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Guideline: Mental illness

> Complying with the *Equal Opportunity Act 2010*
in employment



Victorian Equal Opportunity & Human Rights Commission

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Guideline: Mental illness – Complying with the *Equal Opportunity Act 2010* in employment

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About the guideline

Under section 148 of the *Equal Opportunity Act 2010*, the Victorian Equal Opportunity and Human Rights Commission may issue practice guidelines on any matter relating to the Act.

This guideline, developed by the Commission, outlines obligations under the Equal Opportunity Act regarding discrimination against people with mental illness in employment. It provides practical guidance for employers on how to be proactive in preventing discrimination against employees and job applicants with mental illness.

In addition to outlining legal obligations for employers, this guideline also provides general information about mental illness and seeks to dispel some of the myths and stereotypes about how mental illness can affect people in employment.

As required under the Act, the Commission consulted widely to make sure that this guideline is relevant and useful to you. Industry bodies, industrial organisations, employee advocacy organisations and people with mental illness assisted the Commission by highlighting the issues and challenges of managing discrimination based on mental health in the workplace.

While this guideline may be used in a formal capacity by a court or tribunal, the Commission has sought to simplify the language of the law to make it as easy as possible for you to put into practice.

This information is intended as a guide only and does not cover every possible situation you may encounter. If you have a matter you need to clarify, you may consider seeking legal advice.

Terminology

The term mental illness is used throughout the guideline. We have used this term because it is commonly used in the community. However, we recognise that other terms, such as mental health disability or psychosocial disability, may be preferred by people with disability.

Who is this guideline for?

This guideline is for all employers operating in Victoria, regardless of the size of their organisation.

The duties of an employer extend to all full-time, part-time and casual workers, agents and contractors, trainees and apprentices, clients and job applicants. They also extend to volunteers and unpaid workers with regard to discrimination in service delivery (for example when a charity runs an accreditation program for volunteers) and protection from sexual harassment. The protections against victimisation apply to everyone.

These duties cover all stages of employment, including when people are applying for work, serving probationary periods, returning to work after an absence or facing dismissal or redundancy. They also apply to people who have left your organisation if they experienced discrimination, sexual harassment or victimisation in the course of their employment with your organisation.

Why do I need to follow this guideline?

There are important reasons for using this guideline, including:

- As an employer, you have legal responsibilities under Victoria's anti-discrimination law – the Equal Opportunity Act. This means you may be acting unlawfully if you treat employees or job applicants unfavourably because they have a mental illness, which is covered under the Act as a disability.
- The Act specifically requires your organisation to take proactive steps to eliminate discrimination in your workplace – simply responding to complaints that may arise is not enough. This is known as the positive duty.
- Everyone has the right to a workplace that is free from discrimination, sexual harassment and victimisation. Employers are in a unique position to challenge discriminatory behaviour, effect cultural change and provide a positive, safe and productive work environment.
- Discrimination is not only harmful to the health and wellbeing of employees, it also has negative consequences for employers. These can include legal costs, absenteeism, increased employee turnover, poor morale, poor productivity and loss of reputation.
- While this guideline is not legally binding, a court or tribunal may consider whether you have complied with it when hearing a complaint of discrimination.

Part 1: Understanding mental illness

1.1 Background

One in five people experience mental illness each year, which makes it one of the most prevalent forms of disability in the community.¹ This means it is likely that some of the people you work, live and socialise with every day have experienced, or may be living with, mental illness.

*'Many managers are paralysed by the fear of saying the wrong thing and opt for saying nothing instead ... if you approach the conversation with a genuine effort to "put yourself in their shoes", your intent will be felt and appreciated.'*²

Despite the prevalence of mental illness, a poll of the top Australian Stock Exchange (ASX) companies showed that 40 per cent of companies had not considered how to manage discrimination against employees with mental illness in their organisation.³ Research also suggests a significant number of employees with stress or depression will suffer in silence, resulting in a significant loss of productivity for business.⁴

Complaints to the Commission indicate that discrimination based on mental illness is an ongoing concern. Between 1 July 2012 and 30 June 2013, we received 344 complaints of disability discrimination in the area of employment – of these, 11 per cent related to people with mental illness.

Almost half of people with disabilities in Australia are living in or near poverty. On this measure, Australia is ranked 27 out of 27 Organisation for Economic Co-operation and Development (OECD) countries, making it the worst in the developed world. A significant contributing factor is poor employment prospects for people with disabilities. Australia also ranks poorly on this measure – ranking 21 out of 29 OECD countries in the provision of employment outcomes for people with disabilities.⁵ We know this is partly due to discrimination, stereotyping and other barriers to employment.

Discrimination not only has a significant impact on life outcomes for people with disabilities – it also means employers can miss out on valuable employees. Employers have reported the benefits of employing people with disabilities include gaining a better understanding of customers from having a more diverse workforce profile, improvements in operations and strengthening business links with communities.⁶

1 Australian Bureau of Statistics 2007, *National Survey of Mental Health and Wellbeing: Summary of Results*, cat. no. 4326.0 <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4326.02007?OpenDocument>>.

2 Graeme Cowan, *The Elephant in the Boardroom – Getting Mentally Fit for Work* (2013) 18.

3 Thomson Reuters, *Discrimination Alert*: 396 (13 April 2012).

4 Cowan, above n 1, 2.

5 PricewaterhouseCoopers, 'The lucky country? Australia's disability experience' (Media Release, 30 November 2011) <<http://www.pwc.com.au/media-centre/2011/disability-in-australia-nov11.htm>>.

6 Disability WORKS Australia Ltd, *Advantage for employers* <<http://www.dwa.org.au/advantages.htm>>.

1.2 What is mental illness?

Mental illness refers to a group of illnesses. There are three main categories of mental illness:

- mood disorders (such as depression, postnatal depression and bipolar disorder)
- anxiety disorders (such as phobias, panic attacks, social and general anxiety and obsessive-compulsive disorders)
- psychotic disorders (such as schizophrenia and some forms of bipolar disorder).

Mental illness affects people's health, which can include the way they think, feel and interact. Like most health conditions, it is treatable. Some people may have a genetic predisposition to developing mental illness, and some people may be more at risk of developing mental illness due to work or personal pressures.

As an employer, you are not required to be an expert on mental illness, but you need to understand how it may affect your employees. This includes an awareness of how 'healthy' your workplace is and how to ensure you don't discriminate against employees who have experienced mental illness in the past, are currently experiencing mental illness or might be at risk of experiencing it in the future, whether or not you are aware of it.

Employees with mental illness have differing needs and a tailored approach is best. Some people will not need any assistance, and some people may need temporary or ongoing support.

1.3 Responding to mental illness in the workplace

There are important reasons for you to ensure you respond to mental illness in the workplace and prevent discrimination from occurring:

- It is likely your workplace currently employs people who are experiencing, or have experienced, mental illness.
- Your organisation will suffer without appropriate strategies for managing employees with mental illness.
- Research indicates that a failure to adequately respond to mental illness leads to significant financial loss for business.⁷
- Loss associated with failing to take steps to prevent discrimination and respond appropriately includes the cost of potential complaints or litigation, absenteeism and increased employee turnover.

By acting to prevent discrimination and responding to mental illness by making reasonable adjustments you can:

- retain valuable workers
- improve workplace morale
- become an 'employer of choice' by enhancing the reputation of your business as a good place to work
- meet legal obligations under the *Equal Opportunity Act 2010*, as well as occupational health and safety and other legislation.

A person's ability to deal with stress is complex. Work can be therapeutic and, in some instances, may help people with mental illness recover more quickly.

In other situations, people with mental illness may need time off work to recover.

In each case, you should assess the needs of individual employees by having a discussion with them, and in some cases with their medical practitioner, about reasonable adjustments and supports in their job.

If you need more information about different kinds of mental illness, you may wish to seek assistance from one of the organisations listed in Part 6 of this guideline.

1.4 Facts about mental illness

Most people with mental illness are able to manage their health in the workplace and are not a risk to others. However, myths and misconceptions about mental illness continue to influence some people's attitudes, which can lead to discrimination. Here are some facts:

Mental illness is a health condition that is manageable and treatable

Mental illness is largely treatable and many people receive treatment in the community. If treated, some people with mental illness may recover completely. However, in some cases, it might be difficult to predict when a person will completely recover.

You may never know that someone is experiencing or has experienced mental illness because they can effectively manage their illness without it affecting their work. Other people may require support to minimise its impact.

⁷ Australian Human Rights Commission, *Workers with Mental Illness: a Practical Guide for Managers* (2010) 4.

People with mental illness have the same intellectual capacity as anyone else

Mental illness and mental impairment are different. A diagnosis of intellectual or cognitive disability may mean a limit in intellectual functioning. People with mental illness have varied intellectual functioning just like everybody else.

