

Session 5: Respect@Work and Managing Psychosocial Safety Risk

Speakers: Michaela Moloney, Partner and Meg Aitken, Senior Associate

CPD Category: Practice Management and Business Skills

1:00 PM – 2:00 PM (AEDT)



Everyone's lines are muted upon entry. We will open the lines up after the session for Q&A.



If you want to ask a question, use the chat icon (along the bottom of your screen) to send a message to the speakers.



This session is being recorded. The recording will be made available via the K&L Gates HUB.



Wednesday 21 February 2024

Respect@Work and Managing Psychosocial Safety Risk

Michaela Moloney, Partner | Labour, Employment, and Workplace Safety

Meg Aitken, Senior Associate | Labour, Employment, and Workplace Safety

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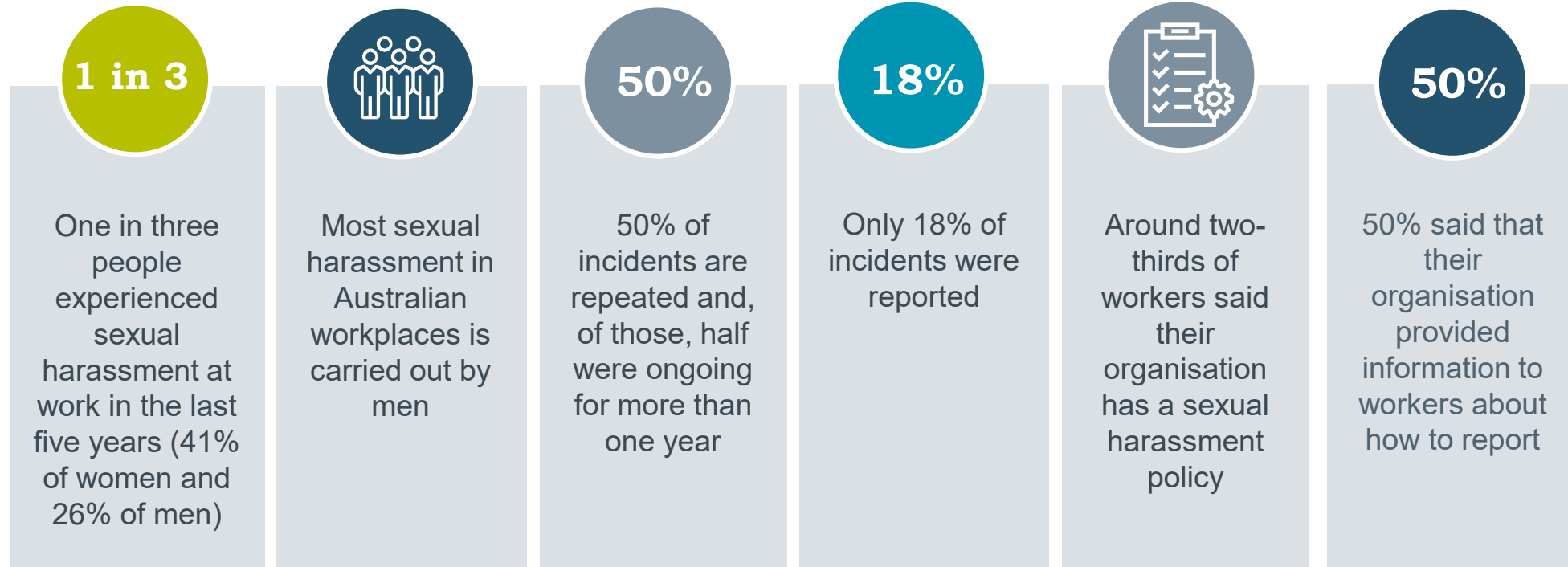
Respect@Work



