of recognised cognitive, emotional, physical, and behavioural symptoms that significantly affect how a person thinks, behaves, and interacts with others. (Caponecchia, Branch and Murray 2020; Oakman and Macdonald 2018) These include, for example, depression, anxiety, or post-traumatic stress disorder.

However, psychological health, mental health, and psychological well-being are terms that are often used interchangeably by the Australian community, and even academics.

The World Health Organization defines mental health very broadly. As a state of well-being in which every individual realises his or her potential and can cope with the normal stresses of life can work productively and fruitfully and can make a contribution to her or his community. (WHO 2013)

The draft code has a narrower definition than the WHO and defines work-related psychological health as 'a state of complete psychological well-being without psychological injury or illness.' The duty holder's responsibilities are also only to manage work-related risks to the psychological health of their workers or those impacted by their business or undertaking. The caveat 'so far as is reasonably practicable' further limits this duty.

In all Australian jurisdictions, psychological injuries are only compensable if they arise out of or in the course of employment. New South Wales (NSW) workers' compensation laws qualify this further by stating the employment must have been a substantial contributing factor to the injury (Workers Compensation Act *1987,* Section 9A).

Claims for psychological injuries are not generally accepted if they are related to reasonable action undertaken in a reasonable way by the PCBU over, for example, performance, disciplinary action, transfer or deployment, dismissal, and so on. (*Workers' Compensation Act 1987*, Section 11 A)

The draft code provides guidance on how to comply with the WHS duty to manage workplace risks that may contribute to psychological injuries or mental disorders.

The draft code does not include content relating to general mental health and well-being at work programs, which are helpful but may not be required under WHS law, for example, programs to support people with pre-existing conditions. Only existing obligations under the *WHS Act 2011* are described in the draft code.

Why we need to manage work-related psychological health risks

All jobs involve interacting with others and carrying out tasks and jobs which, if not designed and managed well, may expose workers to harmful levels of stress.

There are two main ways work-related stressors can damage psychological health:

1. Exposure to frequent but low to moderate levels of stress, can arise in a number of ways, such as when there is too much to do in the available time paired with inadequate practical and emotional support and opportunities for recovery and recognition. In the short-term, this may lead to stress and fatigue, and if exposure continues, to anxiety, burnout, or depression.
2. Exposure to infrequent but highly stressful events, such as bullying, harassment, or threats or acts of violence. In the short term, this may lead to anxiety, and if exposure continues to post-traumatic stress disorders, anxiety, or depression.

The emotional impacts on the individual, their families, workmates, and employer are significant.

No one ever wants to see their workers harmed just because they did their job. Nevertheless, less than nine per cent of the state's workplaces report they have a systematic, integrated, and sustained approach to dealing with mental health issues. Close to one-in-five businesses only have a basic awareness of how to control risks to psychological health that may threaten their workers' health and safety. (Instinct and Reason 2017)

Over half a million NSW employees (272,000 men and 290,000 women) report poor work or non-work-related mental health. NSW industries with typically poor job control and low job security, such as manufacturing, retail, accommodation, food services and administrative services like clerical or cleaning businesses have some of the highest numbers of cases of mental ill-health. (Yu and Glozier 2017)

From 2014-15 to 2018-19 there were over 26,600 people who experienced such serious work-related psychological injuries they needed to take time off work to recover. Tragically others even took their own lives. (NSW State Insurance Regulatory Authority (SIRA) 2018-2019)

The number of accepted psychological injury workers' compensation claims in NSW has been increasing. In 2018-19 (the most recent reporting period), there was a 53 per cent increase in claims compared to the 2014-15 reporting period. This compares to only a 3.5 per cent increase over the same period for physical injuries.

Anxiety/stress disorders, reaction to stressors, and anxiety/depression conditions, post-traumatic stress disorders and depression combined accounted for 91 per cent of psychological injury claims. (SIRA 2018-2019)

The majority of accepted workers' compensation claims for psychological injuries (around 77 per cent) are attributed to a mix of work-related harassment, or workplace bullying, excessive work pressure, exposure to occupational violence or a traumatic event. (SIRA 2018-2019)

These numbers are likely to be underestimations of actual occurrences. As many as 60 per cent of eligible employees do not apply for workers' compensation (LaMontagne et al. 2008)

In NSW, from 2014-2015 to 2018-2019 the five industry sectors with consistently the most number of claims for a psychological injury were in Health Care and Social Assistance, Government (Public Administration and Safety), Education and Training, Retail and Wholesale Trade (combined), and Transport/Postal/Warehousing (SIRA 2018-2019).

While anyone in any workplace can experience a work-related psychological injury, in NSW, these are most prevalent where there are high demands, low job security and job control. For example, in accommodation/food services, manufacturing, retail and administrative services and where workers are at high risk of occupational violence such as first responders and health care. (SIRA 2018-2019, Yu & Glozier 2017)

There are high direct and indirect costs to the individual, employer, and the broader community associated with these injuries. For a range of reasons, workers' compensation claim numbers do not represent the true extent of harm. The estimated costs, such as those produced by Safe Work Australia and others, are likely to be a fraction of the total real cost of all work-related injury and disease in Australia. (Safe Work Australia (SWA) 2015)

Absenteeism, presenteeism (working at reduced capacity due to ill-health) and workers' compensation claims due to mental illness is estimated to cost NSW employers $2.8 billion per year. (Australian Health Ministers' Advisory Council 2013; Yu & Glozier 2017)

In the 2018-19 financial year, the total gross incurred cost in the NSW workers' compensation system was over $585 million for psychological injury claims. The average cost of an individual workers' compensation claim for psychological injury was over $85,000 compared to over $21,000 for a physical injury claim. (SIRA 2018-2019)

The total time lost in NSW in 2018-2019 because of work-related psychological injuries was significant, over 1,203,000 days. On average workers were off work nearly four times longer (175 days) if they experienced a psychological injury compared to a physical injury (44 days). (SIRA 2018-2019)

In response, SafeWork NSW and other authoritative groups have implemented workplace mental health awareness, education, and support programs, for example, SafeWork NSW Mentally Healthy Workplace program and Headsup website.

