

*just redemptive outcomes.*



CORNEY & LIND  
LAWYERS

# Burnout & Mental Health:

## How are they affecting Church and Ministry workers?

Presented by Fran Keyes, Special Counsel

QB Webinar – 19 July 2019

*just redemptive outcomes®*



CORNEY & LIND  
LAWYERS

# Introduction

## Corney & Lind Lawyers Pty Ltd

➤ Mid size law firm – 19 lawyers + 40 staff

➤ Our focus areas

Schools & Education

Not for Profit & Charity

Commercial

Employment & Discrimination

Personal Injury

Commercial Litigation

Family Law

Criminal & Traffic

Estate & Elder Law

➤ Our lawyers travel to you if needed

➤ Specialist lawyers committed to delivering “*just redemptive outcomes®*” with care, attention and integrity

➤ Based right next to the CBD opposite the RBWH transport hub



# Overview

- The absence of a clear distinction between pastoral care and self care in ministry work is leading to an increase in burnout for workers in churches, ministries and other Christian organisations.
- Burnout is prevalent in church and ministry-related work due to the high demand for those workers to support the hurt, suffering and needy on a regular basis. This leads to an increase in **mental fatigue**.
- Ensuring workplaces have adequate policies in place will help employers recognize early signs of mental fatigue, offer and seek help and build resilient workplaces.
- Today I will walk you through;
  1. Navigating the psychological health and safety maze in workplaces
  2. Main causes and consequences of burnout
  3. Navigating the workers' compensation regime relating to psychological injuries
  4. Avoiding Discrimination
  5. Protection of workers' Privacy
  6. Developing a psychologically safe system of work



# 1. Psychological Health & Safety in the Church Workplace

## **Mental Health:**

- World Health Organisation defines Mental Health as *“a state of well-being in which individuals realize their own abilities, can cope with the normal stresses of life, can work productively and fruitfully, and are able to make a contribution to their community”*

## **Burnout:**

- Burnout is *“A psychological condition that results from chronic stress related to working with people”*
- Burnout often exhibits in **three areas:**
  - Emotional exhaustion
  - Depersonalization
  - Low sense of personal accomplishment
- **Burnout leads church workers to feeling emotionally drained by work which can result in emotional and physical withdrawal from both co-workers and other significant personal relationships.**



## 1. Psychological Health & Safety in the Church Workplace – *Main Causes*

### **Main Causes of Burnout:**

Safe Work Australia has identified **9** common psychosocial factors which, when experienced by workers for a prolonged period can cause a psychological injury.

**1. High Job Demands:** *This is a factor where prolonged high physical, mental and or emotional effort is required to do the job.*

- E.g. Long work hours, high workloads, fast work pace or significant time pressure, emotional effort in responding to distressing situations or distressed and aggressive clients (*paramedics*), exposure to traumatic events or work-related violence, shift work leading to higher risk of fatigue

**2. Low Job Control** can cause burnout: *where workers have little control over aspects of the work including how or when a job is done.*

- E.g. Work being tightly managed, workers having little say in regards to how they do their work, when they take breaks or change tasks, workers being unable to participate in decisions that affect them or their clients, workers being unable to refuse dealing with aggressive clients (*police service*)

**3. Poor Support** can cause burnout *where the tasks or jobs undertaken by workers have **inadequate:***

- **emotional support from supervisors** and co-workers, information or training to support their work performance, or inadequate tools, equipment and resources to complete the job

**4. Poor Workplace relationships** can affect a workers mental health in *workspaces that include*

- *Workplace bullying, aggression, harassment, discrimination, poor relationships between workers and their managers, supervisors and co-workers, conflict between workers and their managers, supervisors or co-workers*

## 1. Psychological Health & Safety in the Church Workplace – *Main Causes*

### **Main Causes of Burnout:**

#### **5. Low Role Clarity** affects mental health in jobs where there is **uncertainty relating to:**

- tasks and work standards, important task information which is not available to the worker, conflicting job roles, responsibilities or expectations (e.g. *Managers expecting workers to prioritise multiple conflicting tasks*)

#### **6. Poor organizational change management** occurs in workplaces that where there is:

- Insufficient consideration of the potential WHS and performance impacts during downsizing or relocations associated with introductions of new technology and production processes, or, inadequate consultation and communication with key stakeholders and workers about major changes, lack of practical support for workers during transition times.

#### **7. Low recognition and reward** occurs in workplaces with:

- an **absence of positive** feedback, an **imbalance** between worker's efforts and formal or informal recognition and rewards, a **lack** of opportunity for skill development or an **underuse** of skills and experience.

