

The Mental Health of Workers: New Zealand Still in Need of Major Reforms

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The new Health and Safety at Work Act 2015 is set to commence this month, implementing a major part of the “Working Safer Reform Package.”¹ The reform package expands the scope of legal duties, creates greater powers for the regulator, tougher penalties, and a national target to reduce serious injuries and fatalities.² While these new measures are a step forward, they will do little to address the looming problem of poor worker mental health. Internationally, mental illness is “now the leading cause of sickness absence and long-term work incapacity in most developed countries.”³ Yet, our health and safety and accident compensation laws are still primarily designed for the “accidents” of 20th century, factories, mines and workshops.

The Changing Nature of Work and the Impact on Worker Mental Health

The 2014 *New Zealand Sectors Report* highlights the fact the majority of New Zealanders are now working in the broadly described “services”, health, education, or government sectors.⁴ Changes in the nature of work mean changes in the types of working hazards people are exposed to. Jobs in these sectors tend to have hazard profiles associated with a greater risk of developing mental health problems and stress-related disease, than accidental injury. Workers in these “mental” jobs, however, receive less favourable treatment under New Zealand’s ACC and health and safety laws than workers in other types of work. For example, the hazards associated with building work expose builders to injuries such as falling from a ladder and breaking a leg, or crushing their fingers between pieces of wood. A social worker working with children who have suffered abuse and neglect would be exposed to the hazards of traumatic information, emotional exhaustion or threats of violence. The builder’s broken leg or crushed fingers would have ACC cover, and require the notification of Worksafe, whereas the social worker’s anxiety disorder or depression would not. While these workers would be treated equally for the same injuries (e.g. if they both had broken legs), the reality is that the social worker’s job has a low risk of falls from height, and a high risk of developing depression, and the social worker would not receive the same treatment for the health problems that arise more commonly from the type of work that he or she does.

ACC Reform: Cover for Work-Related Mental Health Problems

¹ Ministry of Business, Innovation and Employment *Working Safer: Blueprint for New Zealand’s Health and Safety System* (August 2013).

² Ministry of Business, Innovation and Enterprise *Working Safer, Reducing Work-Related Fatalities and Serious Injury by 2020: Progress Towards Target* (March 2015).

³ Samuel Harvey, Sathbh Joyce, Leona Tan, Anya Johnson, Helena Nguyen, Matthew Modini and Markus Groth *Developing a mentally healthy workplace: A review of the literature* A report for the National Mental Health Commission and Mentally Healthy Workplace Alliance (November 2014).

⁴ Ministry of Business, Innovation and Employment *New Zealand Sectors Report 2014: An Analysis of the New Zealand Economy by Sector* (April 2014) at 39-50.

The area in most need of urgent reform is the cover provisions of the ACC scheme. Presently, the vast majority of mental health problems arising from work are excluded from ACC cover.⁵ Since 2008 there has been some cover for narrowly defined single incident trauma (e.g. a train driver whose train hits a suicidal person and develops post-traumatic stress disorder), but this has only very limited reach.⁶ There is still no cover for chronic work-related mental conditions, such as a police officer who develops a traumatic stress disorder as a result of multiple traumatic events over the course of a career,⁷ occupational overuse syndrome or pain syndromes as a result of repetitive work⁸ (ACC treats these as mental), stress-related mental illnesses such as depression or anxiety,⁹ or any stress-related physical illness, that at its most expansive, includes heart attack, stroke and alcohol and other drug addiction resulting from stressful work.¹⁰

The Consequence of Exclusion: A Rise in Stress-Related Personal Grievances

If an employee suffers from a work-related health problem that is excluded by ACC their only option is to sue their employer for compensation, usually through a personal grievance for unjustifiable disadvantage, (the disadvantage being the employer's failure to meet their health and safety obligations to the employee). These actions require the employee to prove the employer is at fault, which the New Zealand Court of Appeal has described as posing "formidable obstacles" to employees making these claims.¹¹ The exclusion of mental health problems from ACC means that employers are also exposed to the risk of litigation and compensation claims for the mental health problems of their staff, in a way they are not with physical injuries. The lack of regulatory guidance as to what constitutes "all practical steps" in relation to worker mental health has made it harder for employers to know how to prevent mental health problems arising, or how to defend against personal grievance claims when they are brought.

If an employee's personal grievance claim is successful, their remedies are usually limited to reimbursement of lost wages (generally capped at 12 weeks' ordinary time) and compensation for "humiliation, loss of dignity, and injury to the feelings."¹² This type of compensation is rarely generous, or equivalent to that available under ACC, as it does not provide for treatment, on-going income support for incapacity, or rehabilitation. If unsuccessful in their claim, the employee has only the benefit system to fall back on. In 2013 research was conducted into the socioeconomic impact of the difference in financial support (ACC versus the support provided through WINZ) on a group of people of a similar age and level of functional impairment.¹³ The study concluded that those in the illness group (not covered by ACC) had "considerably poorer socio-economic outcomes," did not return to work as early, and were the "most vulnerable for decline into poverty and ill health."¹⁴ The current ACC cover provisions leave a large number of workers without support or assistance for their work-related health problems.

⁵ There is cover for mental injuries that arise "because of a physical injury" under section 26(1)(c) and those caused by certain criminal acts listed in Schedule 3.