Significant Changes Focused on Gender Equality

- **Significant changes to Fair Work Act** – this includes changes to flexible working arrangements, paid domestic violence leave, prohibition of sexual harassment, new protected attributes, pay secrecy laws
- **WGEA reporting** – expanded reporting on sexual harassment, harassment on the ground of sex or discrimination – data no longer kept “in-house”
- **Director / officers** – lead the proactive approach to managing these issues and can be personally liable

Prevalence of Sexual Harassment



AHRC Fifth national survey on sexual harassment in Australian workplaces 2022 : <https://humanrights.gov.au/time-for-respect-2022>

Sexual Harassment

Sexual harassment is **any unwelcome conduct of a sexual nature** that occurs in circumstances in which a **reasonable person**, aware of those circumstances, would anticipate that **the person being harassed** might feel **offended, humiliated or intimidated**.

- One off or repeated
- Intention irrelevant
- Mutual attraction or consensual conduct is not sexual harassment but be aware that conduct may be unwelcome even if not explicitly rejected
- Extends beyond the 'workplace'

Respect@Work

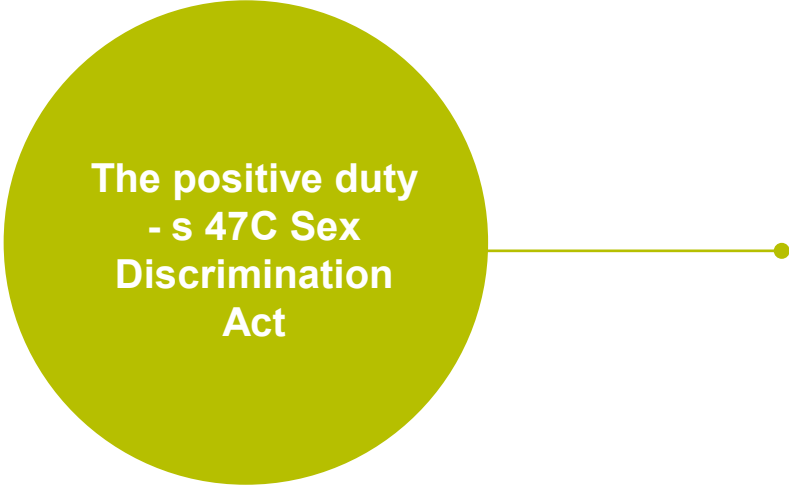
- Significant reform to Federal legislation between 2021-2022
- Aimed at implementing recommendations from Respect@Work: Sexual Harassment National Enquiry Report
- The Commission heard of the need to shift from the current reactive, complaints-based approach, to one which requires positive actions from employers and a focus on prevention



Respect@Work:
National Inquiry into
Sexual Harassment in
Australian Workplaces

AUSTRALIAN HUMAN RIGHTS COMMISSION • 2020

The new Positive Duty – What is it?



The positive duty
- s 47C Sex
Discrimination
Act

Employers and PCBUs (duty holders) must take reasonable and proportionate measures to eliminate, as far as possible:

- Sexual harassment
- Sex discrimination
- **Sex-based harassment**
- **Hostile working environments**
- Victimisation

What Proactive Steps Should Employers be Taking

AHRC GUIDANCE

- Leadership
- Culture
- Knowledge
- Risk Management
- Support
- Reporting and Response
- Monitoring, evaluation and transparency

The new Positive Duty – What Does Risk Management Look Like in Practice

1

Identify the Hazard

- Assess the physical and online working environment
- Consider work systems and practices
- Observe culture and interactions
- Identify worker demographic
- Review grievance data

2

Assess the Risk

- Power imbalances
- Lack of accountability for prevention at senior levels
- Workplace culture
- Use of alcohol and social events
- Working from home
- Isolated work