#### **8. Poor organizational justice** occurs where workplaces have:

- an inconsistent application of policies and procedures, unfairness or bias in decisions regarding allocation of resources and work, or poor management of underperformance

#### **9. Exposure to violent or traumatic events or vicarious trauma** occurs in workplaces with exposure to:

- Abuse, threat of or actual harm that causes fear and distress, or recurring disclosures involving descriptions of painful or traumatic events (*first responders, emergency services*)



## 2. Consequences

*The consequences of Burnout can be categorized into 5 main areas:*

### 1. Physical Symptoms:

- *Illnesses and fatigue*

### 2. Emotional consequences

- *Employees viewing regular work activities as major hurdles to overcome and feeling unable to complete them*

### 3. Relational consequences

- *Employees alienating themselves from their partners, friends and families*

### 4. Vocational consequences

- *Increased turnover and premature leaving of the profession*
- **40% of ex-pastors in Australia were either no longer worshipping or were inactive in their congregation– John Mark Ministries survey**

### 5. Spiritual consequences

- *Employees questioning their calling and the nature of God*



## 2. Consequences of Burnout – *Case Study*

### **Case Example – Eric Geiger (Senior Pastor)**

Eric Geiger is a Senior Pastor of Mariners Church in Irvine, California. When Eric first entered ministry, over twenty years ago, he felt some Christian leaders held to inaccurate and unhelpful views about mental health.

“They did not mean to, of course, but they had been taught that any struggle with the mind was solely a spiritual problem... If someone were struggling with depression, some leaders would simply respond with “Read the Bible and pray more...” Thankfully, in recent years church leaders have developed a better understanding that struggles with depression and battles with mental health are not solely spiritual issues. Just as godly people can struggle with physical sickness, godly people can struggle with mental sickness. Both are a result of our fallen and broken world.”





### 3. Navigating the workplace psychological health and safety maze – *Legislative Framework*

#### 3.1 Obligations under the *Work Health & Safety Act 2011* operate alongside other legislative frameworks

*Workers' Health and Safety laws and Workers' Compensation laws operate alongside other legislation, including:*

- Criminal Laws:

- Criminal laws can apply to workplace incidents of bullying involving assault or other criminal behaviour.

- Anti-Discrimination Laws:

- Anti-Discrimination laws vary between jurisdictions, however, they all require organisations to **make reasonable adjustments** by making changes which facilitate workers with mental disorders to perform the inherent requirements of the job.

- Fair Work Act 2009 and other jurisdictional industrial laws*

- This legislation contains measures and procedures to address bullying at work.

- An employee experiencing bullying in the workplace can apply to the FWC for an order to prevent the worker from being bullied by individuals or a group.

- The *Fair Work Act 2009* prohibits an employer from taking adverse action against an employee or prospective employee because of their disability (*including mental health conditions*).

- Privacy laws*

- Responsibilities for handling personal information , including disclosure of personal information, can arise under the *Privacy Act 1998 (Cth)* or other varying state and territory laws.

- Personal information **includes** information or opinions about an **identifiable individual**.



### 3. Navigating the workplace Psychological Health and Safety Maze – *Worker and Volunteer Responsibilities*

#### 3.2 Workers (and volunteers) have certain legislated responsibilities to their employers:

##### Workers, under the *Work Health & Safety Act 2011* (*section 28*), must:

- (a) Take reasonable care for their own health and safety; and
- (b) Take reasonable care that their acts or omissions do not adversely affect the health and safety of other persons; and
- (c) Comply, so far as the worker is reasonable able, with any reasonable instruction that is given by the person conducting the business or undertaking to allow the person to comply with this Act; and
- (d) Co-operate with any reasonable policy or procedure of the employer relating to health or safety at the workplace that has been notified to workers

##### ‘Worker’ includes volunteers

•**Volunteer:** “a person who is acting on a voluntary basis, irrespective of whether the person receives out-of-pocket expenses” -- **Schedule 5**

•**Worker includes a volunteer** – **Section 7**

## 3. Navigating the workplace Psychological Health and Safety Maze – *Worker and Volunteer Responsibilities*

### 3.2 Workers (and volunteers) have certain legislated responsibilities to their employers:

#### A worker's obligation to disclose a psychological condition to an employer:

- Workers **do not** have an obligation to disclose a **pre-existing** psychological condition where it does not have a **material effect** on their ability to perform the **inherent requirements** of the role.
- Where it does have a **material effect**, the *Fair Work Act* prescribes a duty to disclose
  - The prohibition of adverse action against an employee on the basis of physical or mental disability may not apply where a worker has failed to **disclose their condition**.
  - **Failure to disclose may also limit an employees access to workers' compensation** where the condition worsens or recurs during that employment
- Employers should implement systems which ensure their workers understand the importance of seeking medical advice when their condition is **affecting** their ability to carry out the inherent requirements of the job or , alternatively, where the inherent requirements of the job are **exacerbating** the existing condition