Employees with mental illness are not a risk to others

If left untreated, only a very small number of people with mental illness may show violent symptoms but this can be managed through treatment.

Often aggressive behaviour is not a sign of mental illness, but might be attitudinal or learned behaviour (for example people who think it is acceptable to use physical force in conflict).

People at all levels of employment can experience mental illness

Myths and stereotypes can lead some people to believe it is less likely that managers and executive level staff will experience mental illness. Anybody can experience mental illness. Hence, people with this disability work in a range of employment areas and at all levels.

Part 2: Understanding the law

The *Equal Opportunity Act 2010* prohibits discrimination, sexual harassment and victimisation.

2.1 What is discrimination?

Discrimination is treating, or proposing to treat, someone unfavourably based on a protected attribute under the Equal Opportunity Act – such as age, race, disability or sexual orientation.

Discrimination can also occur when systemic practices unreasonably disadvantage (or could disadvantage) people with a protected attribute.

In determining whether a person has discriminated against someone else, the person's motive is irrelevant.

Discrimination is against the law if it occurs in an area of public life including employment, sport, education and accommodation. While the Act identifies a number of protected attributes and areas of public life, this guideline only focuses on discrimination based on mental illness in employment.

Direct discrimination is when you treat or propose to treat a person with an attribute unfavourably because of that attribute. For example, denying a person with mental illness a position because of the stereotype that they may be a risk to the organisation or may spend too much time attending medical appointments.

Indirect discrimination can happen when you impose or propose to impose a requirement, condition or practice that is not reasonable and has or is likely to have the effect of disadvantaging a person with an attribute. Requiring all employees to work irregular shifts could disadvantage someone with mental illness, and may be indirect discrimination (for example, a person taking certain medications may find it difficult or be unable to

work shifts at particular times of the day). In such a situation, the employee may still be able to perform the requirements of the job if you make some reasonable adjustments for them when arranging their shifts (see section 3.3.1 for information on reasonable adjustments, page 18).

2.2 Mental illness is a 'disability' under the Equal Opportunity Act

It is against the law to discriminate against someone because they have mental illness, which is covered as 'disability' under the Equal Opportunity Act. It is against the law to discriminate against someone because of a disability that:

- is actual or presumed
- is temporary or permanent
- occurred in the past, present or future (this refers to a genetic pre-disposition towards mental illness as well as the onset of foreseen or unforeseen mental illness).

The Equal Opportunity Act also protects people from discrimination on the basis of:

- characteristics that a person with mental illness generally has
- characteristics that a person with mental illness is generally assumed to have
- a person having an 'assistance aid' (including assistance dogs) that alleviate the effects of the mental illness.

2.3 Discrimination in employment

It is unlawful to discriminate against job applicants and employees.⁸

In employment, discrimination includes:

- not hiring someone or dismissing someone from work
- denying training, promotion or other employment benefits
- subjecting an employee to any other detriment, such as by allowing discriminatory remarks and behaviour from co-workers to go unchecked.⁹

The law requires you to address and prevent discrimination, harassment and victimisation of people with mental illness. It also requires that you actively work to eliminate the causes of discrimination in the workplace. This is called 'the positive duty'. Part 3 of this guideline provides information on what you can do to prevent discrimination and meet your legal obligations under the Act.

2.4 Other forms of discrimination under the Equal Opportunity Act

2.4.1 Failing to provide reasonable adjustments

Failing to provide reasonable adjustments also constitutes discrimination under the Act.

The law requires you to accommodate people with disability by making reasonable adjustments for them. You have a duty to provide reasonable adjustments for those who are offered a job and for ongoing employees. Failing to provide adjustments for job applicants in a recruitment process may also be discrimination.

An employer may discriminate if the person requires adjustments to perform the genuine and reasonable (or inherent) requirements of the job but they still cannot perform these requirements even after the reasonable adjustments are made.¹⁰

The duty to provide reasonable adjustments for those who are offered a job and an employee are

8 The duties of an employer extend to all full-time, part-time and casual workers, agents and contractors, trainees and apprentices, clients and job applicants. Volunteers and unpaid workers are also protected from discrimination in service delivery and from sexual harassment under the Act. The protections against victimisation apply to everyone.

9 *Equal Opportunity Act 2010* (Vic) ss 16, 18.

10 The term 'genuine and reasonable requirements' is used throughout the guideline as this is the term used in the Victorian Equal Opportunity Act. The term 'inherent requirements' is used in federal anti-discrimination legislation to describe a similar concept.

'stand-alone' provisions in the Equal Opportunity Act.¹¹ That is, a person making a complaint does not have to prove direct or indirect discrimination, they only have to show that reasonable adjustments were not made for them. Reasonable adjustments are discussed in more detail in section 3.3.1, page 18.

2.4.2 Discriminatory advertising

It is against the law for you to publish or display (or for you to authorise someone else to publish or display) an advertisement or other notice that indicates an intention to discriminate. You could be liable for the actions of others if you cannot show that you took reasonable precautions to prevent a discriminatory advertisement from being published.

2.4.3 Requesting discriminatory information

It is against the law to seek information from people that could be used to discriminate against them, unless you can show that information is needed for a legitimate, non-discriminatory purpose.¹² This includes making verbal or written requests, and also applies to printed and online application forms. This is relevant when you are seeking information from job applicants (including during interviews) or when you seek information from existing employees. There are also industrial laws, health privacy laws and occupational health and safety laws that impact on how and what information you can obtain about someone's mental illness. You can find guidance on avoiding this kind of discrimination in Part 3 of this guideline.

2.5 Are there any exceptions to the law?

Some actions will not be against the law if:

- they constitute a *special measure* to promote equality for groups of people who have one or more of the protected attributes under the Act.¹³
- an *exception* in the Act applies.¹⁴
- you have been granted an *exemption* from the law for a set period of time.¹⁵

11 *Equal Opportunity Act 2010* (Vic) s 20.

12 *Equal Opportunity Act 2010* (Vic) ss 24-29.

13 *Equal Opportunity Act 2010* (Vic) s 12. You can find out more about special measures by visiting <<http://www.humanrightscommission.vic.gov.au/specialmeasures>>.

14 *Equal Opportunity Act 2010* (Vic) ss 58-62.

15 You can find out more about exemptions by visiting <<http://www.humanrightscommission.vic.gov.au/index.php/exceptions-exemptions-and-special-measures/exemptions>>.

In the context of this guideline, two exceptions are particularly relevant:

Genuine and reasonable requirements: Failure to provide reasonable adjustments for a person with disability will not be against the law if a person could not perform the genuine and reasonable requirements of the job, even after you have provided reasonable adjustments for them (see section 3.3.1 on making reasonable adjustments, page 18).¹⁶

Health, safety or property: not appointing someone with a disability if it is reasonably necessary to protect their health and safety, or that of others, or to protect property.¹⁷ This exception applies in employment as well as recruitment. Section 2.10.2, page 11, outlines your occupational health and safety obligations in more detail.

Example of genuine and reasonable requirements; and health and safety exception

An airline hires a number of qualified airline pilots to travel long-haul international flights. The role requires pilots to meet strict health tests, which include an absence of illness requiring medications that cause drowsiness. In this case, subject to privacy laws, the airline may be able to set specified health requirements for the role to ensure the health and safety of passengers on the airline.

2.6 Sexual harassment

The Equal Opportunity Act also prohibits sexual harassment. You can find detailed information on the nature of sexual harassment and your obligations as an employer in the Commission's sexual harassment guideline.

Guideline: Sexual harassment > Complying with the *Equal Opportunity Act 2010*

You can find more detailed information about sexual harassment in the Commission's guideline for employers, which is available on the Commission's website at humanrightscommission.vic.gov.au/guidelines.

2.7 Victimisation

Victimisation is subjecting someone to a detriment, or threatening to, because they spoke up about their rights, made a complaint, helped someone else to make a complaint about discrimination, or refused to do something that would be a contravention of the Equal Opportunity Act. Victimisation is also against the law.

For example, one of your employees could claim victimisation if they are demoted, ostracised or denied a promotion in your organisation because they made a complaint, even if they are not the person who was the direct victim of the discrimination.

2.8 The positive duty

Section 15 of the Equal Opportunity Act requires you to take reasonable and proportionate measures to prevent discrimination, sexual harassment and victimisation as far as possible – this is called the positive duty. The positive duty is about being *proactive*. It means identifying problems and eliminating causes of discrimination, harassment and victimisation that may be part of your systems of work and not just responding to complaints that may arise.

To meet the positive duty, employers need to consider the drivers of discrimination and take steps to address them, such as entrenched negative attitudes toward people with mental illness, and any unhealthy workplace behaviour or conditions that might exacerbate, aggravate or cause mental illness.

As an employer, taking these steps will help you to identify and act on things that will help you to avoid vicarious liability if a complaint is made. This is discussed at Section 2.9.3, page 11.