3

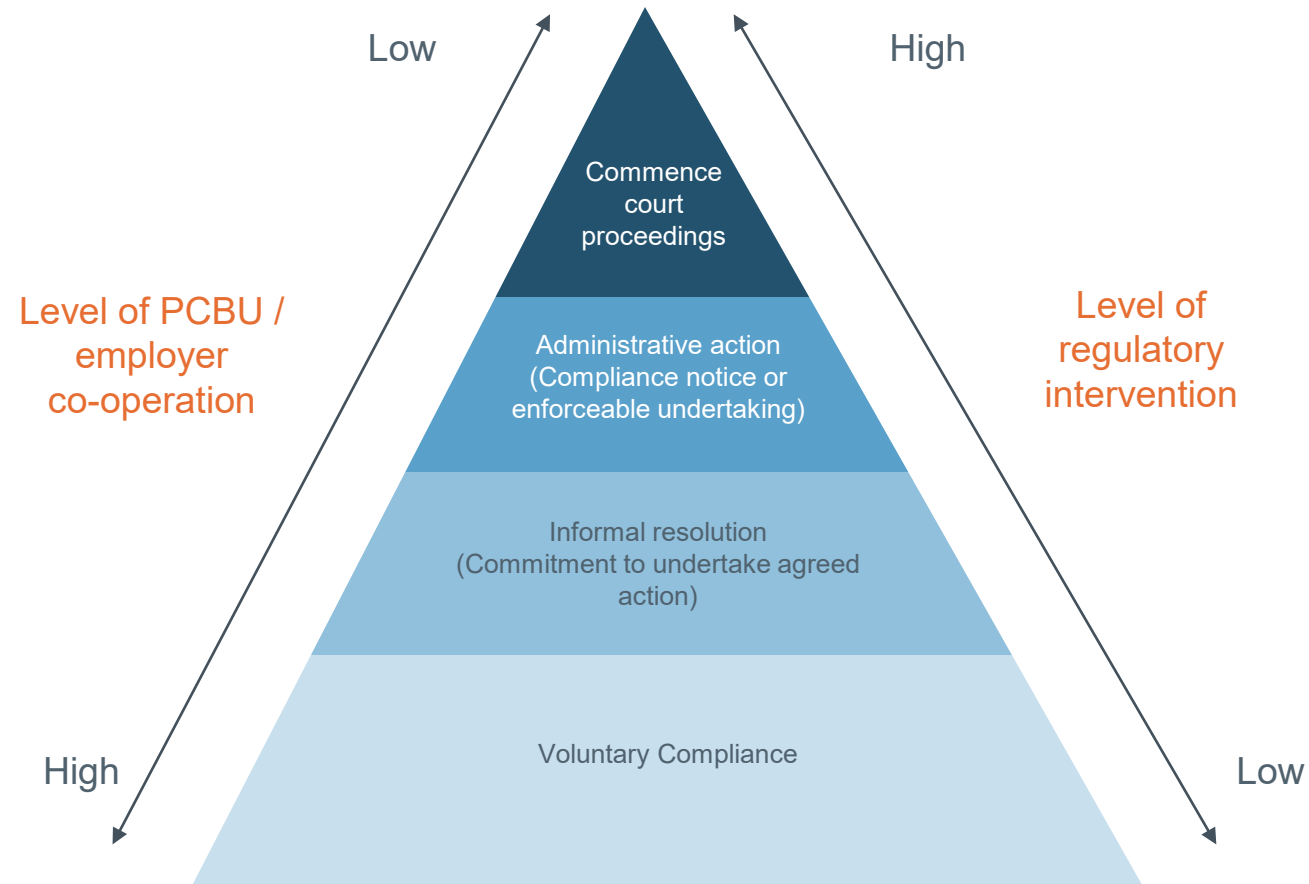
Control the Risk

- Reasonable and proportionate measures determined based on:
 - The size, nature and circumstances of the business;
 - The resources, financial and non-financial, of the business;
 - The practicability of the measures;
 - Likelihood of being exposed to sexual harassment; and
 - Any other relevant matters.