## 3. Navigating the workplace Psychological Health and Safety Maze – *Employer Responsibilities*

### 3.3 Employers must ensure, to the extent that is reasonably practicable, the health and safety of their workers

- Health includes **psychological health** under the *Work Health and Safety Act 2011* – **Section 4**
- **Section 17:** An employer's duty to ensure the health and safety of its workers requires that employer to:
  - (a) eliminate risks to health and safety, so far as is reasonably practicable; and
  - (b) where it is not reasonably practicable, to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable
- **Section 18:** outlines factors which should be considered in assessing what steps were reasonably practicable in ensuring health and safety of employees. These factors include
  - (a) *the likelihood of the hazard or the risk concerned occurring; and*
  - (b) *the degree of harm that might result from the hazard or the risk; and*
  - (c) *what the person concerned knows, or ought reasonably to know, about;*
    - (i) *the hazard or the risk; and*
    - (ii) *the ways of eliminating or minimising the risk; and*
  - (d) *the availability and suitability of ways to eliminate or minimise the risk; and*
  - (e) *the cost associated with available ways of eliminating or minimising the risk, including whether the cost is **grossly disproportionate to the risk***

***For church organisations, such steps could include ensuring workers have a balanced workload and are offered support services.***



## 3. Navigating the workplace Psychological Health and Safety Maze – *Employer Responsibilities*

### 3.3 Employers must ensure, to the extent that is reasonably practicable, the health and safety of their workers

- **Section 19** outlines the primary duty of care of the employers
- **Section 19(3)** requires employers to ensure, **so far as is reasonably practicable**;
  - (a) *the provision and maintenance of a work environment without risks to health and safety and*
  - (b) *the provision and maintenance of safe plant and structures; and*
  - (c) *The provision and maintenance of safe systems of work; and*
  - (d) *the safe use, handling and storage of plant, structures and substances*
  - (e) *the provision of adequate facilities for the welfare at work of workers including ensuring access to those facilities*
  - (f) *the provision of any information, training, instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of their role*

#### **Employers must ensure a worker is *fit to work***

- *Where an employer believes the worker is at risk to themselves, co-workers, or to their congregation members, there are **4 tools** available to employers to assist in assessing whether the worker is fit to work, and, if applicable how they can be supported and remain at work*
  1. Get an affirmative statement of fitness for work
  2. Request medical information
  3. Conduct an independent medical examination
  4. Make reasonable adjustments and facilitate return to work

### 3. Navigating the workplace Psychological Health and Safety Maze – *Reasonable Adjustments & Facilitating return to work*

#### 3.4 Employers must make *reasonable adjustments* to facilitate employees returning to work: *Direct Discrimination*

##### Reasonable Adjustments

- **Section 4** *Disability Discrimination Act (Cth) 1992*: a reasonable adjustment is an adjustment to be made by a person (employer) and will be reasonable unless it imposes “**unjustifiable hardship**” on the person.
- A reasonable adjustment **will not be reasonable** if the employee cannot perform inherent requirements of the role even with adjustments
- Where the position description is **broad**, any reasonable adjustments will also be considered **broadly**: *Butterworth v Independence Australia Services* [2015] VCAT 2056

##### Direct Disability Discrimination

- **Section 5 (2)** *Disability Discrimination Act (Cth) 1992* outlines that discrimination will also occur:
  - (a) where an employer fails to make, or proposes not to make, reasonable adjustments for an employee; and
  - (b) the failure to make the reasonable adjustment, has or would have, the effect that the aggrieved person is, **because of the disability**, treated **less favourably** than a person without the disability, in circumstances **not materially different**



### 3. Navigating the workplace Psychological Health and Safety Maze – *Reasonable Adjustments & Facilitating return to work*

3.4 Employers must make *reasonable adjustments* to facilitate employees returning to work: *Indirect Discrimination*

#### Indirect Disability Discrimination

- **Section 6 (2)** *Disability Discrimination Act (Cth) 1992* outlines that discrimination will also occur
  - (a) *where the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and*
  - (b) *because of the disability, the aggrieved person would comply, or would be able to comply, with the requirement or condition **only if the discriminator made reasonable adjustments for the person, but the discriminator **does not do so** or proposes not to do so; and***
  - (c) *the failure to make reasonable adjustments has, or is likely to have, the **effect of disadvantaging** persons with the disability*

***Once the church becomes aware of a psychological injury, it is important that role adjustments are made in order to reduce the likelihood of ongoing suffering or further harm.***

### 3. Navigating the workplace Psychological Health and Safety Maze – *Reasonable Adjustments & Facilitating return to work*