There is also a large volume of information generated by consultants and well-meaning groups, that are not always strongly evidence-based nor accurately reflecting WHS legal requirements. Typically, these focus more on downstream optional individually focused interventions like stress management techniques and de-stigmatisation, rather than eliminating workplace risks at the source which will benefit all workers including those with existing mental disorders or psychological injuries.

SafeWork NSW stakeholders report employers are concerned they will also be assumed to be responsible for non-work-related causes of poor mental health. They may invest time and money on optional programs believing they are meeting their legal obligations.

Poorly focused interventions mean workers will still be exposed to risks to psychological health and the employer vulnerable to enforcement action.

For employers, the diversity of terminology, intervention models, and approaches and the sheer volume material can be confusing.

A code of practice is a practical guide on how to meet the standards of health and safety required under the WHS Act and Regulations. A code of practice provides guidance about what is expected by the regulator. Following a code of practice will help a business to demonstrate that it has taken reasonably practicable steps to comply with the health and safety duties under the WHS Act and Regulations.

Where does a code fit into the WHS legislative framework?

NSW WHS and workers' compensation legislation seeks to: prevent work-related injury, disease, and death, rehabilitate affected workers and compensate workers (or their dependents in the case of death) who suffer work-related harm.

The primary purpose of the WHS framework is to require safe and healthy work environments and safe work systems. It is based on the principle that this will be achieved by eliminating or controlling work-related risks so far as is reasonably practicable (SFARP).

NSW is a signatory to the model WHS laws. NSW has a WHS framework which includes the *WHS Act 2011* (the Act), *WHS Regulation 2017* (Regulations), a range of codes of practice, guidance material, and NSW government-endorsed policies and procedures relating to how compliance and enforcement activity will be undertaken.

WHS Act 2011

The Act is broad and covers all work situations and must be followed. It defines health as including physical and psychological health. It provides the legal framework to protect the physical and psychological health, safety, and welfare of all workers and others in NSW workplaces and work activities. The Act also includes descriptions of the principles, duty holders, duties, obligations, rights, and outlines the power to create regulations.

WHS Regulation 2017

The *Work Health and Safety Regulation 2017* is made under the WHS Act. It provides comprehensive safety requirements about particular hazards, high-risk activities, procedures, and obligations. Not all WHS hazards and risks are included explicitly in the regulations; for example, psychological injury risks are not. Nevertheless, they are captured under section 19 of the Act which imposes a primary duty of care on persons conducting a business or undertaking in relation to workers and others in the workplace.

NSW WHS Legislative Framework
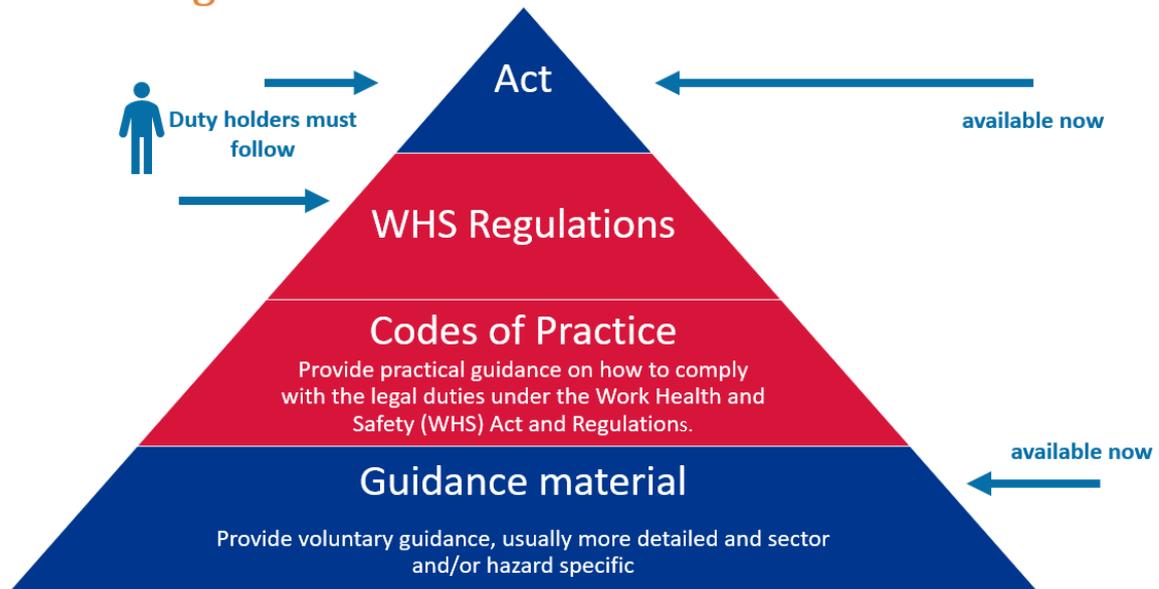
Figure 1 NSW WHS legislative framework

Codes of Practice

An approved code of practice is a practical guide on how to comply with the legal duties under the Act and Regulations. They may be relied on by courts when making determinations about the state of knowledge, and what is reasonably practicable in the circumstances to which the code of practice relates (s.275 WHS Act).

They are not mandatory. Duty holders may follow other approaches if they can demonstrate that by following these, they can meet or exceed the standard of work health and safety required in a code. An approved code of practice requires the Minister's approval.