AHRC now has Enforcement and Compliance Powers to:

- Conduct inquiries into compliance with the positive duty and provide recommendations to achieve compliance
- Issue compliance notices specifying action that employers must take, or refrain from taking, to address any non-compliance
- Apply to the Federal Court for an order to direct compliance
- Enter into enforceable undertakings with an organisation

AHRC Approach to Compliance





Claims and Complaints



How Claims Arise

Australian Human Rights Commission

State Anti-Discrimination Bodies

Fair Work 'Stop Sexual Harassment Order'

General Protections claim

Complaint to Safety Regulator

Workers' Compensation

Vicarious Liability

- The Employer is liable for discrimination or harassment that occurs in the workplace or in connection with a person's employment
- Employers are vicariously liable unless they can show they have taken **all reasonable steps** to prevent the sexual harassment or discrimination
- Active prevention measures are necessary
- Lack of awareness the harassment was happening is not a defence

Reasonable Steps

- Prevention based strategy – policy and training
- Response – investigate the complaint and respond appropriately

Sexual Harassment Safety Prosecution

- Six workers as young as 16 were sexually harassed
- Groping, touching and sexually intrusive and suggestive comments
- A sexual harassment policy was in place but no mechanisms on how a complaint could be made
- Director - **AU\$40,000**
- Corporate PBCU - **AU\$110,000** and **AU\$140,000**

LEGAL, WORKPLACE HEALTH & SAFETY

\$290,000 in fines for first sexual harassment conviction under VIC workplace safety laws