#### 3.4 Employers must make *reasonable adjustments* to facilitate employees returning to work: Exceptions

##### Exceptions – Inherent requirements– s21A

- **Section 21A (1)** states that it is **not unlawful for a person to discriminate against another person on the ground of a disability of the aggrieved person if;**
  - (a) *the discrimination relates to particular work; and*
  - (b) *because of the disability, the aggrieved person would be **unable to carry out** the inherent requirements of the particular work, even if the relevant employer made **reasonable adjustments** for the aggrieved person*

##### Exceptions – Unjustifiable Hardship – s21B

- **Section 21B** states that it is *not unlawful for a person to discriminate against another person on the ground of a disability of the other person if avoiding the discrimination would **impose an unjustifiable hardship** on the discriminator*

***Facilitating a church workers return to work after a psychological injury can include reviewing and, if necessary, adjusting the performance requirements of the job; arranging flexibility in work hours and approving more regular breaks.***





## 4. Workers' Compensation

- Workers' compensation legislation aims to support **workers** in the event of a work-related injury or illness, **including a psychological injury**.

- Employers have a **duty of care** to protect workers from ***reasonably foreseeable psychological injuries***

### **When will an employee be eligible for compensation?**

- WorkCover will apply the eligibility criteria outlined in the *Workers' Compensation and Rehabilitation Act 2003* when assessing a psychological or psychiatric injury

- The Act requires a compensable psychiatric or psychological disorder to have **arisen out of, or in the course of, employment**, if the **employment** is the **major significant contributing factor** – **Section 32(1)(b)**

### **Injury does not include a psychiatric disorder where:**

- The psychiatric disorder has arisen out of the course of, *reasonable management action taken in a reasonable way by the employer in connection with the workers' employment* – **Section 32 (5)**

- E.g. Reasonable management actions taken in a reasonable way may be: action taken to transfer, demote, discipline, redeploy, retrench or dismiss the worker, or, a decision not to award or provide promotion, reclassification or transfer of, or leave of absence or benefit in connection with, the worker's employment*



## 4. Workers Compensation – Employer Obligations

### Employer Responsibilities:

- Generally, workers' compensation laws places responsibilities on the employer to:
  - Have workers compensation insurance
  - Maintain a record of all work-related injuries, and, where required, to report these to the relevant WHS regulator
  - Maintain a documented rehabilitation policy which prescribes steps to be taken if a worker has a work-related injury
  - Consult with an injured worker and provide information regarding their rights and responsibilities
  - Treat the worker fairly during and after a claim lodgement
  - Notify the insurer of all workplace injuries within a specified timeframe (*this will vary between jurisdictions*)
    - *Some jurisdictions will include extra duties where a worker is able to return to work on a full-time or part-time basis to:*
      - **Notify** the WHS regulator about certain kinds of injuries and incidents
      - **Develop** or be involved in the development of the worker's RTW plan, and
      - **Comply** with the obligations prescribed in the plan, and
      - **Provide** meaningful suitable duties, as far as reasonably practicable



## 4. Workers Compensation – *Employee Obligations*

### Worker responsibilities:

- Workers are required to:
  - Notify their employer of an injury **as soon as practicable**.
    - *Time limits vary according to the jurisdiction and in some states, workers do **not have** this duty.*
  - Participate and co-operate in *returning to work* planning and approaches.
  - Comply with obligations set out in *returning to work* planning approaches, **including**, participation in injury management or rehabilitation.
  - Make **reasonable efforts** to return to work to their suitable duties **when practicable**.

### **How is a psychological injury claim assessed?**

- WorkCover has **20 business days** to make a decision regarding a psychological or psychiatric claim.
- WorkCover will gather information from the worker, employer, associated doctors, allied health professionals and any other relevant persons (*including direct witnesses or independent medical examiners*).



## 4. Workers Compensation – Compensation

### What compensation can be claimed?

- Compensation and entitlements that can be claimed for psychological injury can include
  - Medical expenses (*doctors, psychiatrists, psychologists or counsellors*)
  - Income replacement payments to injured workers
  - Costs associated with retraining for other employment or duties
  - Lump sum payment for any **permanent injury** or disability
  - Death benefits to a dependent of a deceased worker in the event of a **work-related** death

### Volunteers

- Section 18 *Workers Compensation & Rehabilitation Act 2003* applies to persons in a **voluntary or honorary position with religious, charitable or benevolent organisations.**
- **S18** states that
  - (1) WorkCover may enter into a contract of insurance for this subdivision with a church, non-profit charitable organisation or benevolent institution
  - (2) the contract may cover a person in a **voluntary or honorary position with the institution**
  - (3) a person covered by the contract is **entitled to compensation for injury sustained only while engaged on a specific capital undertaking of the institution and performing a duty required by or for the institution for the undertaking, as a volunteer**
- **Volunteer church workers may still have access to compensation for psychological injuries, depending upon the applicable insurance policy.**