¹⁶ *Equal Opportunity Act 2010* (Vic) s 23.

¹⁷ *Equal Opportunity Act 2010* (Vic) s 86.

Why the positive duty matters

Maria works as a mid-level manager with an insurance company. After a period of being undermined and harassed by her work team, Maria develops severe symptoms of anxiety and starts taking days off work. Maria's manager, Roger, speaks to her about her days off and tells her that he is very concerned about the effect this has had on team outputs. Maria does not feel she can tell Roger about her anxiety and discuss how she has been treated by other employees because these issues are never discussed in her workplace and she fears this will compromise her career.

Other colleagues report a poor workplace culture, where senior managers use language like 'sink or swim' when dealing with staff concerns. Maria's employer has taken no steps to meet its positive duty obligations under section 15 of the Equal Opportunity Act to prevent unlawful harassment and discrimination as far as possible. Her employer has no policies or training regarding anti-discrimination laws and mental health, and has failed to respond to complaints from other workers about the workplace culture. Maria's employer could be liable for discrimination.

2.8.1 What are reasonable and proportionate measures?

All businesses and organisations are different. As such, the measures you take to meet the positive duty will depend on factors such as:

- the size of the business operations
- the resources of the business
- the nature of the business
- the business and operational priorities
- the practicability and cost of the measures.

Your organisation is required to take measures to prevent discrimination **to the best of its ability** within the context of the factors listed above.

2.9 Who is liable and what are they liable for?

The law applies to organisations as well as individuals. When it comes to employment, this includes:

- directors and managers
- human resource professionals
- recruitment consultants
- employment services agencies
- industry and employment peak bodies
- anyone with responsibilities for recruiting employees.

2.9.1 Individuals can be liable

If a person discriminates against another person they may also be individually (and directly) liable. This means they will be held responsible for their conduct and may be ordered to personally pay compensation to the person they discriminated against.

2.9.2 Authorising or assisting discrimination

It is against the law for you to request, instruct, induce, encourage, authorise or assist another person to discriminate against another person.

Authorising another person to discriminate can also include situations where an employer or manager is aware discrimination is occurring but chooses not to do anything to stop it.

It is against the law for a recruitment agency to discriminate based on an employer's instructions. It is against the law for an employer to provide a discriminatory brief, and for the recruitment agency to follow that brief.

Examples of authorising and assisting discrimination

Peter has developed an anxiety disorder following the death of his wife, which is known to colleagues. Peter's anxiety leads him to withdraw from staff activities and he rarely interacts with other staff members. A fellow staff member alerts the manager, Bill, that two particular staff members have made a number of derogatory comments about Peter including that he is 'crazy' and 'unstable' and should take some time off. Bill takes no action to intervene and stop these comments. Bill may be authorising or assisting discrimination against Peter based on his mental illness.

2.9.3 Employers can be liable for the actions of employees

Employers and principals will generally be responsible for the actions of their employees and agents if they are acting in the course of their employment with the organisation or acting on the organisation's behalf. In cases like this, while the employee still bears individual liability for their actions, the employer can also be found to be liable for the conduct.

To avoid vicarious liability, you must be able to show that you took reasonable precautions to prevent an employee or agent acting in a discriminatory way. These precautions include making sure that you have policies dealing with equal opportunity and anti-discrimination laws, including specific information about mental illness, and that you familiarise your staff with those policies so that they are put into practice.

Examples of types of liability

An employer engages a recruitment agency to employ an account manager. The agency puts forward the name of the best applicant, Tiffany. The employer queries a long gap in employment on Tiffany's CV from several years ago. A recruitment agent says that this was raised in the interview and Tiffany revealed she had suffered a breakdown following the end of a relationship a number of years ago but has since excelled in her career and has learnt to manage occasional onsets of depression. The employer's senior manager, Mary, tells the recruitment agent to 'forget it – I don't want any crazies in this role'. The recruitment agent follows this instruction and does not employ Tiffany on this basis. In this situation, Mary could be personally liable for discrimination, the employer could be vicariously liable, and the recruitment agent could be liable for authorising or assisting discrimination.

2.10 What other laws apply?

2.10.1 Federal equal opportunity laws

Discrimination based on mental illness is also covered by the federal *Disability Discrimination Act 1992*.

You can find information about your obligations under the Disability Discrimination Act and other federal anti-discrimination laws from the Australian Human Rights Commission at humanrightscommission.vic.gov.au. For specific information about the Disability Discrimination Act, visit humanrights.gov.au/disability_rights/dda_guide/dda_guide.htm.

2.10.2 Occupational Health and Safety

A work environment where a person experiences discrimination, sexual harassment or victimisation can put them at risk of stress and physical and psychological harm, including depression and anxiety.¹⁸ Under the *Victorian Occupational Health and Safety Act 2004*, employers have a duty to maintain a workplace that is safe and without risks to health as far as is reasonably practicable.

The Occupational Health and Safety Act requires organisations to provide a safe and healthy work environment that does not cause, exacerbate or aggravate ill health. Employees also have a duty to protect their own health and safety and the health and safety of others. While employees have an obligation to disclose such information to you themselves, these laws also mean that if you have a reasonable concern for someone's health and safety at work or the health and safety of others, you should speak to the person and may need to obtain further medical information to ensure you are providing a safe workplace.

Taking steps to prevent discrimination and meet the positive duty under the Equal Opportunity Act will also help you to meet your obligations under the Occupational Health and Safety Act and avoid complaints of discrimination or complaints to the Victorian WorkCover Authority.

For information about obligations under the Occupational Health and Safety Act visit the Victorian WorkCover Authority website at vwa.vic.gov.au.

¹⁸ Joe Catanzariti, 'Discrimination Can be Costly' (2009) 47 *Law Society Journal* 42.

2.10.3 Workers compensation

The *Victorian Accident Compensation Act 1985* provides that employees may be entitled to an award of compensation for any injury, including mental injury, caused in connection with work. However, the Act provides an exception for mental injury that is caused by management action taken on reasonable grounds and in a reasonable manner by or on behalf of the worker's employer. The Act also provides that any information obtained for the purpose of investigating or pursuing claims under it must not be used for any other purpose.

Abraham has previously been absent from work because of work-related depression. He suffers from another bout of depression. Abraham's manager needs to consult him for new medical information to ensure his fitness for work.

2.10.4 Fair Work Act

Employers also have legal obligations under the federal *Fair Work Act 2009*. The Fair Work Act deals with discrimination by prohibiting adverse action against employees and prospective employees on a number of grounds including race, sex, age, physical or mental disability, pregnancy or parental status. However, the Fair Work Act allows discrimination that is permitted under the Equal Opportunity Act (for example, because an exception applies – see section 2.5, page 8) and discrimination that is taken because of the genuine and reasonable requirements of the particular position concerned.

The Fair Work Act states that an employer must not dismiss an employee because the employee is temporarily absent from work because of illness or injury. The Fair Work Act also provides that any termination must not occur in a manner that is harsh, unjust or unreasonable.

Ian works as a stockbroker with an investment firm responsible for a large number of high net worth investors. Following the death of his son 12 months ago, Ian is unable to perform the tight deadlines of his role. Ian's treating doctor has certified that Ian is not now or in the foreseeable future able to perform his usual role. Because Ian can't perform the genuine and reasonable requirements of his role as stockbroker, his employer finds Ian another permanent role without tight deadlines supporting the operations manager. This avoids losing a valued employee, while ensuring the firm's business needs are met.

You can find out more about your obligations under the Fair Work Act from the Fair Work Ombudsman fairwork.gov.au.

2.10.5 Contract or negligence

Discrimination and harassment can also amount to a breach of the common law duty of care as an employer, or a breach of an implied term of mutual trust and confidence in a contract of employment. As such, your organisation could face claims of breach of the employment contract or negligence.

2.10.6 Privacy

Your organisation may be subject to privacy legislation and be required to comply with either federal or state privacy principles.

The federal *Privacy Act 1988* contains the Australian Privacy Principles which apply to federal government agencies and all private businesses and not-for-profit organisations with an annual turnover of \$3 million or more. The Australian Privacy Principles also apply to some smaller businesses.¹⁹

The Victorian *Privacy and Data Protection Act 2014* also contains Information Privacy Principles, which apply to the state government, its departments and statutory agencies.

The Victorian *Health Records Act 2001* established Health Privacy Principles that apply to health information collected and handled in Victoria by the Victorian public sector and the private sector

Even where your organisation is not bound by privacy legislation, you will be bound by other obligations around maintaining confidentiality in an employment relationship.

In practice, you may need to request information about an employee's health, the nature of their mental illness, the type of treatment they are on, or other sensitive, personal information. Only ask for this information if you need it to determine whether the person is able to perform the genuine and reasonable requirements of the job, to determine what reasonable adjustments can be made, or to assess any health and safety risks for the employee or others.