DAVID ADAMS OCTOBER 30, 2023





Managing Psychosocial Risk

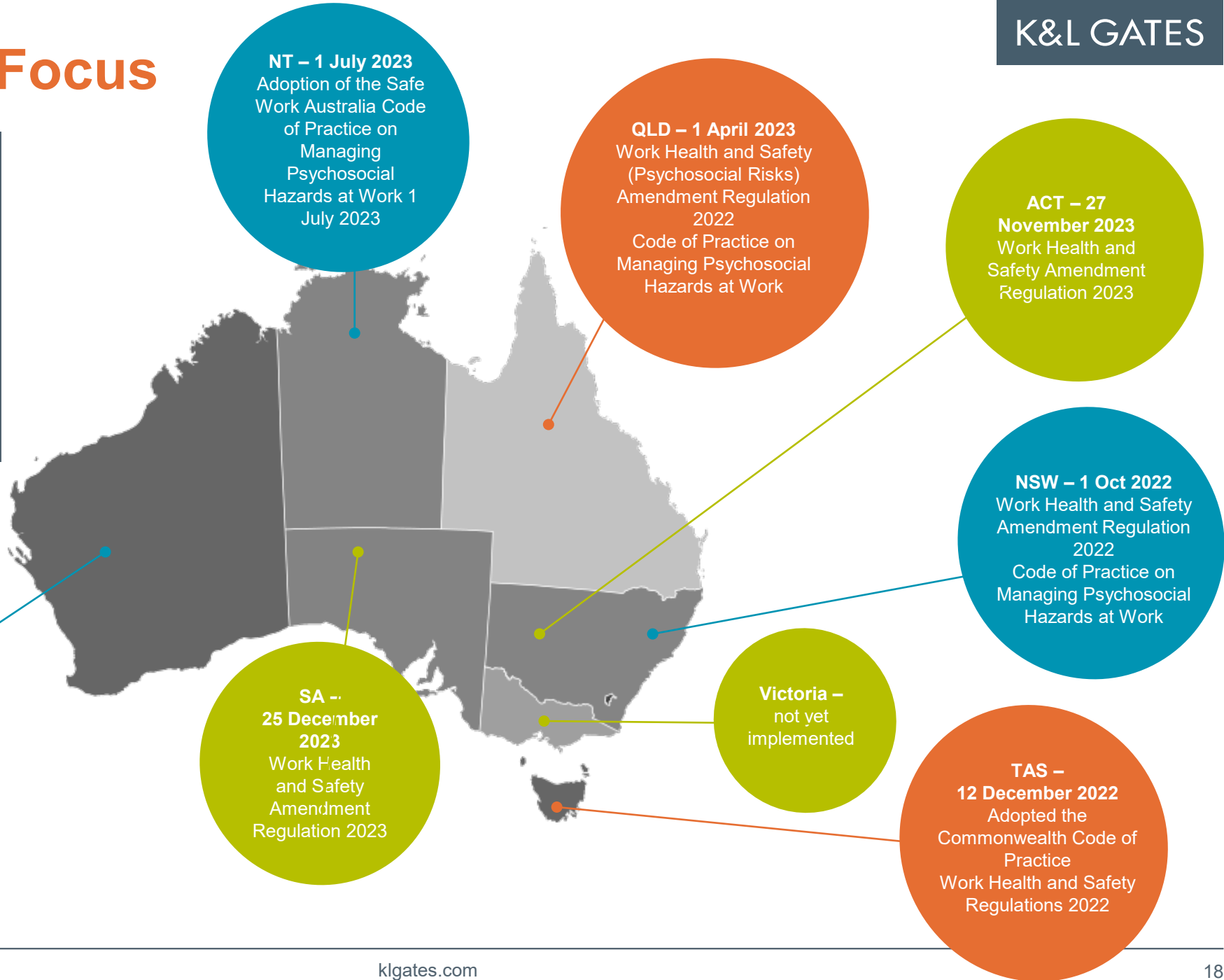


A Nation Wide Focus


Commonwealth – 1 April 2023

Work Health and Safety Amendment (Managing Psychosocial Risk and Other Measures) Regulations 2022

Code of Practice on Managing psychosocial hazards at work, 2022



Key Definitions



Psychosocial risk:

a risk to the health or safety of a worker or other person from a **psychosocial hazard**.

A **psychosocial hazard** is a hazard that:


(a) Arises from, or relates to:

- (i) The design or management of work; or
- (ii) A work environment; or
- (iii) Plant at a workplace; or
- (iv) Workplace interactions or behaviours; and

(b) *May* cause psychological harm (whether or not the hazard may also cause physical harm)

Key Requirements

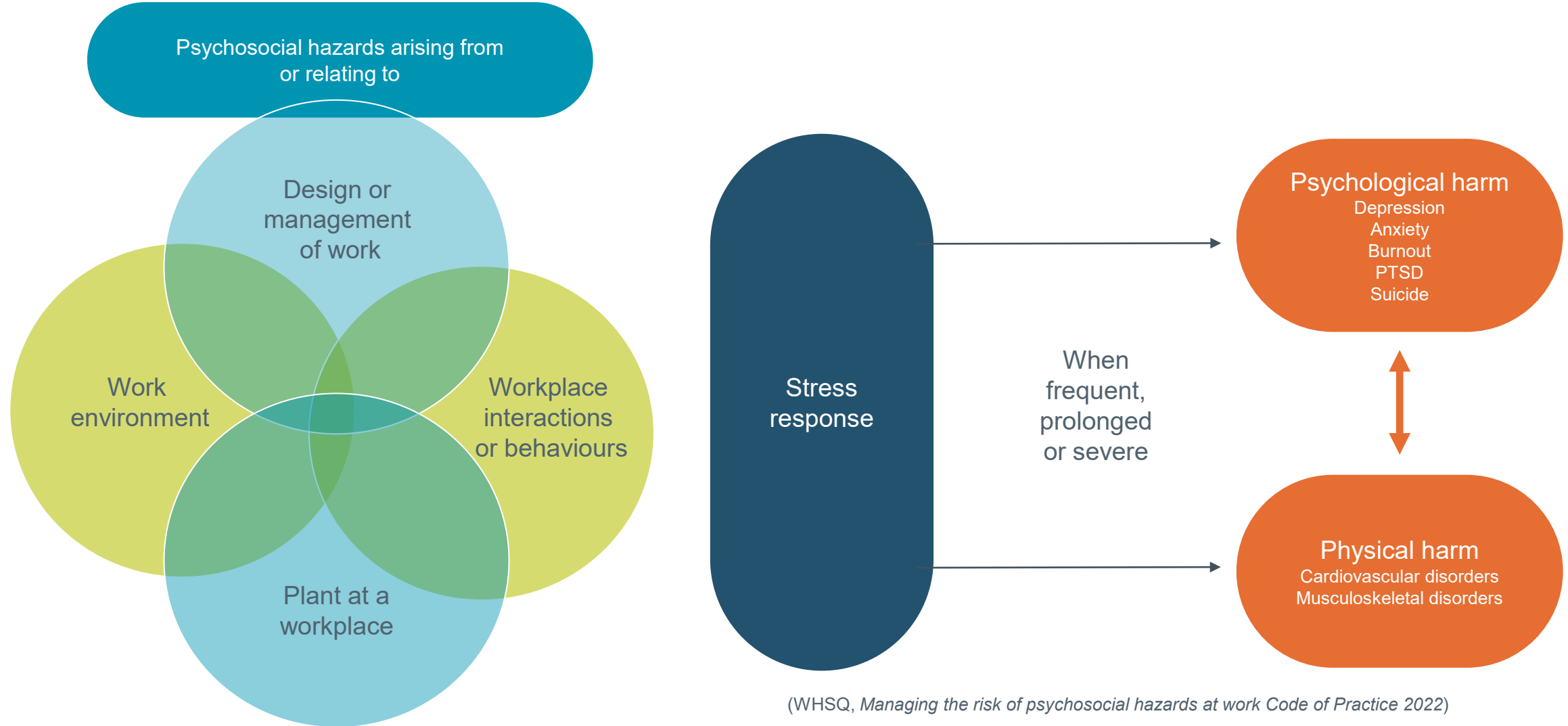
Employers are required to **manage psychosocial risks** including by:

- 
- **Identifying reasonably foreseeable hazards**
 - **Eliminating risks** or, if it is **not reasonably practicable** to do so, **minimising those risks**

When determining the control measures to implement, a PCBU must have regard to all relevant matters, including:

- a) The duration, frequency or severity of the exposure to psychosocial hazards
- b) How the psychosocial hazards may interact or combine
- c) The design of work (job demands and tasks)
- d) The systems of work
- e) The design, layout, and environmental conditions of the workplace
- f) Workplace interactions or behaviours
- g) The information, training, instruction and supervision provided to workers

Psychosocial Hazards, Risk and Injury



Psychosocial Hazards

ARE

Factors in work design, systems of work, management of work, carrying out of work or personal or work-related interactions that may arise in the working environment and may cause an employee to experience one or more negative psychological responses that create a risk to their health and safety.



ARE NOT

Personal health issues or stressors that are not work-related (including family, personal and financial issues).



Common Types of Psychosocial Hazards

Work Environment

- Systems of work
- Workplace design and layout
 - Environmental conditions
- Plant, substances and structures
- Facilities for the welfare of workers

Job Design

- Management of work
 - Low role clarity
- Low recognition and reward

Job Demands

- Long hours
- Long periods of vigilance
- Too much / too little to do
 - Monotonous tasks
- Hazardous conditions
- Remote or isolated work

Workplace Interactions

- Poor workplace relationships
 - Interpersonal conflict
- Inappropriate or harmful conduct
 - Bullying and harassment
 - Violence and aggression

Workplace Decisions

- Poor organisational justice
- Poor organisational change management

Support

- Response to traumatic events
 - Supervision
- Information, instruction and training
- Tools, equipment and resources