Codes of practice:

– deal with a duty or obligation under the WHS Act or Regulations

– provide clarity for duty holders on how to comply with their duties

– include known information about particular hazards, risks and control measures

– help in determining what is reasonably practicable in the circumstances.

An inspector may refer to an approved code of practice when issuing an improvement or prohibition notice.

If no Regulation or code of practice exists for a specific risk, the duty holder must choose an appropriate way to manage the risk, taking reasonable precautions, and exercising due care. NSW does not currently have an approved code of practice on managing risks to psychological health.

Guides, information and fact sheets

Finally, there are voluntary guides, information and fact sheets. These are typically short, and hazard-specific.

Responsive regulation and psychological health

It is recognised that every business faces different health and safety risks and has varying capabilities and willingness to comply with their WHS and workers' compensation obligations. For example, it is not expected that smaller businesses manage risks to psychological health in the same way as a large business. However, it is expected that no matter the business size, people will not be physically or psychologically harmed as a result of doing their job.

When deciding what enforcement action should be taken in response to risks to psychological health and incidents which occur in workplaces, SafeWork NSW is guided by the *National Compliance and Enforcement Policy* (SWA 2011), NSW *prosecution guidelines*, and *approach to work health and safety regulation*. (SafeWork 2018)

SafeWork NSW inspectors use a graduated approach to compliance and enforcement. When considering enforcement action, they take into account the nature of the offence; the seriousness of the actual or potential harm; business size, compliance history, and attitude; and the possible value of enforcement action. (Way, 2012b; Johnstone, Quinlan& McNamara 2011)

Why develop a code of practice?

The WHS Act provides for the approval, variation, and revocation of codes of practice by the relevant Minister. Under section 275 of the WHS Act, the Minister may only approve a code of practice if it was developed by a process that involves consultation between the Commonwealth and each State and Territory as well as with unions and employer organisations.

A draft code is released for public consultation; this is typically for four to six weeks. The Minister then considers the outcomes of the consultation process and makes a decision to approve, request further amendments, or reject the code. If approval from the Minister is given, the code of practice is then gazetted.

A code of practice only has evidentiary status under NSW WHS laws once it has been approved by the relevant Minister and gazetted.

Draft code: intention and issues

The draft Code of Practice on *managing the risks to psychological health* is intended to:

- support compliance with the primary duty of care in the WHS Act 2011 s.19
- provide guidance on existing duties and obligations under the WHS Act about risks to psychological health
- include known information about particular psychosocial hazards, risks to psychological health and control measures
- help in determining what is reasonably practicable in the circumstances by providing a recommended, a reasonable, practical approach to manage these risks, and
- can be supplemented with other types of guidance material.

The draft code *only* refers to the WHS duties to effectively manage work-related risks, not to additional optional actions to support general mental health at work.

The draft code is intentionally broad to be generally applicable to most NSW workplaces. It does not include every psychosocial hazard or psychological health risks

as some are quite specific to the business reflecting their operating environment, design and management of the work, relationships, and workforce profiles. If the systematic risk management approach advocated in the draft code is used, additional business-specific hazards should be identified by the duty holder.

In line with Council of Australian Governments (COAG) principles and NSW requirements, the draft code tries not to unnecessarily duplicate information included in other approved documents such as the: *Code of Practice How to manage work health and safety risks* or *Guide for preventing and responding to workplace bullying.* The reader is expected, where necessary, to refer to these and other relevant NSW documents when deciding how to manage WHS risks for their business.

This next section of the paper highlights the intent and particular issues related to the content of the draft code. Through the public consultation form, comments are sought about the:

- **Legal clarity -** how clearly it explains the legal duties under WHS laws
- **Content -** is there enough information, and
- **Effectiveness -** is the information useful and practical.

Terminology

Intention: The draft code defines what is meant by the terms: psychosocial hazards, psychological harm, and psychological health. These are in the Glossary in Appendix A. It also describes some of the most common hazards and risks in Appendix B of the draft code.

Issues: Health includes both physical and psychological health. The title and content of the draft code uses 'psychological health' rather than 'psychological health and safety.' The term 'psychological safety' means feeling respected and safe to challenge the status quo, including safety standards, without fear of negative consequences. (Kahn 1990; Clark 2020) This term is considered a subset or outcome of a psychologically healthy workplace. The term psychological health in the draft code is consistent with the WHS Act.

There are alternative terms used by academics, consultants and mental health advocates to those used in the draft code, for example, psychological hazard/risk, mental health hazard/risk, psychosocial context, sociopsychological factors, psychological strain, psychosocial safety climate, and others.

Whether someone considered something, a 'hazard,' 'factor,' 'risk', or 'outcome' often depends on the individual's definitions and disciplinary background.

Advice from industry and social partners is many employers, and members of the community use the terms 'hazard', 'factor', and 'risk' interchangeably. They note that while the technical differences are significant to academics and regulators, most employers just want a clear list of 'things' they should consider. They advise, so long as terms are defined and used consistently in the draft code and in supporting material produced by SafeWork NSW this should not present a comprehension problem for employers.

The definition and use of 'hazard' and 'risk' including risks to psychological health in the draft code are consistent with other SafeWork NSW and SWA material, and other jurisdictions' information.

Work demands can trigger a stress response which if mild and temporary can increase motivation to perform. However, if exposure is severe and/or frequent this can lead to hyper arousal and become harmful.

For the purpose of this code, work related stress is recognised to be on a continuum from mild, temporary stress, to harmful, which can then increase the risk of psychological injury and chronic disease.

