

# State of mind

AS THE WORLD IS TURNED ON ITS HEAD BY THE COVID-19 PANDEMIC, IT IS TIMELY TO DISCUSS MENTAL HEALTH IN THE LEGAL PROFESSION.

BY PAUL HORVATH  
AND INES PERKOVIC

With the COVID-19 pandemic causing ripples of disruption to our ordinary routines, people are being urged more than ever to safeguard their mental health and wellbeing.

For many legal professionals working from home in isolation, adapting to court appearances conducted via Microsoft Teams and Zoom and meeting with clients remotely, there is a palpable loss of community, connection and closeness in the industry.

These unique and somewhat difficult circumstances add pressure to a profession which is already rife with high levels of stress. Adverse increases in stress and mental health deterioration are said to have impacts that require longer periods of recovery.

This is the perfect time to add to the discussion around mental health and wellbeing and why it is important to legal professionals.

What exactly are we talking about when we talk about “mental health” and how is it relevant to us as legal professionals?

As defined by the World Health Organisation, mental health is a “a state of wellbeing in which every individual realises his or her own potential, can cope with the normal stresses of life, can work productively and fruitfully, and is able to make a contribution to her or his community”.<sup>1</sup> Mental health is not simply the absence of mental illness – stress, anxiety

and depression may occur in an otherwise healthy population.

Mental health, therefore, can be characterised as having the tools, vocabulary and support to deal with the stressors of life in a way which empowers individuals and those around them.

Taking this definition, the concept of mental health (and relevantly, wellbeing) is crucial to our role as legal professionals. Although we are all members of the legal profession, practice areas and expertise touch all facets of society – from commercial and corporate law, to family and child protection, to employment and workplace safety, to criminal law, as well as countless variations of these.

## Impacts of not being proactive about mental health in the workplace

The impacts of not being proactive about your employees’ mental health in the workplace can be devastating.<sup>2</sup>

Legal obligations on employers to take reasonable steps to protect their employees from mental harm are now enshrined in legislation.<sup>3</sup> Chris Molnar’s September 2015 *LII* feature “Eliminating mental health hazards” provides a valuable analysis of the legislative schemes which apply to employers to manage mental health in the workplace.<sup>4</sup>



A study by PricewaterhouseCoopers estimates the total baseline impact of untreated mental health conditions to Australian workplaces is approximately \$11 billion per year.<sup>5</sup> WorkSafe Victoria further reports that every year two out of five Australians report leaving a job because of a poor workplace environment and that by 2030 mental health injuries will comprise 33 per cent of WorkSafe Victoria claims.<sup>6</sup>

The Victorian government has launched a royal commission into Victoria's mental health system and has committed a further \$59.4 million package to help meet demands relating to mental health. This not only highlights the significance of mental health but, importantly, it sets a standard for employers. If you do not take steps to address mental health in your workplace, you risk exposing yourself to liability, or being left behind as this area develops further.

## What risk factors are relevant to legal professionals?

Mental health issues are particularly prevalent in the legal sector. The 2019 Meritas Wellness Survey found that 63 per cent of professionals have experienced, or observed in colleagues, depression, and 85 per cent of professionals have experienced, or observed in colleagues, anxiety.<sup>7</sup> Although alarming, it is unsurprising given the stressors we experience in our day to day professional lives.

Long hours, the pressure to meet billables and generate business for the firm, tight (and often unexpected) deadlines, an unbalanced workload, the pressure to deliver the best outcome to our clients no matter the circumstances and rapidly changing technologies (made evident by the pandemic) are all causes of stress.

Arguably, the power imbalance related to recent underpayment disclosures to junior lawyers may also underscore the vulnerability of some in the legal profession, as does the requirement to work long hours under considerable pressure in order to have the most sought-after job, be it now or in the future.

Working from home because of COVID-19 may also cause us to feel lonelier and more isolated. Some may work longer hours because their work is always at their fingertips.

As individuals, legal professionals are generally highly driven, motivated, competitive and perfectionist in nature. We have high expectations of ourselves. It is easy to take any perceived failure or criticism personally, even when those failures are caused by factors beyond our control.

