

The Human Risk Equation: Managing Misconduct, Performance and Mental Health



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Legal framework

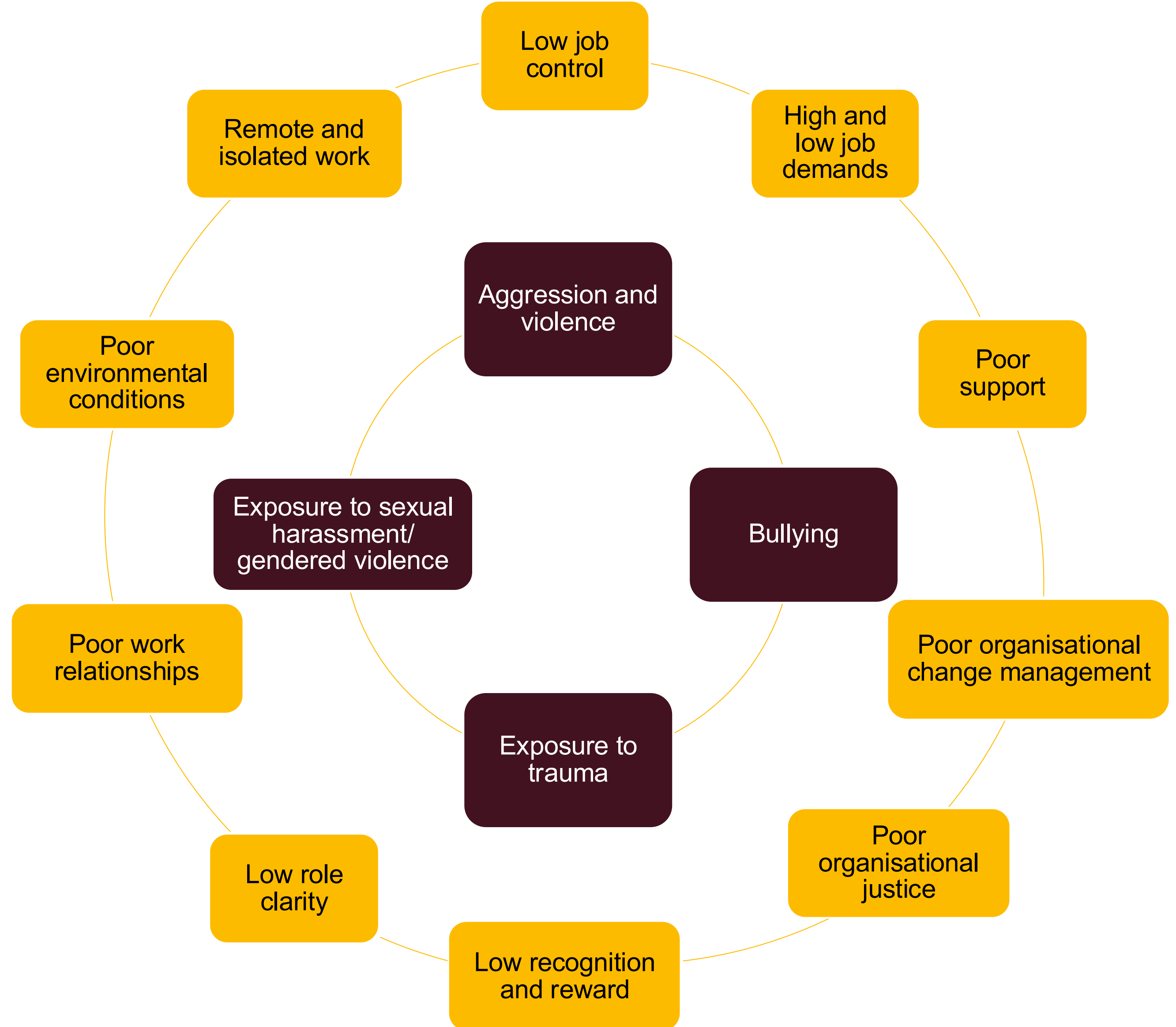
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Practical tips – managing psychosocial hazards alongside performance and conduct concerns

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Case studies

What are psychosocial hazards?