> **Public Consultation Questions**
> 1. d) The usefulness of references to the Act
> 1. c) Accuracy of terminology and definitions
> 8. Is the glossary in Appendix A useful?

Duty holder obligations and limits to duties

Intentions: The draft code specifies who has duties and what these are concerning the management of work-related risks to psychological health. The draft code does not extend duties beyond those required under section 19 of the Act. The advice is designed to clarify how compliance can be achieved.

The extensive use in the draft code of the term 'so far as is reasonably practical' is deliberate, as some duty holders are reportedly confused about the limits of their duties and obligations for work-related psychological health matters.

Industry groups note concerns that, as community awareness of mental health issues increases, some employers are now being asked by mental health advocates to undertake actions for which they do not have a duty under the Act. The draft Code, therefore, clarifies what must be legally done and deliberately omits desirable but optional mental health promotion activities.

Issues: The contents of the draft code refer only to the legal duties to control work-related, not non-work-related risks to psychological health. The use of this caveat term in the document is limited, as it is assumed readers will understand it applies.

When preparing the draft code, there was a commitment not to unnecessarily duplicate duties that are outlined in the Act.

The draft code draws duty holders' attention to the obligation to manage both psychological and physical risks.

Commentators have noted the critical role of officers of entities conducting a business or undertaking to be proactive in WHS matters. There is often a misunderstanding of the scope and application of due diligence obligations by officers. (O'Neill and Wolfe 2017, Tooma 2017)

The duty of officers of an organisation, the PCBU, and workers concerning psychological health risks is, therefore, explicitly mentioned in the draft code. Of interest is whether the role of the officer of the PCBU and their obligations are sufficiently clear in the draft code, and the obligation to support and direct the PCBU to manage risks to psychological health.

The draft code refers to the duty to control risks including to psychological health, so far as is reasonably practicable (SFARP) (WHS Act 2011 s.18). The draft code links to the Safe Work Australia (2013) explanations on the interpretations of this term to assist readers' understanding.

The extensive use of SFARP in the draft may impede readability. An alternative approach could be to note it once at the commencement of the code and that readers should apply it to all actions outlined in the draft code.

Explanations on why it is desirable to undertake actions to promote psychological health beyond the minimum specified under WHS duties are not included.

The public comment submission form asks if the draft code has struck the correct balance with these issues and is sufficiently clear.

> **Public Consultation Questions**
> 2. Does the draft code clearly explain the legal duties under WHS laws?
> 3. Does the draft code clearly describe duty holder obligations?

Common psychosocial hazards, risks to psychological health and control options

Intention: The draft code lists some of the most common hazards, risks and control options in Appendix B and E of the draft code, noting others relevant to the employer's circumstances may be identified when they apply a systematic risk management process.

The inclusion of this information in the draft code will demonstrate for example:
  – state of knowledge on the matter
  – what a person 'ought reasonably to know' and
  – what might be considered 'reasonably practicable' control measures.

Issues: Where, when, how, and who will undertake work is changing. This is in response to economic and technological changes and even health concerns like pandemics. These changes mean it is especially important that those involved effectively communicate with each other to identify existing and emerging hazards and risks and work together to find practical solutions. Attention in the code is therefore drawn to the duty to consult, cooperate, and coordinate with relevant others.

Psychosocial hazards, including, bullying and occupational violence if not adequately controlled, can lead to risks to psychological and physical health and safety. Including, for example, work-related anxiety, depression, post-traumatic stress, suicide, and musculoskeletal disorders and physical illnesses. (Caponecchia 2019; Tuckey et al. 2019; Oakman & Macdonald 2018, Dollard et al. 2012, Way 2012a; Butterworth et al. 2011; Leka et al. 2011; LaMontagne et al. 2008)

The contents of Appendix B and E in the draft code are consistent with the SafeWork NSW, SWA, Australian, and international WHS regulator material and empirical evidence. (UK-HSE 2019; Caponecchia 2019; Tuckey et al 2019; SWA 2018; Jimmieson, Tucker & Bordia, 2016, Bowling, Alarcon, Bragg & Hartman 2015; EU-OSHA 2015; Dollard et al 2012; Way 2012a; Way 2012b; Butterworth et al 2011; Leka et al 2011; Nieuwenhuijsen et al 2010; LaMontagne et al 2007; Bakker & Demerouti 2007; Ferrier et al 2002, Karasek & Theorell 1990, ILO 1986)

Psychological harm can arise from exposure to highly distressing one-off events, such as to occupational violence or abuse, and or from cumulative exposures to lower level psychosocial hazards. Some hazards will present a higher risk than others because they are always or very frequently present and may have inadequate controls.

Both psychological and physical hazards and risks interact, resulting in the likelihood of harm. For example, if there is significant time pressure combined with role uncertainty, and working with hazardous plant increasing the likelihood of both serious errors and incidents and more significant stress than if these were present in isolation. (Richardsen, Martinussen & Kaiser, 2019; Oakman and Macdonald, 2018, Cooper & Clarke 2003 and others)

Section 2.3 in the draft code draws the duty holder's attention to the need to consider how hazards and risks may interact, and to the need to consider where required a combination of control measures.

The draft code notes bullying and occupational violence are both a source and a potential consequence of stress. Discussion of the need for specific investigation approaches and control strategies for these issues was beyond the scope of inclusion in a general psychological health code. Where duty holders identify these are an issue, they are expected to undertake additional or appropriate actions to manage the risks.

To improve the code's layout, the list of common psychosocial hazards and risk control measures are located in the appendices rather than the body of the code. Comments are sought on the most appropriate location for this information.

The same risk management steps employers will already probably be applying for physical health and safety risks is noted in the draft code. This should reassure duty holders they can use the same systematic steps to manage risks to psychological health. The possible issues around the hierarchy of control are noted later in this paper.