¹⁹ For example, if the small business is a health services provider; is trading in personal information; is related to a business which is not a small business; a contractor that provides services under a Commonwealth contract; a reporting entity for the purposes of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (AML/CTF Act); or an operator of a residential tenancy database. See section 6D of the *Privacy Act 1988* (Cth) for the complete definition.

You should ensure the privacy of your employees is protected, and use information only for the purposes for which it was obtained (for example where you need to make reasonable adjustments to the work of the employee who is experiencing mental illness). This extends to where individuals are providing a reference for someone with mental illness when they apply for another job.

In some circumstances, an employee might consent to having their disability disclosed more broadly (for example to their team members), but this should be at the discretion of the person disclosing and done in a way they are happy with.

Part 3: Preventing and responding to mental illness in the workplace

Preventing discrimination based on mental illness in employment has significant benefits. Taking action to prevent this kind of discrimination will also support the wellbeing of your employees more generally and will assist with meeting your obligation to provide a working environment that is safe and without risks to health.²⁰

This part of the guideline provides key steps to avoid potential discrimination based on mental illness in employment and how to respond if discrimination does occur. These are outlined in four aspects of employment:

3.1 Recruitment

Guidance on ensuring discrimination does not occur in recruitment by reviewing documentation, advertisements and your short-listing and interview processes.

3.2 Your workplace environment

Guidance on creating a workplace environment where discrimination based on mental illness is less likely to occur – reducing risks to health and safety; your policies address discrimination based on mental illness; your staff are trained to be aware of their rights and responsibilities, and you have an effective complaints process.

3.3 Responding to issues arising in employment

Guidance on specific scenarios arising in employment including where an employee has or has not disclosed mental illness; reasonable adjustments; performance management; and managing leave and return to work.

3.4 Terminating someone's employment

Information on terminating someone's employment as an option of last resort where reasonable adjustments have not assisted and an employee can no longer perform the genuine and reasonable requirements of the job, or they pose an unreasonable risk to their own health and safety or the health and safety of others.

3.1 Recruitment

3.1.1 Review recruitment documentation

Review documentation, including job descriptions, advertisements and application forms to ensure they do not contain any discriminatory elements.

To avoid discrimination against people with mental illness when you are advertising and recruiting to a position:

- identify the core or essential elements of the job that cannot be altered (the genuine and reasonable requirements of the role)
- objectively assess the applicants' experience and abilities against these requirements
- only request information that you need to assess whether applicants can perform these requirements
- do not allow myths and stereotypes about mental illness or other personal characteristics to influence your decisions.

Discriminatory advertising is also against the law. You should avoid discriminatory language in the job advertisement, which may inappropriately discourage some people from applying. Write it in a clear and accessible format, and make sure your advertisement:

- avoids references to individual attributes that are not relevant to the position
- clearly outlines the key duties or results required and the skills to achieve these
- differentiates between 'essential' and 'desirable' criteria

²⁰ Occupational Health and Safety Act 2004 (Vic) s 21.

- ranks criteria in order of importance to help you objectively identify the best applicants.

If the Victorian Civil and Administrative Tribunal (VCAT) has granted an exemption for the job, give information about the exemption and provide the VCAT reference number in the job description.

3.1.2 Short-listing applicants

Review your recruitment practices as well as documentation. Employers and recruitment professionals must have a clear understanding of the job requirements, and look for the same type of information from all applicants about their capacity to perform the job based on their skills and experience.

Short-list applicants based on their demonstrated ability to perform the genuine and reasonable requirements of the job.

Example of discrimination when short-listing

A factory manager is responsible for recruiting a glass blower and engages a recruitment agency to short-list applicants.

The manager tells the recruitment consultant that they should be careful they don't end up with anyone 'nuts' for the role, because they are sick of 'crazy arty types', and they 'can't afford to take someone on who will just not turn up'. The recruitment agency complies with the request and does not forward on Claire's details, even though they consider her to be a very good candidate for the role.

Claire is a qualified glass blower with many years of experience. She is widely known in the industry to have suffered a period of postnatal depression following the birth of her second child. Claire has been discriminated against because of her mental illness. The recruitment agency is liable because it assisted the glass-making business to discriminate. The glass-making business is liable because it requested the discrimination.

3.1.3 Interviewing job applicants

It is against the law to seek information from people that could be used to discriminate against them, unless you can show that information is needed for a legitimate, non-discriminatory purpose. In this context, this will most likely be where an employee has disclosed that they have a mental illness and you need information to discuss adjustments they need to perform the genuine and reasonable requirements of the job. By contrast, seeking information about a person's mental illness at the

interview stage and deciding not to offer them the job because they have a mental illness may be against the law.

The prohibition on requesting discriminatory information is also relevant to psychometric or aptitude testing (see section 3.1.5, page 16). You should only use such tests to seek legitimate, non-discriminatory information about a person's capacity to perform the job, rather than attempting to seek information (such as about a person's mental illness) that could be used to discriminate against them.

There is no obligation on a candidate to disclose disability, including mental illness. However, all employees may need to disclose information that is relevant to them being able to perform the genuine and reasonable requirements of the role safely, for example, explaining they are on medication that makes them drowsy, if that is relevant to the job. If you are aware of a disability a person has disclosed, you may want to ask them for information about the impact it might have on their ability to do the job, or any health and safety risks it may cause for the candidate or others in your workplace.

Focus on the candidate's ability to meet the job requirements and any strategies that could assist them, rather than on their condition or diagnosis. This can be done through detailed descriptions about the nature of the job and asking for examples of how the candidate has performed in similar contexts. This focuses the conversation on ability rather than any assumed disability.

You might also need to ask for follow-up information to identify any adjustments you could make, but this should not be based on assumed need.

Example of discrimination in interviewing because of mental illness

Paul attends a job interview for a position as an accountant. At the interview, Paul is told that the workload will be high and that the job can be stressful at times. When the interviewer asks Paul whether he is confident he can handle stress, Paul mentions that he has suffered from anxiety in the past. He goes on to say how he's spent time getting his condition under control, has learnt specific strategies to deal with stress, and has performed well in high volume jobs with tight deadlines. A week later, Paul is told he has been unsuccessful in getting the role. When he asks why, he is told 'it is a very stressful role'.

Paul could make a complaint of discrimination.

3.1.4 Questions about injuries or previous workers' compensation claims

It may be against the law to ask job applicants whether they have ever made a workers' compensation claim, how much sick leave they took in the previous year or other questions about health conditions that do not relate to their ability to perform the job.

You may ask a job applicant about whether they have any pre-existing injury or illness that is relevant to their ability to perform their job or which might be made worse by the job. This may be necessary for two reasons. Firstly, because a failure to notify about a pre-existing injury may mean the employee is ineligible to make a workers' compensation claim in the event the injury or illness does recur or is aggravated or exacerbated by the employment. Secondly, because the information may be necessary to determine reasonable adjustments that will assist the employee to perform the role without injury. However, you must give the job applicant details about the nature and duties of the work, so they understand how to answer any questions about pre-existing injury or illness.²¹

Example of discrimination because of a previous workers' compensation claim

A factory refuses to employ Ali because he has previously made a WorkCover claim due to post-traumatic stress he experienced following a serious workplace incident.

The employer could be directly discriminating against Ali by either assuming that he still has the disability or that he is more likely to be at risk at work than other applicants are.

If the reason for not employing Ali was his past workers' compensation claim, this would constitute unlawful discrimination unless the employer can show the reason was because the job would jeopardise his health and safety and he would therefore be unable to perform the genuine and reasonable requirements of the job – or because another applicant was better suited to the role.

3.1.5 Gathering information after the interview

Referees

You should use referees to confirm information about the candidate gathered through the selection process and to enquire about their suitability for the job based on the selection criteria.

Apply the same principles you used when you developed your recruitment documentation and the interview questions. That is, do not ask questions of a personal nature that do not relate directly to the job requirements. Previous employers and other referees are not allowed to disclose personal medical information of employees.

Medical tests

It is against the law for you to refuse to employ a person based on the information resulting from a medical examination that discloses a health problem or disability if the information is not related to how adequately the person could perform the genuine and reasonable requirements of the job.

If you require medical testing as part of the selection process, you should:

- inform those conducting the medical examinations of precisely what type of work the candidate will have to do
- avoid invading the candidate's privacy by enquiring into areas of the candidate's health that are not related to potential health risks associated with the job requirements
- ensure test results remain strictly confidential
- advise the candidate of the results, unless the medical practitioner advises against providing the results for medical reasons.

Psychometric and aptitude tests

Only use these kinds of tests if you reasonably require them to determine whether a person will be able to perform the specific requirements of the job. Do not use them to seek irrelevant broad-based information about the candidate. These tests should also be adjusted to accommodate the needs of people with disability or those from different cultural backgrounds.