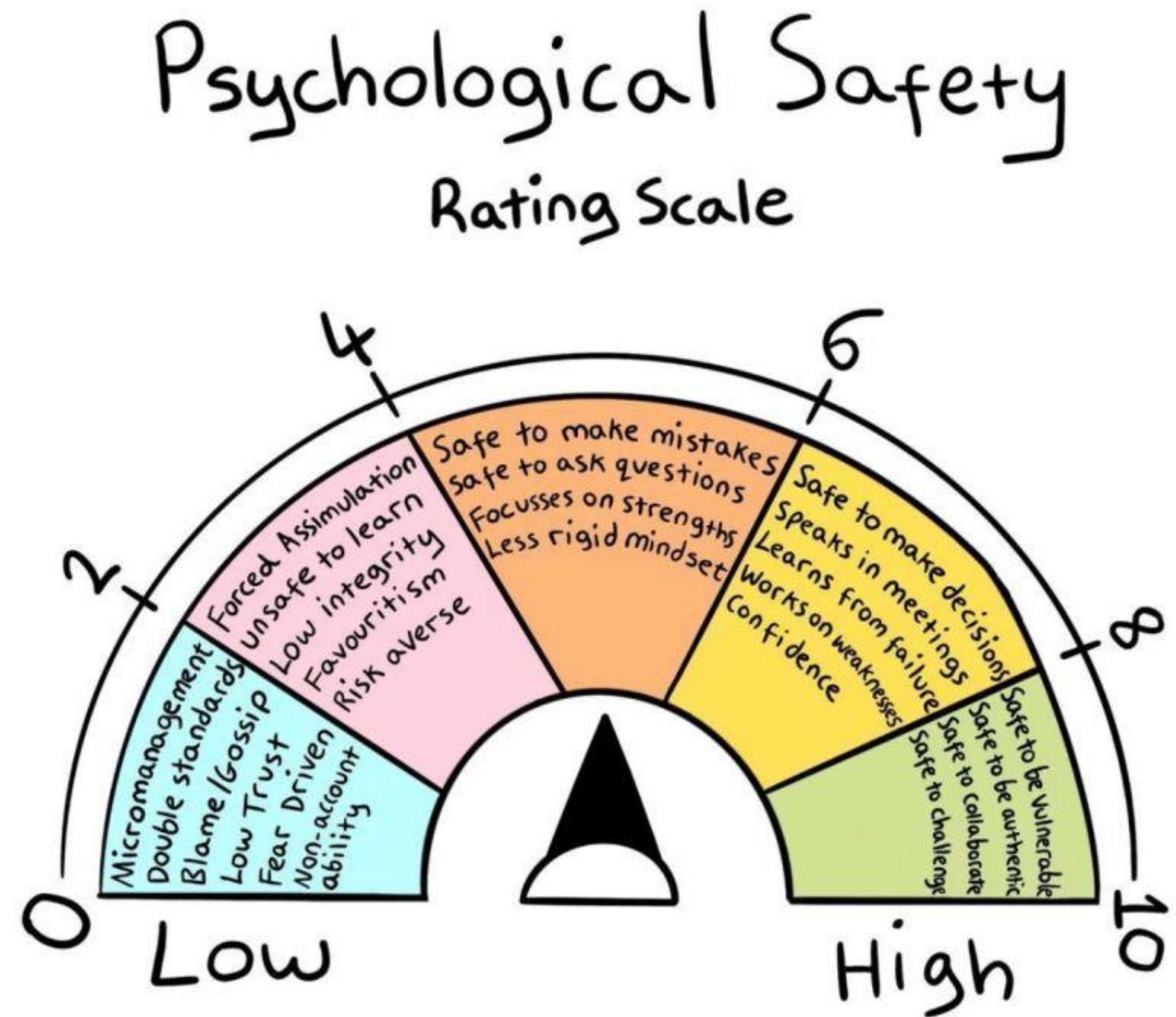
Key Trends – Psychosocial Hazards in Schools

- Teacher stress and workload remain very high — leaders are supporting staff who are more likely to be anxious, burned out or leave.*
- Unresolved conflict:
 - reduces morale, productivity, personal leave
 - increases disengagement, turnover, and the risk of employee claims and regulatory action.
- Evidence shows early manager-led intervention prevents escalation in a majority of cases.
- Authorities and parents expect transparent, timely handling of concerns — poor handling risks reputational and regulatory consequences.