Others, such as courts, bosses, colleagues and clients hold us to equally high standards. The constant pressure to perform, without an appropriate opportunity for rest and recovery (both in frequency and duration), can be a breeding ground for unhealthy stress.

Some professionals may have experienced trauma in their personal lives, and their experiences cause them to be more at

### SNAPSHOT

- This article covers what mental health means, specifically for legal practitioners, the impacts of neglecting mental health, and tips to ensure wellness in the law.
- There are both "healthy" and "unhealthy" levels of stress and the profession needs to be aware of vicarious trauma.
- In order to create mentally healthier workplaces, we need acceptance of wellbeing as a priority and destigmatise mental health as a show of weakness from high performing lawyers.

risk of developing a mental health condition.

Finally, the stigma surrounding mental health is another major contributing factor. Poor mental health may be associated with perceived weakness, incompetence or laziness.<sup>8</sup> Others still believe that those suffering from mental health issues should – and can – “snap out of it”. Stigma can lead to poor treatment in the workplace, including bullying, harassment and discrimination, which exposes firms to claims being brought against them by injured employees, and further leads to those suffering mental health conditions not to speak up. Stigma can cause us to self-stigmatise and increases negative perceptions towards oneself.<sup>9</sup>

It's prudent to note that while people may look like they are coping well on the outside, they may not be on the inside. The Black Dog

Institute notes, concerningly, that 33 per cent of lawyers and 20 per cent of barristers self-medicate with alcohol, and that 11 per cent of lawyers contemplate suicide each month.<sup>10</sup>

## When does stress become bad?

Practising law is stressful at the best of times, and although we should welcome healthy amounts of stress or pressure, there is often a fine line between being driven and inspired by stressors, and finding oneself dragged down by the high-pressure environment in which we work.

Not all stress is bad. Research shows that positive stress, or “eustress”, can help us be better employees and more satisfied in our lives overall.<sup>11</sup> Eustress tends to occur in short and specific periods, particularly in situations which challenge us. Eustress can be triggered by events such as:

- giving a presentation to your peers on a topic that interests you
- starting work in a new practice area
- working towards and meeting tricky court deadlines
- successfully negotiating an outcome for your client in a difficult mediation.

Importantly, experiencing “positive stress” is also said to help us buffer the negative effects of “distress”, or negative stress.<sup>12</sup>

Without pressure and challenges, we may become idle and bored in our work. However, prolonged stress can cause your mental health to suffer. Further, mental and physical health are intrinsically linked. When you become overloaded by stress (or become “distressed”), it begins to cause adverse physical reactions in your body, and feeds the cycle of mental unwellness.

In the legal profession, too much stress can be caused by:

- unrealistic and unmanageable workloads
- managing difficult clients and their often-unrealistic expectations
- long hours and excessive overtime
- a developed outlook of pessimism (so as to protect clients from perceived negative outcomes).<sup>13</sup>

## Vicarious trauma

Vicarious trauma is an effect of empathy-based strain, and may occur in legal practitioners as a result of their empathetic

engagement with a client who is going through a traumatic life event. The effect can be more transitory in nature, but this will depend on how it is managed, what immediate support is provided both at the firm and at home, and checking in on a lawyer responding to a very challenging client's mental health condition.

Legal professionals, particularly those working in criminal, family and employment law, are vulnerable to experiencing vicarious trauma.

We have acted in criminal cases for individual clients who have taken their own lives – one who was jailed for serious child assault and another due to perceived paranoia towards authority due to a severe personality disorder. This can lead to self-blame for the outcome and questioning of “What could I have done differently so that did not happen?”

As many lawyers acting for a client with a mental health condition know, the battle is often how to deal with the frequent reference to the client feeling very despondent, and sometimes suicidal. We tend to carry that as our responsibility to manage the client's case and their expectations in a manner that does not contribute to or drive them “over the edge”. Again, it makes our decisions in running an already pressured legal case all the more difficult. This creates stress for us as the lawyer. We have experienced this in bullying and discrimination cases where the employee has developed a psychological or psychiatric condition.