Do not use the test results as a reason for immediately excluding the person from the job. If a test result indicates the candidate may have mental illness, you should follow the processes suggested above to clarify whether any mental illness affects their ability to perform the genuine and reasonable requirements of the job.

²¹ See section 82(7) and (8) of the *Accident Compensation Act 1985* (Vic).

Guideline for the recruitment industry and employers: Complying with the *Equal Opportunity Act 2010* in recruitment

You can find more detailed information on preventing discrimination in recruitment in the Commission's guideline for the recruitment industry and employers, which is available on the Commission's website at humanrightscommission.vic.gov.au/guidelines.

3.2 Your workplace environment

This section outlines steps you can take to prevent and respond to discrimination by reviewing policies and practices, staff knowledge and training, and providing support to staff.

While this guideline focuses on your obligations under the *Equal Opportunity Act 2010*, thinking more broadly about the wellbeing of your staff and your obligations under occupational health and safety legislation will also help you to meet these obligations. Think about the following:

- Is my workplace environment free from systems or behaviours that may trigger or contribute to mental illness?
- Are my staff adequately supported to respond to stress? While experiencing stress and having mental illness are not the same thing, stress may trigger, contribute to or aggravate mental illness.
- Is my workplace safe and without risks to employees' health, including their psychological health?
- As an employer, you have an obligation to provide a safe and healthy workplace for your employees and contractors. Are you meeting that obligation?

You can find more information on steps you can take to meet your occupational health and safety obligations from the Victorian WorkCover Authority (see Part 6 of this guideline).

3.2.1 Review policies

Reviewing your policies is a good first step for meeting your obligations, ensuring employees are aware of their rights and responsibilities and creating a culture where discrimination based on mental illness is less likely to occur.

You should have a general equal opportunity policy that clearly sets out your organisation's commitment to preventing discrimination, sexual harassment and victimisation and states that this conduct is against the law. You can include information about discrimination based on mental

illness in this policy. Once you have developed your policy, communicate it to staff and make sure they can easily access it.

If possible, consult with staff and other stakeholders to develop your organisation's policy. Monitor the effectiveness of your policy and, if necessary, revise it as part of your business planning cycle.

You should include information about your obligation to provide reasonable adjustments, which will apply to all forms of disability in the workplace. The policy should also clarify roles and expectations for managing disability in the workplace.

Additionally, you should review other policies that impact on employees with mental illness, including any sick leave policy, employee privacy policy, return to work policy, occupational health and safety policy and employee assistance policy.

Right Smart Employers Toolkits

You can find a range of tools to assist you, including policy templates, from the Commission's Right Smart Employers Toolkits at victorianhumanrightscommission.vic.gov.au/employers.

3.2.2 Review staff knowledge and training

Familiarise your staff with equal opportunity legislation, and provide them with training on the Equal Opportunity Act.

In addition to providing training for staff and managers about mental illness and discrimination, you can also make other efforts to educate employees about mental illness, such as by providing information in manuals, e-bulletins, staff meetings or online learning courses.

If you have an inclusive workplace culture with a clear commitment to preventing discrimination and your staff and managers have a good understanding of rights and responsibilities regarding discrimination, then they may be more likely to feel safe to disclose their mental illness so you can provide them with support or adjustments if needed. Managers will also feel more confident to respond appropriately to mental illness.

To gather information about staff skills and knowledge, you can check training records and you may wish to survey staff about their current levels of understanding. Below are some questions you could include in a staff survey:

- Do you have a good understanding about mental illness and discrimination based on mental illness?

- Are you aware of our policies dealing with discrimination based on mental illness?
- Would you know what to do or where to get support if you or someone else at work was experiencing mental illness?
- If you have or if you had a mental illness, would you feel able to tell your manager or other staff where appropriate to discuss workplace adjustments?
- Have you had sufficient training about discrimination? Would you like to receive more training?

You can also analyse other information, such as exit data or employee survey data, to understand experiences and needs of workers who are at risk of mental illness or who have an existing mental illness.

Examine any practices among staff that may lead to discrimination. Listen out for derogatory language or stereotypes that may lead to discrimination or make employees feel unwelcome or uncomfortable. Planning to prevent discrimination in the workplace will reduce the likelihood of other employees responding negatively to an employee's mental illness or discriminating against them.

Use the information you obtain to set out an action plan identifying improvements you can make. Take an approach that is relevant to your organisation's size, resources and functions. Where needed, develop new policies and procedures and/or a revised communication and training approach to equal opportunity and mental illness in the workplace. In your action plan, you can identify the aims of your organisation and what it wants to achieve in the future to eliminate discrimination.

To manage any negative responses to employees' mental illness you should have clear policies and procedures in place dealing with discrimination, including information on making a complaint.

3.2.3 Provide support for all your staff

Managing mental illness in the workplace may be challenging. You should establish confidential processes for all employees including anyone supporting an employee with mental illness, such as managers, to debrief and seek support if necessary. You should inform employees of available supports for dealing with personal or work challenges, such as counselling services or an Employee Assistance Program. You can do this without disclosing that an employee has a mental illness by updating all your staff about the availability of the Employee Assistance Program or other supports on a regular basis.

3.2.4 Review complaints

Look at your complaints. Have you received relevant complaints from employees? What is the nature of the complaints? How have they been responded to?

An effective complaints process helps you to deal with complaints of discrimination, sexual harassment and victimisation quickly, fairly, impartially and transparently.

The Equal Opportunity Act does not prescribe what a complaints process should include. However, an internal complaints process can be strengthened by:

- including information about the complaints process in any equal opportunity policy
- dealing with complaints in a way that is fair, prompt, transparent and as confidential as possible
- listening to the complaint in an open-minded and impartial way
- communicating about the progress of complaints
- ensuring that the person, their relatives and carers are not victimised or treated badly because they made a complaint
- informing the complainant that they may be able to have their complaint dealt with externally by the Victorian Equal Opportunity and Human Rights Commission or one of the organisations listed in Part 6 of this guideline.

3.3 Responding to issues arising in employment

3.3.1 Employee is employed with a known mental illness – making reasonable adjustments

Like everyone else, people who experience mental illness want to work and, for many, simple, inexpensive supports can help them to do so.

Reasonable adjustments are changes in the workplace that will help an employee do their job.

Examples of reasonable adjustments

Ronald sits in an open plan office. He experiences heightened stress and panic attacks when he is surrounded by too many people or too much noise. He also experiences anxiety when making work phone calls from his desk where he can be overheard by his colleagues. His manager finds him a desk against the wall of the office where he is not surrounded by other staff and allows him to use the phone in the meeting rooms.

Arnold has depression. He works in an open plan office and one of his symptoms is difficulty concentrating when multiple colleagues are speaking to each other or talking on the phone. Arnold's employer allows him to use headphones as a tool for enhancing his concentration and drowning out distracting noise.

Identifying whether an adjustment is 'reasonable' for your business

As the term implies, the adjustments you need to make should be 'reasonable'. This means you have an obligation to consider any adjustments an employee may need, while balancing the need for change with the expense, effort and impact of making the change. This includes taking into account:

- the person's circumstances, including the nature of their disability
- the nature of the job
- the type of adjustment that is needed
- the employer's financial circumstances
- the size and nature of the business and the workplace
- the effect on the business and the workplace of making the adjustments
- the consequences for the employer if the adjustments are made
- any relevant action plan that has been made under the federal *Disability Discrimination Act 1992*
- any relevant disability standards made under the Disability Discrimination Act.

This does not mean that smaller employers have less responsibility to make reasonable adjustments. Employers are expected to make reasonable adjustments for people with disability to the best of their ability, within their organisational capacity.

In some circumstances, your organisation may not be able to make adjustments because the financial burden would be too great, or the genuine and reasonable requirements of the job may legitimately exclude a person with a particular mental illness. If a person cannot meet these

requirements even with reasonable adjustments, then any unfavourable treatment will not be unlawful discrimination. You will be required to show evidence of this if a complaint is brought against you.

Example of discrimination regarding reasonable adjustments

Lisa works part time. She tells her manager that she will need to take some time off in the coming months for fortnightly appointments to see her psychiatrist. Her manager agrees to Lisa taking time off for these appointments, but tells her she 'probably needs to find another job that would suit her better'. Lisa could make a complaint of discrimination.

Consulting about reasonable adjustments for employees

Some things to consider when identifying and assessing reasonable adjustments are provided below. These examples are not exhaustive but provide a starting point for considering options in consultation with your employees and their medical practitioner in some circumstances.

The role:

- Identifying tasks that the employee is likely to find more challenging because of their mental illness, for example public contact or managing staff – and modifying or reducing these (for example, a job requirement that focuses on networking might be adjusted to specify non face-to-face contact, such as an emphasis on social media use).
- Reviewing and, if necessary, adjusting the performance requirements of the job (for example, if a full-time position reverts to part-time position for a period of time).
- Approving job-share tasks among staff.