## 5. Avoiding Discrimination

### Unlawful Discrimination is governed by both state and federal legislation:

- **Section 9** *Anti-Discrimination Act 1991* (Qld) outlines its prohibition of **direct & indirect** discrimination
- The Commonwealth *Disability Discrimination Act 1992* **does not** have an equivalent provision but **does contain provisions** which **prohibits discrimination in a particular protected area** (including education)
- The *ADA* and the *DDA* have a **substantially similar** effect despite the different provisions as the prohibition in **section 9** of the *ADA* **cannot be** relied upon **outside of a protected area**.

### Protected Attribute: *Anti-Discrimination Act 1991* (Qld)

- Section 7 prohibits discrimination on the basis of listed attributes which include;
  - (h) Impairments
  - (p) association with, or relation to , a person identified on the basis of any of the above attributes
- A person can be discriminated against by association with a person possessing a listed attribute
  - Section 7(p) allows for discrimination complaints to be made by parents of students with a disability
- The *ADA* does not operate on the term **disability**, rather, **it assesses discrimination** in light of **someone's "impairment"**

## 5. Avoiding Discrimination

### Imputed Attribute:

- Discrimination can occur on the basis of an **imputed, presumed or past attribute**
  - *Anti-Discrimination Act 1991 (Qld) – Section 8*: disability is termed as an “**impairment**” which, as defined in the Schedule **includes imputed** attributes
  - *Disability Discrimination Act 1992 (Cth) – Section 4(k)*: Definition of disability **includes imputed** disabilities

### Definitions:

#### **ADA-- Schedule: “Impairment”**

“**impairment**”, in relation to a person, means—

- (a) the total or partial loss of the person’s bodily functions, including the loss of a part of the person’s body; or
- (b) the malfunction, malformation or disfigurement of a part of the person’s body; or
- (c) a condition or malfunction that results in the person learning more slowly than a person without the condition or malfunction; or
- (d) a condition, illness or disease that impairs a person’s thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour; or
- (e) The presence in the body of organisms capable of causing illness or disease; or
- (f) reliance on a guide, hearing or assistance dog, wheelchair or other remedial device; whether or not arising from an illness, disease or injury or from a condition subsisting at birth, and includes an impairment that—
- (g) presently exists; or
- (h) previously existed but no longer exists.



## 5. Avoiding Discrimination – *Definitions*

### **Definitions:**

#### **DDA – Disability defined – Section 4 as:**

“ **disability**”, in relation to a person, means:

- (a) total or partial loss of the person's bodily or mental [functions](#); or
- (b) total or partial loss of a part of the body; or
- (c) the presence in the body of organisms causing disease or illness; or
- (d) the presence in the body of organisms capable of causing disease or illness; or
- (e) the malfunction, malformation or disfigurement of a part of the person's body; or
- (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction;
- (g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgement or that results in disturbed behaviour

**and includes a [disability](#) that:**

- (h) presently exists; or
- (i) previously existed but no longer exists; or
- (j) may exist in the future (including because of a genetic predisposition to that [disability](#)); or
- (k) **is imputed to a person.**

***A disability that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability – Section 4***



## 5. Avoiding Discrimination – *Definitions*

- **The definitions found in both Acts are wide enough to ensure all persons with disabilities are protected and necessarily include the following impairments:**
  - *Physical*
  - *Intellectual*
  - *Psychiatric*
  - *Sensory neurological*
  - *Affect learning*
  - *Physical disfigurements*
  - *Involve presence of a disease-causing organism*





## 5. Avoiding Discrimination – *Direct Discrimination*

### Direct Discrimination: **s10 Anti-Discrimination Act** & **s5 Disability Discrimination Act**

- Direct discrimination concerns instances where impaired persons are subject to “**less favourable treatment**” in circumstances that are the same or **not materially different** – **s10(1) ADA & s5(1) DDA**
- Provision differences between *Anti-Discrimination Act* & *Disability Discrimination Act*
  - Less favourable treatment under *Anti-Discrimination Act*: “**on the basis of**” the attribute
  - Less favourable treatment under *Disability Discrimination Act*: “**because of**” the disability
- Despite the language differences, the relevant consideration is determining what the “**true basis**” or “**real reason**” was for the conduct: *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92, [13], [14]; *Forbes v Australian Federal Police (Cth)* [2004] FCAFC 95, [65]-[67]

### Multiple reasons motivating actions:

- **Section 10 Disability Discrimination Act** : complainant’s disability need only be **one of 2 or more** reasons
- **Section 10(4) Anti-Discrimination Act**: complainant’s attribute must be the **substantial** reason for the action taken
  - A church’s **motivation or intention** is irrelevant: *Waters v Public Transport Corporation* (1991) 173 CLR 349, 359, 382.
- Discrimination is **less burdensome** to prove from an evidentiary perspective under the **DDA** because of the **lower threshold created** by section 10 as opposed to section **10(4) of the ADA**.