Risk Management Process



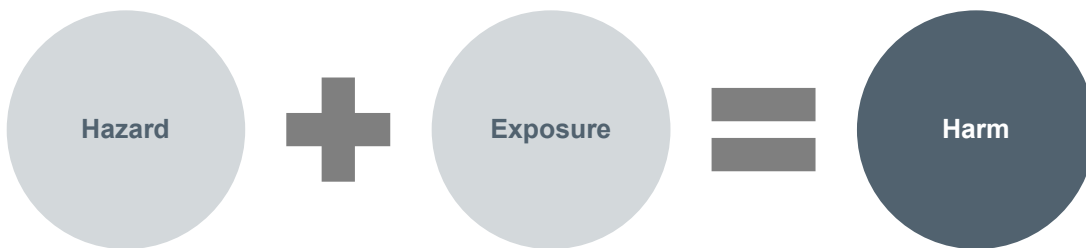
Key considerations:

- **Work / worker characteristics** impacting vulnerability to a hazard (e.g. young workforce)
- **Severity, frequency & duration** of exposure to hazard
- **Interaction & combination** of hazards in the workplace (compounding effect)

Complexity in Assessing Psychosocial Risks

Standard Approach

Assumption of harm



Calculation of consequence



New Understanding

Exposure to a psychosocial hazard does not necessarily lead to psychosocial harm.

There is no objective way to measure the consequence of exposure to a psychosocial hazard and the maximum potential harm.

Identify the hazard, the workers affected and consider the **duration**, **frequency** and **severity** of their exposure.

Common Types of Control Measures

Work Environment

- CCTV and physical security
 - Duress alarms
 - Safe glass
- Private and safe spaces
- Eliminate or minimise environmental stressors (e.g. nuisance noise)

Job Design

- Flexibility
- Autonomy over work tasks / workflow
- Design work tasks and activities to eliminate or minimise hazard exposure

Job Demands

- Give a realistic view of demands during recruitment
 - Job rotation
- Monitor workloads and redistribute work during high demand periods
 - Reasonable deadlines
 - Limit or manage overtime

Workplace Interactions

- Clear reporting lines
- Code of conduct on appropriate workplace behaviour
- Manager training to respond to inappropriate behaviour

Workplace Decisions

- Consultation and communication with workers
- Support through periods of change
 - Performance review systems give timely, fair, and constructive feedback
- Fair reward and recognition schemes

Support

- Supervision
 - Debriefing
- Peer support networks

Bullying: Parramatta City Council & Hawkesbury Race Club

Improvement Notice issued to Parramatta City Council

Sydney Morning Herald · 14d

Sydney council hit with workplace safety warning over yelling, ridicule and intimidation

The workplace health and safety regulator has formally warned Parramatta City Council for failing to provide a ...



Leggett v Hawkesbury Race Club Limited (No 4) [2022] FCA 622

Woman shares tragic details after 'control freak' boss led to \$2.8m payout

Vivienne Leggett has exposed the bullying and harassment she suffered at the hands of her "micromanaging" boss, and how it destroyed her life.



Ally Foster

 @allyjfoster  4 min read July 14, 2022 - 9:57AM 

Vicarious Trauma: *Kozarov v Victoria* [2022] HCA 12

The employee was a prosecutor in a serious sexual offences unit:

- Had direct contact with victims
- Required to view child exploitation material

The employee herself had a young child.

Experienced vicarious trauma & psychiatric injury.

The High Court found that:

- there were evident signs that she was at risk (e.g. erratic behaviour, overwork and raising concerns in staff meetings)
- The State did not take reasonable measures to prevent her injury as it did not implement its Vicarious Trauma Policy (including to rotate her to other work areas)

Former prosecutor awarded \$435k after court finds OPP breached its duty of care

By court reporter Karen Percy
Posted Thu 20 Feb 2020 at 4:32am



Changes Coming - Right to Disconnect

- The Federal Government has introduced a 'right to disconnect'
- Will apply to everyone but subject to reasonableness test
- All awards will be varied to include 'right to disconnect' provisions
- The changes will take effect in six months



Contacts



Michaela Moloney

Partner
+61 3 9640 4430
Michaela.Moloney@klgates.com



Meg Aitken

Senior Associate
+61 3 9640 4427
Meg.Aitken@klgates.com

K&L GATES