Flexibility:

- approving flexible start and finishing work hours, or part-time work
- allowing flexible use of time for the worker to attend medical appointments
- allowing extra time to complete projects or meet deadlines where possible
- allowing for short breaks or time to organise appointments with health professionals
- allowing for flexible leave arrangements, for example, staggered annual leave days or flex leave
- allowing workers to undertake regular shifts at the same time every week
- allowing employees to work part time or from home
- reducing or redefining workload or specific tasks for a period of time.

Interpersonal supports:

- appointing a mentor, 'buddy' or coach on a similar skill level to provide support
- ensuring that feedback and supervision is supportive and tailored to the employee's needs
- meeting in a location that makes work-related discussion less confronting and more relaxed
- providing written instructions instead of verbal instructions, or sending email reminders or prompts if an employee experiences difficulty with memory
- providing access to an Employee Assistance Program.

Examples of reasonable adjustments for workers with mental illness

Ahmed experiences serious anxiety when given new tasks or instructions relating to specific areas of work that he is unfamiliar with. He has had trouble remembering important new information in the past, which leads him to give incorrect information to customers and lose sales. Ahmed's employer 'checks in' with him about some recent, higher responsibilities that are less familiar to him and asks if he needs any support. Ahmed does not disclose that he has been experiencing serious anxiety but does agree with his employer that he will receive detailed, written instructions relating to new unfamiliar tasks. Ahmed also meets with his employer for fortnightly coffee to discuss his progress. The supports greatly improve Ahmed's ability to tackle new tasks and he begins to excel in the role.

Joanne's manager observes that she has been coming to work late over the last few weeks and no longer eats lunch in the staff kitchen with other colleagues. While her performance hasn't been affected, her mood is low and she seems to be tired.

Joanne's manager notices these changes and arranges to meet with her confidentially to 'check in' and ask if she needs anything. Joanne discloses that she has recurring depression. Her manager agrees that she can start later in the mornings and make up the time after work. They also agree that Joanne can work from home on days where she needs to attend appointments closer to home. They agree to trial this arrangement for two months. They also agree not to inform Joanne's colleagues of the reasons for the new arrangements.

These adjustments help Joanne recover and get back on track more quickly.

Review adjustments

After time has passed, review the adjustments to see if they have assisted the employee. It is reasonable for you to set the review time frame in advance. Also determine if the adjustments are required on an ongoing basis or only at specific periods.

Checking in with staff is a central feature of any organisational management role. Reviewing adjustments and ensuring that employees can fulfil the genuine and reasonable requirements of their job is a key feature of good practice and also helps employers meet their obligations to prevent discrimination under the Equal Opportunity Act.

3.3.2 An employee discloses mental illness

If an employee discloses to you or a member of your management team that they have a mental illness, you should find a confidential location to have a conversation with them at a mutually convenient time as soon as possible.

Having some understanding of mental illness before your discussion will help you to implement responses that will be supportive, helpful and non-discriminatory. However, you should not (and in fact unless you are a medical specialist, who has specifically assessed the person, cannot) attempt to diagnose employees. It is always best to start with focusing on the experiences or behaviour of the person and what they may need, rather than setting out to discover a mental illness. If someone has not disclosed, making these assumptions can lead to inaccurate labelling, stigmatisation and discrimination.

If you need more information about mental illness, you may wish to seek assistance from one of the organisations listed in Part 6 of this guideline.

Maintain confidentiality

You should keep any information about an employee's mental illness confidential. Only use it to respond appropriately to the needs and circumstances of individual employees, including protection of health and safety, providing any reasonable adjustments and preventing discrimination against them.

Do not disclose or share their information with any third party unless the employee agrees you can. Even where the employee has given you this permission, you should only disclose what the employee has agreed to and with good reason. You also need to do this in a way that the employee is comfortable with. It is important for the health and safety of the employee that they are involved in the flow of information about themselves.

There may be some situations where you need to disclose some confidential information in order to comply with obligations under occupational health and safety laws. This will most likely be where there are occupational health and safety risks associated with a person's mental illness that you need to address. However, in these situations it is most likely you will only need to respond to the potential risks rather than disclosing the reasons for your response to others. If you are seeking or disclosing confidential information so you can determine how to respond to these risks, it should only be on a 'need to know' basis, most likely between management staff and possibly external medical professionals if necessary (see section 3.3.2 – Obtaining medical advice, below).

If an employee has disclosed their mental illness to others, given you permission to disclose, or you have had to disclose information to protect the health and safety of the employee or others, you should carefully consider the effects of disclosure in the workplace. Reassure the employee that they should let you know immediately if they experience negative treatment or discrimination from other employees because of their mental illness. Again, it is crucial that you consult with the employee about what information you can disclose and how this will be done.

Obtaining medical advice

It is lawful and reasonable for an employer to request medical advice in some circumstances. However, you should generally do this with the employee's consent. Even where you may have the power under law to require a medical certificate or assessment, the employee's consent will generally be required by their medical practitioner if you are seeking information from them.

Often you may be able to get all the information you need from the employee themselves, who will be in contact with their medical practitioner, rather than you contacting their medical practitioner. It is likely you would only need to contact a GP or other medical professionals (such as a psychologist or psychiatrist) without an employee's consent in an emergency situation. You might need to obtain medical advice in the following situations:

- When you need further information to determine what reasonable adjustments will assist the employee in their role and you cannot gather this information yourself from discussions with the employee. With the employee's consent, you may be able to contact their medical practitioner for more information about their mental illness and to discuss the genuine and reasonable job requirements and what would assist.
- When considering disciplinary action for misconduct and you need more information and advice about an employee's mental illness as a mitigating factor.
- When developing a return to work plan and you need further medical information about what adjustments will assist with return to work and the employee can't provide you with all the information you need.
- When considering termination and you need medical advice to assist with reasonable adjustments or to confirm that an employee will not be able to perform the genuine and reasonable job requirements even with reasonable adjustments – or to confirm that the employee should be able to perform these requirements with adjustments.

3.3.3 You believe your employee may have a mental illness

An employee might not want to disclose their mental illness to you even if it is affecting their work. They may simply not wish to do so or not think it is necessary; or they may be fearful of how others will react.

You may, however, have reason to discuss an employee's circumstances with them if you notice a decline in performance or changed behaviour that may also cause a risk to the health and safety of themselves or others. To avoid making assumptions, it is best to approach this with open questioning.

You may also wish to initiate a discussion with an employee because you are concerned they may have a mental illness and you want to discuss supports or reasonable adjustments. However, you should avoid making assumptions about this in the absence of disclosure.

If you have taken steps to create a supportive work environment and address discrimination (see section 3.2, page 17) then employees will feel safer to disclose and seek support or adjustments if necessary.

Having the discussion

Beginning a discussion with an employee if you think they have a mental illness that is affecting their work can be challenging and there is no particular way to do so. However, the way you conduct such conversations could mean the difference between a successful outcome and potentially intimidating your employee and making them feel unwelcome.

Think to yourself: how would I like to be treated in this situation? Think about your own experiences – whether you've experienced or are experiencing mental illness yourself or know others who have – and what helped in those situations. Demonstrating a sense of compassion and empathy, rather than simply focusing on results and what is necessary to address the issue or improve performance, is likely to make your employee feel more comfortable and preserve your relationship with them.

You can find some helpful tips on having these discussions on the R U OK website. Visit 'How to ask R U OK' at ruokday.com for more information.

You can also seek further advice from the Commission or the other organisations listed in Part 6 of this guideline if you are unsure about whether and how to discuss mental illness with your employees, or if you would like to know more about support for different kinds of mental illness.

3.3.4 Employee is absent from work due to mental illness

If an employee is away from work because of mental illness, a good question to ask yourself is: what would you do if the person was absent from work or requested flexible work hours because of a physical illness? You may find that many policies and procedures that you would use can apply to the situation.

In the same way as sick leave entitlements are available for people with physical illness such as the flu, these are also available for people experiencing mental illness. Longer-term illnesses may be best managed through flexible leave provisions on a case-by-case basis, you may have a salary continuance program for staff or you may allow an employee to take leave without pay for an agreed period. In some circumstances, it will not be possible for the employee to continue in their position. However, this should be considered a last resort (see section 3.4, page 24).

Offering support

Make sure that the employee understands the obligation to give you notice as soon as practicable that they are taking leave due to illness, to inform you of the period or expected period they will be away from work and, if applicable, remind them of any obligation to provide a medical certificate or statutory declaration to support their absence. You may have a sick leave policy that covers these requirements.

Ask the employee if they need any support, particularly if their absence is likely to be long. They may not wish to accept your offer but at least they will know that support is there if they need it.