⁶ Fiona Thwaites "Mental Injury Claims Under the Accident Compensation Act 2001" (2012) 18 Canterbury Law Review 244.

⁷ *ETN v ACC* [1998] NZACC 227 (27 Oct 1998); *Gable v ACC* [2003] NZACC 212 (27 Aug 2003).

⁸ *Meikle v ACC* [2008] NZACC 158 (11 July 2008); *Teen v ACC and Telecom Ltd* [2002] NZACC 244 (3 Sept 2002)

⁹ *Nilson-Reid v AG (In respect of Dir. Dept. of Conservation)* [2005] 1 ERNZ 951 (EC); *Rosenburg v Air New Zealand Ltd* (unrep. ERA, AA 311/09, 1 Sept 2009); *Davis v Portage Licensing Trust* [2006] ERNZ 286.

¹⁰ *A-G v Gilbert* [2002] 2 NZLR 342

¹¹ *Ibid*, at [87].

¹² Employment Relations Act 2000, section 123(1)(c)(i).

¹³ S McAllister, S Derret, R Audus, P Herbison and C Paul "Do different types of financial support after illness or injury affect socio-economic outcomes? A natural experiment in New Zealand" (2013) 85 Social Science & Medicine 93.

¹⁴ *Ibid*.

A Lack of Data: A Lack of Action

In New Zealand work-related harm statistics come primarily from ACC administrative data, which means where there is no ACC cover, there is no resulting data. The lack of cover from chronic mental health problems means a lack of statistical information about worker mental health, rendering the problem largely invisible. This makes it difficult to understand the size and nature of the problem, limiting future research, policy development and enforcement activity. The lack of information is a recognised problem by Worksafe¹⁵ and is likely part of the reason for the exclusion of occupational disease from the current national *Working Safer* targets. Targets drive decisions about resources and enforcement activity, and the exclusion of occupational disease (including mental health) from the national targets creates a real risk of continued exclusion from policy priorities. Simply, until policy makers can see the problem, they are unlikely to take any real action to solve it.

A Lack of Detail: The Need for Regulatory Standards

Whether the new legislation can have any positive impact on worker mental health depends on the regulatory standards and enforcement activity sitting beneath it. A key lesson from the prior Health and Safety in Employment Act 1992 is that widely drafted general duties can be undermined by a lack of regulatory detail and enforcement activity. Since 2004, the law expressly included “physical or mental harm caused by work-related stress”¹⁶ within employers’ health and safety obligations. The general duties did not distinguish between mind and body, or injury and disease, but the regulations, guidelines and ACOPs certainly did. Anyone looking for concrete direction as to what “all practicable steps” were required to ensure the mental health of employees would have found very little help. There has been minimal enforcement activity under the former legislation for mentally unsafe work practices¹⁷ and the position of the Ministry of Business, Innovation and Employment was to encourage employees to address mental harm issues through mediated settlement.¹⁸ There is a real risk of this pattern continuing under the Health and Safety at Work Act 2015. While the new section 36 duty is drafted widely, clearly requiring action to ensure the mental health of workers, there is a remarkable lack of attention to worker mental health in the proposed regulations and a notable absence of mental health directed enforcement tools and policies.

A Different Approach Needed to Regulating for Mental Health

Regulating for work-related mental health requires a shift in thinking from “safety” to “health,” and an awareness that the nature of work, and the workforce, has changed a great deal from that which existed when earlier regulations were designed. Regulating to ensure mentally healthy work requires a very different type of regulation, with a different mode of operation and enforcement. It also requires us to accept the need to regulate working conditions that lead to poor worker mental health, including potentially management practices, job design, working hours, social interaction, worker autonomy and participation, performance and remuneration systems. The *Working Safer* reforms continue to place primary control of health and safety in the hands of employers, declaring that an overly prescriptive approach would stifle the innovation and creativity needed to grow new businesses.¹⁹ However, regulating for worker mental health does not need to look like, and nor should it look like, prescriptive 20th century regulations for factories and mines. There are better ways of regulating to ensure mentally healthy work.

¹⁵ Ministry of Business, Innovation and Enterprise Working Safer, Reducing Work-Related Fatalities and Serious Injury by 2020: Progress Towards Target (March 2015), at 20.

¹⁶ Health and Safety in Employment Act 1992, s 2.

¹⁷ The only prosecution action taken is that of *Department of Labour v Nalder & Biddle (Nelson) Ltd* [2005] NZHSE 20.

¹⁸ See Department of Labour Guideline *Healthy Work: Managing Stress and Fatigue in the Workplace* (June 2003).

¹⁹ *Working Safer: Blueprint for New Zealand’s Health and Safety System*, at 3.

Time for Action

More New Zealand workers are working in jobs with hazards associated with the development of mental illness and stress-related diseases. These workers deserve regulations designed for the type of work they do, and compensation for the health problems that arise from that type of work. While New Zealand's injury and fatality rates are inexcusably high and rightly deserve attention, addressing our failures in relation to worker safety should not excuse us continuing to ignore our even greater failures in relation to worker mental health.

This article introduces the issues in a larger paper on the regulatory reforms needed to respond to poor worker mental health in New Zealand. For access to the full paper email: dawn.duncan@vuw.ac.nz