## 5. Avoiding Discrimination – *Indirect Discrimination*

**Indirect Discrimination: s11 Anti-Discrimination Act & s6 Disability Discrimination Act**

**ADA:**

- s11 (1) ADA: *indirect discrimination occurs if a person imposes, or proposes to impose, a term*
- (a) with which a person with an attribute does not or is not able to comply; and*
  - (b) with which a **high proportion** of people without the attribute comply or are able to comply; and*
  - (c) that is **not reasonable***
- (2)** *Whether a term is reasonable depends on all the relevant circumstances of the case, including*
- (a) the consequences of failure to comply with the term; and*
  - (b) the cost of alternative terms; and*
  - (c) the financial circumstances of the person who imposes, or proposes to impose, the term.*
- (3)** *It is not necessary that the person imposing, or proposing to impose, the term is aware of the indirect discrimination.*

**DDA:**

- s6 (1) ADA: *indirect discrimination occurs if a person (the discriminator):*
- (a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and*
  - (b) because of the disability, the aggrieved person does not or would not comply, or is not able or would not be able to comply, with the requirement or condition; and*
  - (c) the requirement or condition has, or is likely to have, the effect of disadvantaging persons with the disability.*
- (2)** For the purposes of this Act, a person (the **discriminator**) also **discriminates** against another person (the **aggrieved person**) on the ground of a disability of the aggrieved person if:
- (a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and*
  - (b) because of the disability, the aggrieved person would comply, or would be able to comply, with the requirement or condition only if the discriminator made reasonable adjustments for the person, but the discriminator does not do so or proposes not to do so; and*
  - (c) the failure to make reasonable adjustments has, or is likely to have, the effect of disadvantaging persons with the disability.*



## 5. Avoiding Discrimination – *Indirect Discrimination*

### Provision differences between *Anti-Discrimination Act* & *Disability Discrimination Act*

- **Section 11(1)(b)** of the *Anti-Discrimination Act* requires demonstration that a **high proportion of people without the attribute are able to comply with** the policy
- **Section 6** of the *Disability Discrimination Act* contrastingly finds indirect discrimination where the requirement has the effect of **disadvantaging persons** with the disability unless the requirement is reasonable.



## 5. Avoiding Discrimination – *Indirect Discrimination*

### Making a reasonable adjustment:

- *Disability Discrimination Act*: **wider in scope**

- Those imposing a term or requirement must make reasonable adjustments for the person with a disability, unless it is an **unjustifiable hardship** for the church to do so – **Section 29A**

- *Anti-Discrimination Act*: Churches may not need to make a reasonable adjustment where their term can be **demonstrated as reasonable in the circumstance**.

- Availability of an “*alternative term*” is **relevant** in considering reasonableness

- **Section 11(2)**: Factors to consider in determining reasonableness-

- Reasonableness is an **objective test: weighing of nature and extent of discriminatory effect against reasons advanced in favour of the term**: *JM v QFG and GK [1998] QCA [228]*

### Instances of alleged indirect discrimination require a **consideration of both**:

- The **reasonableness of the term** in the relative circumstances and --
- Whether the impaired person is **able to comply** reasonably, practically and with dignity
  - This assessment goes beyond mere ‘**technical**’ compliance: *Access for All Alliance (Hervey Bay) Inc. v Hervey Bay City Council [2004] FMCA 915 [9]*



## 6. Protection of Privacy – *Breach of actual or implied contractual term*

- **Obligations of confidence and privacy for church leaders can apply through various ways;**
  - a. Breach of an actual or implied term of confidentiality in the Contract of employment;
  - b. Equitable breach of confidence;
  - c. Breach of the Privacy Act;
  - d. Any express ethical obligations of the staff member.

### **a. Breach of an actual or implied term of confidentiality in Contract of employment**

- There is a contractual relationship between church workers and church leaders
- Contracts need not be in writing to be enforceable
- Terms can be;
  - In writing
  - Agreed to orally (*e.g. a church organization may orally agree to provide a church worker with training*)
  - Incorporated by conduct or part performance or
  - Implied
- Written employment contracts would generally include obligations of confidentiality. Where these clauses are breached, the church could be held liable for breach of contract. If the church wishes to be excused from confidentiality clauses in specified circumstances, there must be **clear terms** reflecting this in the contract.