The public consultation submission form seeks comments on areas for improvement in the draft code on hazards, risks, and control measures.

> **Public Consultation Questions**
> 4. Does the draft code adequately cover the common psychosocial hazards, risks and controls listed in Appendix B?
> 5. Are the risk management steps outlined in the draft code reasonably practicable for duty holders to apply?
> 9. Is the Psychological Risk Checklist in Appendix C useful?
> 10. Is the Risk Assessment Process in Appendix D useful?
> 11. Are examples of psychological risk control measures in Appendix E useful?
> 12. Is the Psychological Risk Management Action Plan Template in Appendix F useful?

A competent person

Intention: Inadequate information, training, instruction or supervision is a health and safety risk. Under Section 1.3 what is involved in managing risks to psychological health, employers' attention is drawn to the need to ensure anyone providing information, training, instruction or supervision is competent and considers the:

– nature of the work
– psychological and physical risks
– how best to communicate with those who are doing the work and

- what control measures need to be in place for the work to be without risk of harm.

Issues: Just like when preparing so a worker can safely operate equipment, anyone providing information, training, instruction, or supervision, where there are known psychosocial hazards and risks to psychological health will need to be competent. This element in the draft code will help meet the duties under sections 19 and 27 of the WHS Act.

The draft code defines a competent person as 'a person who has acquired through training, qualification or experience the knowledge and skills to carry out the task.'. This definition is consistent with the NSW WHS Regulation 2017, clause 5.

The level of competence required will depend on the complexity of the situation and the particular help required.

> **Relevant Public Consultation Questions**
> 8. Is the glossary in Appendix A useful? [Noting this includes a definition of a competent person]

Individual behaviours as a source of risk

Intention: The draft code notes unacceptable behaviours at work, may present a psychological risk. These may include deliberate or inadvertent disrespectful behaviours, or poor communication, consultation, and cooperation between workers leading to stress, irritation, and potentially dangerous errors.

In the most extreme circumstances, it may include overt interpersonal conflict, bullying, harassment, and even occupational violence leading to severe psychological or physical injuries. Where people are displaying unacceptable behaviours, whatever the cause, the issue must be managed SFARP by the employer.

Issues: This issue is, without a doubt, one of the most challenging and concerning for an employer to manage. There are two aspects to consider, and poor behaviours can result from a combination of the two.

The first is where work is a major contributing factor. There is growing evidence that unacceptable conduct is more prevalent in workplaces with poor work and organisational design and management and supervision practices. For example, excessive time pressure, poor working environments, role conflict, perceptions of unfair application of workplace policies and procedures, where workers are regularly exposed to abuse and cultures where this is viewed as 'just a normal or an inevitable part of doing the work'. (Caponecchia 2019; Tuckey, Zadow, Li & Caponecchia 2019; Li, Chen, Tuckey, McLinton, & Dollard 2019; Bowling et al. 2015, Slain & Hoel 2010; Baillien, De Cuyper & De Witte 2011)

Way (2012a page 5) notes

> *"Whilst it is important to acknowledge individual differences, health and safety legislation requires duty holders to act to control the risk of job-attributable strain. Control of this risk should be done with a greater focus on aspects of the design and management of work that may be creating a risk to health and safety. To focus on individual differences at the expense of controlling work-related stressors would constitute a failure to ensure health and safety."*

Section 1.3, what is involved in managing risks to psychological health, explicitly draws the duty holder's attention to the need to identify and manage risks arising from work, organisational, and management practices which may be contributing factors. The steps outlined in the draft code will help to identify and assess where these factors may be contributing to unacceptable behaviours and risks to psychological health.

Many workplaces rely solely or heavily on administrative controls to manage risks associated with unacceptable behaviours (personal correspondence on current research with S Popple and K Way 1 June 2020). These controls are not likely to meet section 19 obligations. Inspectors will expect underlying work-related risk factors to be identified, and appropriate SFARP higher-order controls implemented in addition to administrative controls.

The other issue is where the triggers of poor behaviours are unknown or more likely to be to do with non-work factors— a person's personality and values, home stresses, or health status including if they are mentally unwell at the time of the alleged incident.

Sections 1.3, what is involved in managing risks to psychological health, and 3, responding to reports of psychosocial hazards, include things the employer should consider when investigating allegations of unreasonable workplace behaviours or misconduct.

The draft code glossary (Appendix A) defines relevant terms such as 'reasonable adjustments' and 'reasonable management actions'; this is discussed in the next section.

Where an individual's or several individuals' behaviour is attributed to non-work factors, the employer only needs to make 'reasonable adjustments' and 'reasonable accommodations' in line with relevant other Acts. These adjustments and accommodations should be balanced against the corresponding employer obligations to protect other workers, SFARP, from harm or the potential for harm, arising from other people's unacceptable behaviours at work.

Mental health advocates reasonably call for employers to go beyond minimum compliance with the WHS and anti-discrimination laws, especially if people are unwell. However, best practice information and advice is more appropriate to include as other advisory material.

> **Relevant Public Consultation Questions**
> 2. Does the draft code clearly explain the legal duties under WHS laws?
> 3. Does the draft code clearly describe duty holder obligations?
> 4. Does the draft code adequately cover the common psychosocial hazards, risks and controls listed in Appendix B?
> 8. Is the glossary in Appendix A useful?

Reasonable management action

Intention: The draft code seeks to clarify, consistent with the Fair Work Act s.789FD(2), that reasonable management action carried out in a reasonable manner, while potentially stressful for the worker, is allowable.

Specialised and detailed discussion on the topic reasonable management action was beyond the scope of the draft code.