Keeping in touch

During an absence, if the employee agrees, you might stay in touch as this may help them feel connected and valued. It will also help with the transition back to work. However, if a person's medical practitioner or psychiatrist certifies that they should not be contacted for health reasons, you should observe this recommendation. Correspondence may instead occur by mail directly or through the doctor if necessary.

3.3.5 Employee returns to work after absence

When an employee returns to work from a period of leave or absence due to illness, it is a good idea to prepare a return to work plan. This may be done in conjunction with the employee's medical practitioner where appropriate (see section 3.3.2, page 20). This may be required if the injury is work related. The plan should be tailored to the needs of the individual employee and can address any adjustments that the employee needs due to their illness. It should focus on the employee's ability, not disability. It should be flexible and regularly reviewed.

A good return to work plan may include:

- an agreed date of return to work
- whether the return will be to full-time or part-time work and, if part time, whether there will be a gradual return to full-time work over a particular period of time
- agreed roles and responsibilities of key people in the plan
- a description of suitable duties for the employee and any reasonable adjustments
- information about existing leave entitlements that may be accessed to support the employee
- information about an Employee Assistance Program, or other counselling services
- any advice from human resources

- any advice from a medical practitioner, psychiatrist or psychologist where appropriate
- strategies to handle stress or issues that may trigger mental illness
- any contacts or supports the employee wishes the employer to contact if they become unwell
- an agreed process for implementing and reviewing the plan
- signatures of the employee, supervisor and if relevant, their clinicians.²²

You can find a number of useful tools on developing effective return to work plans from the Victorian WorkCover Authority website vwa.vic.gov.au. Other organisations listed in Part 6 of this guideline may also be able to assist.

3.3.6 Safety concerns

You have an obligation under the *Occupational Health and Safety Act 2004* to take action to prevent risks to health and safety. In addition, employees have an obligation to notify their employer of any health condition or medication that may affect their ability to perform the genuine and reasonable requirements of their job safely.

You may have concerns about the safety of your employee, including potential risk for accidents to occur (for example, due to the effects of medication) or, in much rarer and more serious situations, concerns about an employee harming themselves or others.

Immediate response

Myths, misconceptions and stereotyping can sometimes lead to false assumptions about harm or the degree of risk associated with mental illness. However, if you have genuine, founded concerns about the health and safety of your employees, you have an obligation under the *Occupational Health and Safety Act* to take steps to address the risk of harm in the workplace.

A concern about the health and safety of a worker harming themselves or others can be very stressful. The steps below may make you feel more confident to help your employee during a time of crisis and respond appropriately in the circumstances.

You can encourage the person to talk with a trusted friend or relative, to make an appointment with their GP, social worker, psychiatrist or with an Employee Assistance Program counsellor or to contact Lifeline or other support services.

If you see that any worker is putting the health and safety of others at immediate risk through their behaviour, you might consider taking the following steps:

- Talk to the person calmly but firmly.
- Ask the person if there is someone you should contact for them or consider calling their emergency contact.
- Offer the person 'time out' or ask if they would like to move to a calmer, safer environment if they feel the current environment is not.
- If possible, leave the person alone to calm down.
- If any threats of violence are made, take these seriously. Evacuate staff or clients from the area according to evacuation protocols.
- Contact the Crisis Assistance Team (CAT) or the police.
- If you contact the police, request a mental health response team if possible and appropriate.²³

If you are concerned about an immediate risk of a worker harming themselves the following steps may also be taken:

- Let the person know that you are concerned about them and are there to help.
- Take steps to get immediate help and let them know that there are other options and that help and support is available.
- Contact a medical professional, the person's GP, or the person who is listed as their emergency contact if you have their details for immediate advice about how to respond.
- If the situation is an emergency, call triple zero or contact your local Crisis Assistance Team (CAT) (see Part 6 of this guideline).²⁴

3.3.7 Performance management

You may be uncertain about how to manage performance issues for employees with a mental illness or employees who you think may have a mental illness. This may be particularly so where the symptoms of illness lead to inconsistent or sporadic patterns of poor performance or inappropriate behaviours.

You first need to clarify whether the poor performance has any connection with the mental illness. This is because treating someone unfavourably because of poor performance connected with mental illness can be unlawful discrimination.

²² Adapted from Orygen, *Helping Employees Successfully return to work Following Depression, Anxiety or a related Mental Health Problem: Guidelines for Organisations* (2011) 5.

²³ This information is based closely on the Australian Human Rights Commission's guideline, *Workers with Mental Illness: a Practical Guide for Managers* (2010) 21.

²⁴ *Ibid* 20.

Using your organisation's performance management systems to address a legitimate concern is an appropriate response to poor performance. In doing so, consider the following options:

- Have an open conversation, asking the employee if they feel there is anything contributing to their poor performance. Be sure to let them know you will respect their privacy.
- If the illness has already been disclosed, discuss with the employee whether it is affecting their performance and ask how you can support them to improve their performance and maximise their potential.
- Look at the genuine and reasonable requirements of their role and see if reasonable adjustments can be made to support them to do the job. For example, can you reduce customer service contact if this is contributing to poor performance associated with a disability and it is not a key part of the employee's role?

In situations where you are aware of an employee's mental illness and it is affecting their work, you should allow the employee to have a support person join you for discussions about work performance, supports and adjustments. This might be a family member or advocate who can provide more information about the employee's mental illness and how you can work together to support them.

Tailoring your approach will mean you can focus more on the impacts of the employee's mental illness and what you can do to support them in the role so their performance improves. It can also allow you to address these concerns in a more personal and sensitive manner. During these discussions, you can:

- Advise the employee that you are concerned about their performance or that it has not met the expected standard.
- Advise the employee that you want to come up with strategies together to assist them so their performance improves.
- Make the discussion positive by focusing on support and solutions, such as any reasonable adjustments that will assist.
- Consider recognising the employee's past efforts and ask what will help them to return to their previous standard of work.²⁵

When having these discussions, you should be very clear in identifying specific issues with the employee's performance. Provide adequate warnings and offer support to remedy the poor performance.

Discipline for misconduct

An incident in the workplace which involves mental illness might constitute misconduct that would ordinarily warrant disciplinary action or even termination (for example fighting or abuse). When acting on any incidents, employers should take into account whether the conduct was caused or exacerbated by mental illness. An employer should take this into account as a mitigating factor in finding whether there was misconduct and in determining the appropriate outcome. For example, you may decide to warn an employee rather than terminate their employment. In addition, rather than disciplining an employee, an incident can be the trigger to seek medical advice on whether the person can safely continue to perform the genuine and reasonable requirements of the job (see section 3.3.2, page 20).

3.4 Terminating someone's employment

There are three main scenarios where an employer may need to consider terminating employment of a person with mental illness. Given the risk of legal claims, termination will usually be the action of last resort.

- 3.4.1** Where the employee cannot perform the genuine and reasonable requirements of the job, despite the employer making reasonable adjustments to assist them. This decision should only be made with the support of medical advice confirming that the person cannot perform the genuine and reasonable requirements of the role. Often the employer will consider whether there are other roles available that the employee is fit to perform.
- 3.4.2** Where the employee continues to perform poorly in the role, despite the employer making reasonable adjustments, allowing a reasonable period to improve performance, and in circumstances where a medical practitioner confirms the employees should be capable of performing the standard required.
- 3.4.3** Where the employee has engaged in misconduct so serious that it warrants termination of employment, even taking into account mental illness as a mitigating factor.

²⁵ Ibid 19.

If you want to terminate someone's employment, you also need to be mindful of your obligations around procedural fairness to avoid potential claims of unfair dismissal under the Fair Work Act. These are actions you should take to avoid a claim that the dismissal was 'harsh, unjust or unreasonable' and include:

- ensuring there is a valid reason for termination
- notifying the employee of reasons
- allowing an opportunity to respond.²⁶

You can find more information about unfair dismissal and procedural fairness criteria by visiting the Fair Work Commission's website at fwc.gov.au.

²⁶ *Fair Work Act 2009* (Cth) s 387.

Part 4: Frequently asked questions

What is mental illness?

Mental illness refers to a range of illnesses including mood disorders (such as depression) anxiety disorders and psychotic disorders (such as schizophrenia) (see section 1.2, page 5). Mental illness is a form of disability with a specific meaning under the *Equal Opportunity Act 2010* (see section 2.2, page 7).

Are people with mental illness dangerous?

The vast majority of people with mental illness are not dangerous and, if they are, they are much more likely to be a danger to themselves than others.

What are reasonable adjustments?

Reasonable adjustments are changes to the role that will assist people with mental illness (or other forms of disability) in their role. These may include changes to working hours, the physical environment, or providing interpersonal supports (see section 3.3.1, page 18).

Can I ask my employee if they have a mental illness?

You may be able to ask people questions about mental illness in some situations. You may wish to do this in situations where a person's behaviour or performance has changed and you want to discuss supports and reasonable adjustments. You should only ask for information for non-discriminatory purposes. You should conduct these discussions in a sensitive manner and ensure you meet your confidentiality and privacy obligations (see section 3.3.2, page 20).