## 6. Protection of Privacy – *Equitable breach of confidence*

### b) Equitable breach of confidence

- Church workers can be held accountable for misuse of confidential information. This constitutes an action under **equity** and may result in damages being awarded or injunctions given
- Plaintiff would need to establish:
  - That the information was **confidential in nature**
  - That such information was **shared in a circumstance giving rise to an obligation of confidence**
    - E.g. *personal information*, including *mental health issues shared with a staff member during a confidential session*
- Where information is considered confidential, the confider must not make unauthorized use of the information to the **detriment** of the person
  - Detriment has been interpreted **broadly** and includes: *embarrassment* and *loss of privacy*
- Damages can be awarded for such a breach of confidence
  - Restitution should place the confider in the position they would have enjoyed had the breach not occurred

### Defence to claim for breach of confidence

- Where disclosure is made in the **public interest**
- Involves balancing interests of the confider in maintaining confidentiality with the interests of the public in knowing confidential information
  - E.g. where confidential information relates to commission of a criminal offence: *A v Heydon* (1984) 156 CLR 532; *W v Egdell* [1990] Ch 359.
- Nature of the disclosure is relevant in making this defence. Limited disclosure to appropriate authorities is likely to succeed where a broader disclosure to general public would not.



## 6. Protection of Privacy – *Right to Privacy under Privacy Act 1988*

### c) Right to Privacy under the Privacy Act 1988

#### • **Personal** vs. **Sensitive** information

- **Personal Information:** *information or opinions about an individual whose identity is apparent or can be reasonably ascertained from the information irrespective of the information's objective truth and how it is recorded*
- **Sensitive Information:** *a subset of personal information including an individuals;*
  - Racial or ethnic origin, political opinions, religious beliefs, memberships both professional and trade associations, sexual preferences, criminal record, health information and other genetic information which is not health related
  - Information regarding a students **mental health** would be sensitive

#### **Disclosure of information**

- General Rule: *the individual should **consent** to any use or disclosure of **sensitive information***
  - Consent needs to be specific, informed, voluntarily given and current
- Exceptions to general rule (requiring consent)
  - Using or disclosing personal information as required or authorized by law
    - E.g. responding to subpoena, mandatory disclosures
  - Using or disclosing personal information in a generally permitted situations;
    - Lessening or preventing a serious threat to life, health or safety
    - Taking appropriate action regarding suspected unlawful activity or serious misconduct
    - Locating a reported missing person
    - Reasonably necessary for establishing, exercising or defending a legal or equitable claim or to further a confidential alternative dispute resolution process
  - Using or disclosing personal information for an **enforcement related** activity by an enforcement entity based on a reasonable belief that use of information is reasonably necessary in the circumstances.



## 6. Protection of Privacy – *Ethical Obligations of Confidence*

### d. Ethical Obligations of Confidence

- Obligations of confidence arising from various ethical guidelines imposed by professional bodies
  - E.g. *Australian Psychiatric Society, Queensland College of Teachers*
- Any application of these obligations depends on the staff member's membership and professional qualifications





## 7. Developing a Safe System of Work

### 1. Identify Psychological hazards

- Psychological hazards can include:
  - *Finding situations that could cause potential harm*
- These hazards can arise from; *organizational factors, environmental factors and individual factors*
- Hazards can be **identified by**:
  - *Having **conversations** with workers, supervisors and health and safety specialists*
  - ***Inspecting** the workplace to assess how work is carried out, taking note of any delays, rushing or backlogs*
  - ***Noticing** how people interact with each other during church activities*
  - ***Reviewing** relevant information and records including, reporting systems like incident reports, workers compensation claims, staff surveys, and staff turnover data*
  - ***Using** data to gather information from workers, supervisors and manager*

### 2. Developing a workplace mental health strategy

- Beyond Blue has implemented a strategic approach which focuses on **three key areas** to facilitate better mental health in the workplace:
  - **1. protection**
  - **2. promotion**
  - **3. support**
- An **integrative approach** to mental health and wellbeing will have the best outcome
- Key elements affecting the success of an integrative approach include
  - The **commitment of senior leaders** and.
  - **Ongoing meaningful participation**



## 7. Developing Safe Systems of Work – *Case study: Commitment of Senior leaders*

### **Example – Dr Andrew Wilson, Group Executive – Healthcare & Strategy (Medibank)**

“The role of a leader in creating a mentally healthy workplace is to promote awareness and importantly to promote a culture that allows people to take the steps they need to stay mentally healthy.”