Issues: Appropriate performance feedback is necessary to ensure work is done safely and well. When a worker is stressed, whether work-related or non-work-related, one outcome may be poorer performance. This itself is a source of distress and can be exacerbated by poor performance management.

Work-related factors that may be contributing to underperformance should be identified and addressed. This is noted in sections 2.1 of the draft code consulting your workers.

Employers have rights and obligations to take appropriate management action and make appropriate management decisions including, for example:
- modifying duties
- transferring or re-deploying a worker
- performance appraisals and underperformance meetings
- investigating alleged misconduct, or
- counselling or disciplining a worker for misconduct. (Fair Work Act s.789FD(2))

To ensure these actions are not a foreseeable psychological risk, they need to be:

- fair, and have sufficient regard to natural justice and individual needs
- be consistently applied and
- quality and frequency of communication about the matters are adequate or appropriate.

Relevant Public Consultation Questions
2. Does the draft code clearly explain the legal duties under WHS laws?
3. Does the draft code clearly describe duty holder obligations?
8. Is the glossary in Appendix A useful? [Noting this includes information on this topic]

Individuals with special needs

Intention: The draft code does not include specific instructions on managing non-work-related individual factors, such as stress over personal circumstances, over which the employer has no WHS legal responsibility and little or no practical control.

It does, however, under section 2.1, consulting your workers, note there may be a requirement to provide reasonable adjustments under anti-discrimination, privacy, and other relevant laws.

Issues: If an individual needs reasonable adjustment due to a non-work-related disability or ill health, the employer should make 'reasonable adjustments and accommodations' in line with other relevant Acts.

However, as noted by Way (2012a page 5) "to focus on individual differences at the expense of controlling work-related stressors would constitute a failure to ensure health and safety."

> *"Whilst it is important to acknowledge individual differences, health and safety legislation requires duty holders to act to control the risk of job-attributable strain. Control of this risk should be done with a **greater focus on aspects of the design and management of work** [emphasis added] that may be creating a risk to health and safety.*
>
> *To focus on individual differences at the expense of controlling work-related stressors would constitute a failure to ensure health and safety."*

Recording, investigating and responding to complaints, risks, and incidents

Intention: Employers should have appropriate workplace health and safety management systems (WHSMS) to investigate complaints, record, and promptly and effectively respond to risks to psychological health and incidents.

Issues: In the draft code, section 2.1 review available information, alerts duty holders to a range of sources of information which should help them identify potential hazards and assess risks.

Section 3 Responding to reports of psychosocial hazards also provides information on these matters.

Due diligence obligations mean officers and PCBUs need to be aware of risks to psychological health and monitor if controls remain useful in workplaces they control. A WHSMS can help achieve this outcome.

The organisation's risk register should, in theory, record risks to psychological health, incidents, and how these were resolved. Currently, few organisations are systematically monitoring risks to psychological health or effectively capturing these in their risk registers. (Bolland 2019, Way 2012a)

An effective WHSMS will keep some form of record; these don't have to be complicated. They should note what hazards and risks have been identified and assessed, and the relevant controls. As part of an effective risk monitoring and review process, they should include the dates these have or will be reviewed. An example of a template is in Appendix F Psychological Risk Management Action Plan in the draft code.

When considering what compliance with record-keeping for risks to psychological health looks like the WHS Regulations on the minimum requirements on issues resolution (Clauses 22 (3) and 23 (8) (a) and (b) provides some clarification. These clauses note a PCBU needs to ensure there is an agreed issue resolution procedure and that this is recorded and communicated to workers. A copy of the written agreement should be given to relevant parties.

An inspector may ask to see a copy of records relating to the risk management processes and issues resolution.

An issue for consideration is if the draft code should be more prescriptive and specify that risks to psychological health and incidents be recorded in a risk register. Further, should additional advice on this be included as an additional appendix?

Hierarchy of control

Intention: The draft code uses the term 'hierarchy of control' (HoC), the well-known cascade from the highest level of protection, elimination, to the lowest personal protective equipment (PPE). The HoC is routinely applied to physical WHS risks. The intention is to be consistent with other codes of practice to minimise confusion.

Issues: The HoC was first developed by the US National Safety Council in the 1950s and used for plant and equipment safety. Then through the 1970s and 1980s informally adopted by various governments, modified and expanded to include, for example, hazardous substances and manual tasks. (Ruschena 2019)

The use of the HoC has become widespread, and it is now fully incorporated into the Australian WHS lexicon although there are variations on the model. For example, a six-level model includes: elimination, substitution, engineering controls, isolation, administrative controls, awareness of risks, and personal protective equipment. (NFPA 70E 2018)

Some commentators have challenged whether the traditional hierarchy of control is suitable to apply to psychological health. (Maxwell, 2004; Bailey and Dollard, 2014) Alternative models to support developing a positive 'psychosocial safety climate' reconceptualise it entirely. (Bailey and Dollard 2014) In their model, the first layer focuses on the 'role of senior management values and the development of organisational policy and procedures'. Job design is located near the bottom of the triangle. Importantly their model includes strategies to manage both WHS risks and injuries and moves into best practice, so extends beyond duties under the Act.

Duty holders can choose to use alternative psychological risk management approaches to that specified in the draft code so long as they can demonstrate these meet the minimum standards of health and safety.

Irrespective of the approach, commentators typically all acknowledge the importance of genuine commitment by the PCBU and organisational leaders to the management of risks to psychological health. This commitment is reflected in an officer's due diligence obligations under section 27(5) of the Act and noted in the draft code.