In these circumstances, a possibility arises for the legal practitioner to also experience their own empathy-based strain. When legal practitioners are repeatedly exposed to traumatic events, vicarious trauma may develop.

That is where having a good team around you to recognise this, and to have a second person in on interviews and conversations becomes important. It allows the lawyer to seek a second opinion, especially from someone with a clear, more objective opinion, and not carry the burden of assessing the gravity of the situation on their own.

Setting up buddy networks as well as mental health groups in a firm within which such matters can be raised, including experiences within a firm of bullying or discrimination, can be invaluable. This can take the form of “debrief” sessions, where peers are able

to discuss how a case, event or client may have caused them to feel “burnout”. Debriefing sessions can happen with your manager, co-workers or a mental health professional. We consider debriefing sessions to be critical in reducing the risk of experiencing vicarious trauma.

It may be that lawyers can be saddled with the mental health condition of their superiors, too, and this needs to be guarded against. Being a tough negotiator or litigator may make a person successful, but it may not leave much room for sensitivity to, among other things, a person with mental health challenges.

## Ways to protect mental health in legal practice

If employers are reluctant to proactively address mental health in their workplaces, extreme situations such as the one in *Kozarov*<sup>14</sup> may become more common. In that case, the plaintiff was awarded \$435,000 in compensation for prolonged exposure to child pornography as a prosecutor. The employer had failed in its duty to have an active occupational health and safety system, adequate training, welfare intervention flexibility regarding casework and rotations, which exacerbated the development of a major depressive disorder.

This sort of exposure of firms can be avoided or limited. The way forward is twofold: it requires action from firms, and from individuals.

As a starting point, look into the Minds Count Foundation (formerly Tristan Jepson Memorial Foundation). Its objective is to “decrease work related psychological ill-health in the legal community and to promote workplace psychological health and safety”.<sup>15</sup> It is a foundation started by the Jepson family after their young lawyer son took his life.

The Minds Count Foundation recognises the needs of all legal professionals, from sole practitioners to large firms, to law schools and barristers' and judges' chambers. Many major law firms, courts and other organisations have subscribed to their recommendations. Presently, the Minds Count Foundation website lists more than 200 signatories.<sup>16</sup>

In addition to providing many useful links and resources, the Minds Count Foundation promotes 13 Workplace Factors to guide organisations to create a healthy and safe workplace for all.

These include organisational culture, psychological protection and social support, civility and respect, and balance.

We encourage your firm to review the Workplace Factors and consider becoming a signatory to the Minds Count Foundation, which means committing to implementing and promoting the 13 Workplace Factors in your firm. It also invites you into a community of firms and organisations that have committed to the same principles.

We also recommend, if you do not already have one in place, creating a mental health and wellbeing policy to comprehensively outline your organisation's policy on mental health and make it available to all employees.

The most meaningful change needs to come from the top down. Employers and managers must be the drivers of cultural change within their workplace. Every organisation has different resources and limitations so there is no one approach that fits all.

We offer the following suggestions to employers to help support their employees' mental health and wellbeing:

- attend seminars and educational sessions, or take an online course on mental health to broaden your understanding of why mental health is relevant to your employees and workplace
- consider appointing a manager (such as an HR manager) as a mental health officer, including supporting them to complete a mental health first aid course. Mental Health First Aid Australia facilitates a mental health first aid course for legal professionals in which participants learn how to identify risk factors, signs and symptoms of mental health crises in employees and co-workers and how to respond and offer support using a mental health first aid action plan
- host mental wellness sessions or planning days by setting aside a few hours for your team to brainstorm together and set tasks and expectations in a more relaxed, informal setting
- consider implementing some variety into your employees' workday, such as walking meetings or a breakout room where employees can take 10 minutes to rest and debrief
- if resources allow, sign your firm up to an employee assistance program

(EAP) or consider making a counsellor available to your employees, as some top-tier firms have recently done

- the aim of an EAP is to help employees resolve personal issues that may impact on the employee's performance at work. Ultimately, its aim is to enhance an employee's wellbeing and promote a positive workplace culture
- an EAP is free for employees, and sessions are confidential and can be accessed 24/7
- employees can book a session by booking online or via telephone or email
- if you have a dedicated HR team, ensure they maintain regular contact with your employees to check in on how they are dealing with their workload
- seek support from mentors, business advisers or colleagues. Educate yourself on what other organisations are doing in this space by connecting to your peer group.