## 7. Developing a Safe System of Work – *Commitment of Senior Leaders*

### 2. Developing a workplace mental health strategy – *Integrative Approach*

- *Commitment of Senior leaders*
  - Church leaders need to make a **visible, long term commitment to mental health.**
  - Leaders are in the strongest position to **positively influence** the *working environment, management practices and experiences of employees*

#### **How to lead the way to a mentally healthy workplace:**

1. Demonstrate a visible, active commitment to mental health in the workplace.
2. Speak openly about mental health in the workplace, including any personal experiences.
3. Make mental health an objective of the business.
4. Treat mental health as you would physical health – integrate good health and safety management into all business decisions, policies and procedures.
5. Develop your own leadership and people management skills.
6. Allocate necessary resources for change and establish performance measures.
7. Communicate a zero-tolerance approach to bullying and discrimination.
8. Provide flexible working conditions that promote employee mental health.



## 7. Developing a Safe System of Work – *Ongoing meaningful participation*

### 2. Developing a workplace mental health strategy – *Integrative Approach*

- *Ongoing meaningful participation and ongoing communication*
  - An approach to developing a workplace mental health strategy should be **grounded in co-design**: *promoting different ways for staff to become active participants in the **development, implementation and review** of strategies to enable them to feel that they **own the change and the results***
  - Co-design is based on the notion that the future users of any *product, service or strategy*, are **experts of their own experience**, bringing different points of view that will inform the direction
  - Regular and ongoing communication can help break down barriers to addressing mental health and wellbeing and can assist in reducing the stigma attached to mental health.
  - Broader promotion and recognition of good mental health assists in making the discussion of emotions and mental health more commonplace



## 7. Developing a Safe System of Work – *Ongoing meaningful participation*

### How to develop a workplace mental health and wellbeing strategy

#### 1. Gain leadership support

- **Build** your business case - The rationale for addressing mental health can vary for individuals. While some senior leaders will be driven by the legal, ethical or moral importance of looking after the mental health and wellbeing of their staff, for some the strongest driver will be financial; for others it will be improved customer or client experiences, risk management, productivity and efficiency. Different arguments appeal to different leaders.
- **Identify** champions and establish governance – Who are the key influencers and groups in my church? Who could have the passion and commitment to champion mental health?
- **Commit** financial, human and other resources – Every dollar spent on creating a mentally healthy workplace will, on average, have a positive return on investment of \$2.30

#### 2. Identify needs

- **Identify** existing policies, programs, supports and practices – What do we have and what don't we have?
- **Review** and analyse existing data and research – How does your data compare to other organisations in your industry or national standards on workplace mental health?
- **Consult** with staff and other stakeholders to identify issues and seek feedback on the current approach – How is the current approach working and not working, and why?

## 7. Developing a Safe System of Work – *Ongoing meaningful participation*

### How to develop a workplace mental health and wellbeing strategy

#### 3. Develop a plan

- **Establish** desired outcomes and set goals
- **Identify** need for collaborations / external expertise – How can we work with others?
- **Develop** a realistic, achievable action plan – What does success look like?
- **Implement** actions

#### 4. Monitor, review and improve

- **Monitor** implementation and uptake of initiatives – is the action plan being implemented?
- **Seek** feedback from staff on implementation and effectiveness – what is my implementation team seeing and experiencing in getting this off the ground?
- **Collect** data to compare with your baseline and measure progress against goals – Are we on track to reach our strategic goals?
- **Review** strategy and programs against baseline and goals – How well does my action plan take the goals and make them a reality?
- **Amend** and adjust strategy and actions where required.

## Recap

- Systematic approach to preventing harm and supporting recovery occurs in 3 stages:
  - **1. preventing harm**
  - **2. intervening early**
  - **3. supporting recovery**
- Through incorporation of these three key phases into church programs, churches are ensuring their fulfilment of legal duties which require implementation of controls that **eliminate or minimize the risk of potential psychological injuries or burnout in the workplace**
- The surrounding legislation of Workplace Health and Safety outline that churches **must** systematically and comprehensively;
  - **Identify** work-related hazards and risks
  - **Assess** risks
  - **Implement** effective control measures to eliminate hazards or minimize risks
- Some strategies to achieve this include
  - **Focusing** on the good design and effective management of work
  - **Creating** safe systems of work and
  - **Ensuring** appropriate communication and behaviour
  - **Consulting** effectively with workers and their representatives

*just redemptive outcomes.*



CORNEY & LIND  
LAWYERS

# Questions?





*just redemptive outcomes®*



CORNEY & LIND  
LAWYERS

# Contact



**Name:** Fran Keyes

**Position:** Special Counsel

**Email:** [fran.keyes@corneyandlind.com.au](mailto:fran.keyes@corneyandlind.com.au)

07 32520011

[www.corneyandlind.com.au](http://www.corneyandlind.com.au)