The need to control risks to psychological health at the source through systematic elimination and or minimisation using a combination of controls is widely recognised. (EU-OSHA 2020; UK-HSE 2020; Caponecchia 2019; Tuckey et al. 2019; Oakman & Macdonald 2018; Way 2012a; Leka et al. 2011; LaMontagne et al. 2008 and others)

The 2011 model WHS risk management code simplified the Hoc into four levels: elimination, minimisation (including substitution, isolation, and engineering controls), administrative controls and PPE. This approach is duplicated in the NSW 2019 risk management code.

Only the second level, minimisation, requires clarification with regards to managing the risks to psychological health. So, section 2.3 of the draft code notes minimising psychological health risks means designing or redesigning the work and the working environment and substituting these with less hazardous alternatives.

This can be achieved by designing or redesigning the work and introducing arrangements to:

- reducing psychological and physical demands
- increasing workers' job control and
- increasing emotional and practical support.

Importantly this section also reminds duty holders that where physical risks are contributing to the risks to psychological health, these should be managed. In this example, the second layer controls of substitution, isolation, and engineering are appropriate.

The interpretation of substitution in the draft code is consistent with clause 36 (3) (a) of the WHS Regulation 2017:

> *'substituting (wholly or partly) the hazard giving rise to the risk with something that gives rise to a lesser risk'.*

The draft code Section 2.3 notes duty holders, in most cases, will need to implement a combination of control measures. This is consistent with clause 36 of the WHS regulation.

Another criticism of the HoC is that the desire to provide a visually simple and easy to explain model means it is an oversimplification of how in practice risks should be controlled. (Ruschena 2019, Hollnagel 2008 and others) This a valid concern.

Through the public consultation, comments are sought on possible improvements to explaining the control hierarchy while as far as possible remaining consistent with other NSW codes of practice and ensuring compliance with clause 36 in the WHS Regulation.

Relevant Public Consultation Questions

4. Does the draft code adequately cover the common psychosocial hazards, risks and controls listed in Appendix B?
5. Are the risk management steps outlined in the draft code reasonably practicable for duty holders to apply?

Appendices in draft code

Intention: The appendices in the draft code include information designed to support the practical interpretation of the document.

To improve the layout, some of the content is included in the appendices rather than the body.

Issues: Public comment is sought on the appendices content and layout, including if additional information is required and if so, what form this should take.

How to make a submission

To access other useful information and to have your say go to the electronic submission page at haveyoursay.nsw.gov.au.

If you are unable to give your submission to us using this online form, please contact SafeWork NSW on 131050.

Explanatory Paper glossary

Approved code	Codes of practice approved by the Minister under the Act
Competent person [WHS Regulations 2017 Part 1.1 s 5(g)]	A person who has acquired through training, qualification or experience the knowledge and skills to carry out the task.
Compliance and enforcement action	Compliance action is giving advice and seeking voluntary compliance. Enforcement action includes issuing a prohibition, improvement or infringement notice, seeking an injunction, accepting an enforceable undertaking, undertaking civil or criminal prosecution, revoking, suspending or cancelling authorisations.
Control measure [Code of practice How to Manage Work Health and Safety Risks 2019]	An action taken to eliminate or minimise health and safety risks so far as is reasonably practicable. A hierarchy of control measures is set out in the WHS Regulation to assist duty holders to select the highest control measures reasonably practicable. Note: The WHS Regulation also refers to a control measure as a risk control measure or a risk control. In this Code, control measure is used throughout.
Direct costs	These include workers' compensation premiums or payments to injured or incapacitated workers from workers' compensation schemes.

Due diligence (WHS Act 2011s.27(5))	Obligations on an officer to know about WHS, understand the business WHS risk, provide resources and process and controls, get information about WHS to monitor, legally comply and verify the provision and use of resources and processes so that WHS risks are managed.
Duty holder	Any person who owns a work health and safety duty under the WHS Act, including a person conducting a business or undertaking, a designer, manufacturer, importer, supplier, installer of products or plant used at work (upstream duty holder), officer or a worker.
EU-OSHA	European Agency for Safety and Health at Work
Hazard	A situation or thing that has the potential to harm a person. Common categories include biological, chemical, biomechanical/ergonomic, physical, psychosocial safety.
Health and Safety Committee [Code of Practice How to Manage Work Health and Safety Risks, 2019]	A consultative body established under the WHS Act. The committee's functions include facilitating cooperation between workers and the person conducting a business or undertaking to ensure workers' health and safety at work, and assisting to develop work health and safety standards, rules and procedures for the workplace.
Indirect costs	These include lost productivity, loss of current and future earnings, lost potential output and the cost of providing social welfare programs for injured or incapacitated workers.
Managing risk	This is a process set out in the WHS Regulation to eliminate health and safety risks so far as is reasonably practicable, or if this is not reasonably practicable, minimise the risks so far as is reasonably practicable. It includes identifying hazards, assessing and implementing control measures, and reviewing and maintaining the control measures to ensure their ongoing effectiveness.
Mental Health	Mental health is a state of well-being in which the individual realises his or her abilities, can cope with the normal stresses of life, can work productively and fruitfully and is able to make a contribution to his or her community. (Leka & Jain 2010)
Minister	Minister for Better Regulation and Innovation
Officer	An officer is usually a person involved in making decisions that affect the whole or a substantial part of the organisation or a person who has the capacity to affect the financial standing of the organisation. If the PCBU is a corporation, an officer also includes a director or secretary of the corporation.