## Conclusion

Mental health is something that should be at the forefront of the minds of legal professionals.

We already know that legal professionals are disproportionately at risk of suffering from mental health conditions.<sup>17</sup> As well as it being the humane thing to do, to look out for our fellow colleagues' wellbeing and create a mentally healthy work environment is crucial for the livelihood of the legal industry.

We are confident changing attitudes towards mental health and wellbeing, including legislative schemes to

prevent mental harm, and the efforts to destigmatise mental health and illness through discourse, will have positive effects for legal professionals and the industry generally. It is likely to lead to more balanced and connected employees and managers who look out for each other, a more satisfied and productive workforce, and overall improved outcomes. Those that ignore this issue face significant risks of breaching legislation, duty of care and company policies, and a demotivated workforce in the long term.

## A note for individuals

If you are experiencing difficulties with your mental health, you are encouraged to speak to your general practitioner for support, or a referral to a mental health specialist.

For immediate assistance, consider contacting one of the following:

- LIV EAP 1300 687 327
- Beyond Blue 1300 22 4636; [www.beyondblue.org.au](http://www.beyondblue.org.au)
- Lifeline 13 11 14; [www.lifeline.org.au](http://www.lifeline.org.au)
- SANE 1800 18 7263; [www.sane.org](http://www.sane.org). ■

**Paul Horvath** is principal at PH Solicitor with more than 25 years' experience. He has a strong interest in mental health, especially in the legal profession, has an LLM, and practises in employment and sports law. **Ines Perkovic**, JD, is a lawyer at PH Solicitor, practising primarily in employment law. She is passionate about destigmatising mental health discussions in the workplace to create mentally healthy workplaces.

1. World Health Organisation, "Promoting Mental Health: concepts, emerging evidence, practice" (Summary Report, 2004), 10.
2. See the recent decision of *Kozarov v State of Victoria* [2020] VSC 78, in which a former public prosecutor was awarded damages due to her employer's failure to take reasonable steps to protect her from mental harm in her employment.

3. See *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic); *Occupational Health and Safety Act 2004* (Vic); *Fair Work Act 2009* (Vic); *Equal Opportunity Act 2010* (Vic); *Disability Discrimination Act 1992* (Vic).
4. Chris Molnar, "Eliminating mental health hazards", (2015) 89(9) *Law Institute Journal* 26.
5. PricewaterhouseCoopers, "Creating a mentally healthy workplace: return on investment analysis" (Final Report, March 2014), 10.
6. WorkSafe Victoria, Annual Report 2018-19 (Report, October 2019), 19.
7. Swaab, "Meritas Australia & New Zealand Wellness Survey 2019" (Report, July 2019), 4.
8. Beyond Blue, "Stigma and discrimination associated with depression and anxiety" (Information Paper, August 2015), 4.
9. Note 8 above, 3.
10. Black Dog Institute, "Resilience@Law Legal Profession Mental Health Toolkit" (Paper, 2016), 3-4.
11. G Brule and R Morgan, "Working with stress: can we turn distress into eustress?" (2018) 3 *Journal of Neuropsychology & Stress Management* 1, 2.
12. Note 11 above.
13. NJ Kelk, G Luscombe, S Medlow, IB Hickie, "Courting the blues: Attitudes towards depression in Australian law students and lawyers", (BMRI Monograph 2009-1) Sydney: Brain & Mind Research Institute, 1-2.
14. Note 2 above.
15. Minds Count Foundation, "TJMF Psychological Wellbeing: Best Practice Guidelines for the Legal Profession", 23.
16. Signatories include the LIV, Federal Court of Australia, Supreme Court of Victoria, Leo Cussen Institute, Victorian Bar, Attorney-General's Department, Legal Aid Victoria, and firms such as Allens, DLA Piper and MinterEllison. See the full online list at: <https://mindscount.org/signatories-to-the-guidelines-2/>.
17. Note 11 above, 3.

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