One of my employees is behaving in a rude and unacceptable manner. Could this be because of a mental illness?

You should avoid assumptions that rudeness and bad behaviour mean a person has a mental illness. Just as people with mental illness have varied intellectual functioning like the general population, behaviour also varies among those who have mental illness and those who do not. Everyone is capable of rude or unacceptable behaviour.

To assist you with managing instances of bad behaviour, you should ensure that you have clear standards of acceptable behaviour in the workplace that are separate from your equal opportunity policy dealing with mental illness. You can begin to address any poor behaviour through discussions with your employee referring to these behaviour standards. Through the course of that discussion, you can consider whether mental illness may be an issue or ask your employee if there is anything you can do to help or anything you should know so you can provide the best support (see section 3.3.3, page 21).

Can I contact an employee's doctor?

You can contact an employee's doctor to discuss their fitness to perform the genuine and reasonable requirements of the job with their permission. In practice, it is unlikely a doctor will disclose any information to you if you don't have the employee's permission. Therefore, it is best that you have an open discussion with your employee about contacting their GP or other health professional before you do so to ensure a coordinated and constructive approach, including the provision of supports and adjustments for the employee (see sections 3.3.1, 3.3.2 and 3.3.3).

Can I tell others about someone's mental illness?

You should avoid discussing an employee's mental illness with others in the workplace, unless the employee has agreed that you can and only with good reason. It is likely that the only people you will need to discuss an employee's mental illness with are family members, emergency contacts or health professionals who may be assisting with the employee's treatment and management (see section 3.3.3, page 21). You may also need to tell someone if you have genuine concerns about health and safety in the workplace. For example, a colleague who knows of a risk to health and safety may need to tell a manager.

What should I do if a person with mental illness is struggling to meet the genuine and reasonable requirements of their job?

You can discuss your concerns with the employee and, where appropriate, their medical practitioner to explore reasonable adjustments that may assist them to meet the genuine and reasonable requirements of the job. Review the adjustments and continue to consult closely with the employee about their effectiveness and possible improvements. If the employee is still unable to perform the genuine and reasonable requirements of the job after adjustments are provided, you may consider terminating their employment as an option of last resort (see section 3.4, page 24).

What should I do if an employee develops mental illness at work?

Examine your work environment to consider whether it may have contributed to or aggravated the employee's mental illness (see section 3.2, page 17). You have a positive duty to take active steps to prevent discrimination from occurring and to provide a safe work environment for your employees. In addition to examining the work environment, provide the employee with information and support (see section 3.2.3, page 18) and consult with them about reasonable adjustments that may assist them in their job (see section 3.3.1, page 18).

Part 5: Preventing discrimination against employees with mental illness – checklist

In dealing with all staff

- Be clear in your policies and practices that discrimination is against the law.
- Adopt a zero tolerance approach towards unlawful discrimination based on mental illness in the workplace.
- Train all staff about their obligations under the *Equal Opportunity Act 2010*. Ensure all staff attend refresher training at least every two years.
- Ensure recruitment and selection policies and processes are non-discriminatory.
- Set aside personal bias, myths and stereotypes. Focus on the genuine and reasonable requirements of the job and how job applicants meet those requirements based on their skills and experience, with reasonable adjustments if necessary.
- Check in with your staff where appropriate and let them know about supports that are available, such as an Employee Assistance Program.
- Be consistent and fair in the way you treat all staff (which may mean not treating everyone the same).
- Ensure that employees are aware that reasonable adjustments and assistance is available if they need them.

In dealing with employees with mental illness

- Consult with the employee and obtain expert medical advice on the steps you should take to assist the employee as appropriate.
- Implement reasonable adjustments for employees with mental illness where necessary, after discussing the employee's needs with them.
- Manage absences in a sensitive, planned and supportive manner.
- Create return to work plans where possible.
- Take complaints seriously if they arise, respond promptly and take any corrective action necessary.

Part 6: Where can I find more information?

Victorian Equal Opportunity and Human Rights Commission

You can call the Commission's Enquiry Line on 1300 292 153 or (03) 9032 3583, or download the *Equal Opportunity Act 2010* and find information on the Commission's website at humanrightscormission.vic.gov.au.

Right Smart Employers Toolkits

The Commission has created a suite of free online tools to help you understand and comply with the Equal Opportunity Act.

Simply complete the confidential self-audit tool to assess your equal opportunity compliance and find out where you need to do more. You can also download templates and checklists to help manage specific employment issues.

Visit humanrightscormission.vic.gov.au/employertoolkits to find out more and access the toolkits.

Training and consultancy

Our education, training and consultancy services will help you understand workplace rights and responsibilities, meet your legal obligations and appreciate the benefits of promoting a culture of human rights and equal opportunity in the workplace.

We can also provide you with guidance by undertaking a compliance review under the Equal Opportunity Act.

For more information and to register online visit humanrightscormission.vic.gov.au/training or call (03) 9032 3415.

Employment services

Job Access Advisers

A confidential service available to managers who work with workers with a disability. It provides free expert telephone advice on employment matters affecting people with a disability.

Provides advice on reasonable accommodation of workers with disability and access to funding for these accommodations.

Website: jobaccess.gov.au

Phone: Free call 1800 464 800

Referrals to other experts

Return to work

The Return to work website provides detailed information and guides for employers on developing a return to work plan for staff experiencing mental illness who have been absent from work as a result. It also contains detailed information for families and friends, colleagues, return to work coordinators, supervisors, OH&S and health professionals and trade union representatives on how to support people experiencing mental illness to manage the transition back to work.

Website: returntowork.net.au

Victorian Mental Health Services

Victorian Mental Illness Awareness Council

- provides individual and consumer empowerment and representation
- provides research, education and training
- provides information and peer support
- advocates for the rights of consumers with mental illness.

Website: vmiac.org.au/about.html

Phone: (03) 9380 3900

Orygen

A specialised youth mental health service which provides clinical services to young people aged 15–25.

- undertakes research to better understand the clinical onset of mental illness and develops innovative service models
- provides a training and communications program to promote the capacity of services and the general public to support young people with mental illness
- published guidelines for organisations on helping employees successfully return to work.

Website: oyh.org.au/about-us

Phone: General enquiries (03) 9342 2800

National mental health services

MIND Australia

One of the largest non-government providers of mental health services to people with mental illness.

- assists people who are at risk of homelessness to access community services, including stable accommodation
- conducts an 'Ambassadors of Hope' program which involves consumers speaking out about their experiences.

Website: mindaustralia.org.au

Phone: (03) 9455 7900

Mental Health Council of Australia

The peak non-government organisation representing and promoting the interests of the Australian mental health sector.

Website: mhca.org.au

Phone: (02) 6285 3100

SANE Australia

A not-for-profit, national charity, which provides online and telephone information and fact sheets.

- offers mental health online first aid training for the workplace
- provides information for employers managers, co-workers and employees with mental illness.

Website: sane.org.au

Phone: (03) 9682 5933

Beyond Blue

A national not-for-profit organisation working to address anxiety, depression and related substance abuse issues.

- offers information such as fact sheets
- provides a workplace training program for managers and employees on mental health.

Website: beyondblue.org.au

Phone: 1300 224 636

Other Victorian and national regulators

Victoria

Victorian WorkCover Authority

- helps to avoid workplace injuries by enforcing Victoria's occupational health and safety laws
- provides workplace insurance for employers
- helps injured workers back to work
- manages the worker's compensation scheme in Victoria.

Website: vwa.vic.gov.au

Phone: 1800 136 089

National

Fair Work Ombudsman

The statutory agency responsible for administering the *Fair Work Act 2009* (Cth).

- undertakes proactive enforcement including investigations of complaints received by current and former employees against their employers
- provides public advice through Fair Work Infoline.

Website: fairwork.gov.au

Phone: 13 13 94

Australian Human Rights Commission

Leads the promotion and protection of human rights at the federal government level through education, public awareness on discrimination, complaint handling, and policy and legislative development.

Provides resources, training and information about the *Disability Discrimination Act 1992* (Cth) and specific resources on employment and people with a disability. The Commission also takes complaints under the Disability Discrimination Act.

Website: humanrights.gov.au

Phone: 1300 369 711

Comcare

Comcare contributes to a secure, safer, fairer, more productive and socially inclusive Australia.

Website: comcare.gov.au

Phone: 1300 366 979



Victorian Equal Opportunity
& Human Rights Commission

Contact us

Enquiry Line	1300 292 153 or (03) 9032 3583
Fax	1300 891 858
Hearing impaired (TTY)	1300 289 621
Interpreters	1300 152 494
Email	information@veohrc.vic.gov.au
Website	humanrightscommission.vic.gov.au