A person conducting a business or undertaking For further information, see Interpretive Guideline.	A 'person' may be an organisation or an individual. An individual is also a 'person', but will only be a PCBU where that individual is conducting the business in their own right (as a sole trader or self-employed person). Individuals who are in a partnership that is conducting a business will individually and collectively be a PCBU. The Crown is also a person for the purposes of the WHS Act. The Crown may conduct a business or undertaking through its departments and statutory agencies. An individual is not a PCBU if they are involved in the business or undertaking only as a worker or officer of the business or undertaking. Businesses are enterprises usually conducted with a view to making a profit and have a degree of organisation, system and continuity. Undertakings may have elements of the organisation, systems, and possibly continuity, but are usually not profit-making or commercial in nature.
Proactive regulator interventions	Action to assist PCBUs to improve their WHS performance before a complaint or incident, including education campaigns, and supporting Health and Safety Representatives.
Psychological	Is related to a person's cognitive and emotional processes. Cognitive, emotional and sometimes physical reactions are closely related to each other. It is not usually reasonably practical to analyse emotional, and physical reactions separately.
Psychological harm	The potential for work-related psychological harm is on a continuum from mild to extremely severe. This will be influenced by frequency (how often), duration (over what periods) and intensity (how severe) exposure to psychosocial hazards. Mild exposure to psychosocial hazards can create feelings of stress which whilst distressing doesn't result in psychological injury. At the most severe circumstances it can lead to anxiety, depression, post-traumatic stress disorders and suicide.
Psychological risks	Are workplace factors such as job content, work organisation and management, environmental workplace conditions, and employee's competencies and the interaction of all these variables that are recognised as having a potentially hazardous effect on employee health
Psychological health	A state of complete psychological well-being without psychological injury or illness
Psychological injuries/illness	Also known as mental illness, mental disorders, psychiatric illness These are a variety of conditions that impair an individual's cognitive, emotional or behavioural functioning such as stress, anxiety or depression.
Psychological injury claims	Are made when a worker formally requests compensation for a substantial impact of work on their psychological health under Australian law.

Psychosocial hazards	Psychosocial hazards are work factors that have the potential to cause psychological and/or physical harm. These arise from the design and/or management of work and/or the way people interact with each other. When psychosocial hazards are not effectively managed, these increase the risks to psychological health and/or physical injury or illness. Refer to Appendix B in the draft Code of Practice. These are sometimes also called psychosocial factors.
Reactive regulator interventions	Actions that occur in response to complaints and incident notifications
Reasonable action/excuse	Under NSW workers' compensation legislation, a PCBU can use reasonable action as a defence where a psychological injury is caused by transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal, and provision of employment benefits. Legal decisions have confirmed the onus is on the PCBU to prove the action was indeed reasonable and that the psychological injury was caused "wholly or predominantly" by the reasonable action. (iCare 2018)

Reasonable adjustments (for someone with a mental illness or disability)	Changes to a job to allow a worker to perform their duties more effectively in the workplace, including:
	  – offering flexible working arrangements (e.g. start and finish times)
	  – changing some aspects of the job (e.g. exchanging a single demanding project for a job with a number of smaller tasks)
	  – changing the work area (e.g. moving worker to a quieter area)
	  – purchasing or modifying equipment. (AHRC 2010 page 12)

Reasonable management action	Management and employment functions when carried out lawfully and reasonably. Examples include:
	  – leading, directing and controlling how work is done
	  – monitoring workflow and work quality
	  – giving feedback and managing performance
	  – recruitment, assignment, transfer, and termination of employment
	  – differences of opinion and disagreements.
	Whilst potentially stressful, reasonable management action undertaken in a reasonable way is a legitimate way for supervisors to provide workers with feedback about performance.

Reasonably practicable WHS Act 2011 Section 18	That which is, or was at a particular time, reasonably able to be done to ensure psychological health, taking into account and weighing up all relevant matters including: – the likelihood of the hazard or the risk concerned occurring; and – the degree of harm that might result from the hazard or the risk; and – what the person concerned knows, or ought reasonably to know, about the hazard or risk, and about the ways of eliminating or minimising the risk; and – the availability and suitability of ways to eliminate or minimise the risk; and – after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.
Regulation	*Work Health and Safety (NSW) Regulation 2017*
Risk (work-related risk)	The chance or possibility of harm (death, injury, or illness) which might occur if workers are exposed to a hazard
Risk assessment	A systematic process to identify hazards and risk factors that have the potential to cause harm (hazard identification). Analyse and evaluate the risk associated with that hazard (risk analysis, and risk evaluation). Determine appropriate ways to eliminate the hazard or control the risk when the hazard cannot be eliminated (risk control).
SafeWork NSW	SafeWork NSW is a statutory body established by the NSW Government to lead and promote efforts to prevent and reduce the incidence of work-related injury and disease as well as promote safety by producing a healthy and safe work environment. It undertakes a number of activities including education, regulation, enforcement, research, and provision of relevant policy advice to the NSW government and persons covered by the Act.
Stress (work-related or occupational stress)	Describes the physical, mental, and emotional reactions of workers who perceive that their work demands exceed their abilities and/or their resources (for example time, access to help/support) to do the work.
The Act	*NSW Work Health and Safety Act of 2011*
UK-HSE	United Kingdom Health and Safety Executive
Work design	The ways that decision-makers choose to organise work responsibilities, duties, activities, and tasks for existing and proposed new jobs. It also includes decisions about the resources allocated to undertake that work. Work design should make adjustments, so the mental, physical, and emotional work demands/tasks do not exceed workers' capacity to function effectively and safely. Job design has a focus on those administrative changes that are required to improve general working conditions.

Worker	Any person who carries out work for a person conducting a business or undertaking, including work as an employee, contractor or subcontractor (or their employee), self-employed person, outworker, apprentice or trainee, work experience student, an employee of a labour-hire company placed with a 'host PCBU' or a volunteer.
Workplace	Any place where work is carried out for a business or undertaking and includes any place where a worker goes, or is likely to be, while at work. This may include offices, factories, shops, construction sites, vehicles, ships, aircraft or other mobile structures on land or water.

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