Psychological safety rating scale



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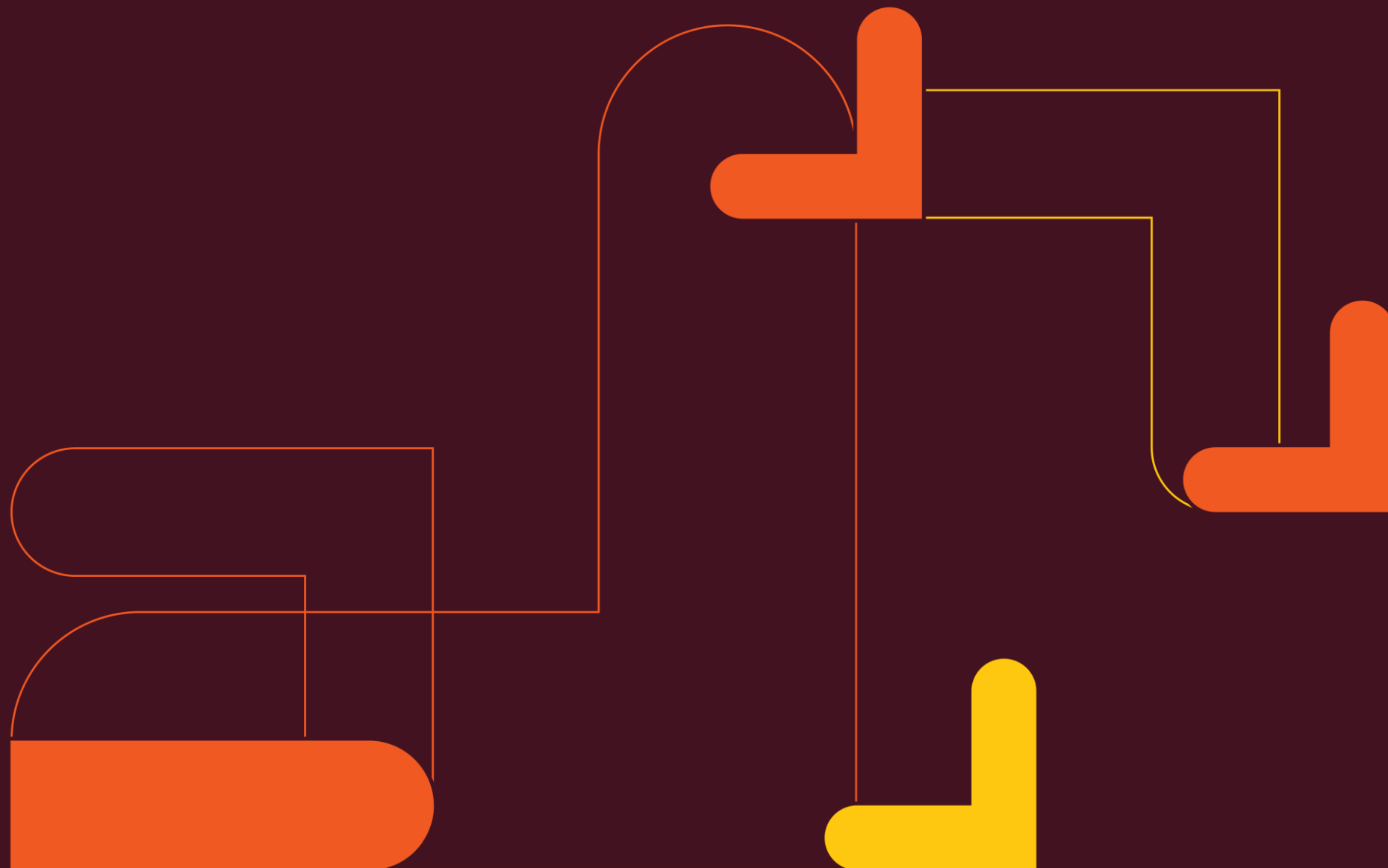
The cost of inaction, avoidance and failing to address issues early

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Legal Framework





Legal framework

- Occupational Health and Safety Laws
 - Duty to manage psychosocial hazards.
- *Fair Work Act 2009* (Cth)
 - Adverse action, bullying, sexual harassment, discrimination, protected industrial action.
- State and federal anti-discrimination laws
 - Discrimination, sexual harassment and victimisation.
- Education regulation and child safety laws
 - Grievance and investigation processes.
- Duty of care
- Privacy laws



Psychosocial Hazards and WorkCover Claims

- Employers are required to take **reasonable steps** to prevent psychosocial hazards.
- When an employee suffers a work-related illness or injury, they may be entitled to **workers' compensation**. Employers must comply with **strict timeframes** when reporting and responding to workers' compensation claims.
- **Psychological injuries** caused by reasonable management action undertaken in a reasonable manner are not generally compensable.
- By addressing performance or conduct issues in a **clear, timely and reasonable** way, employers can help identify and mitigate psychosocial hazards before an injury occurs.
- **Properly handled conversations** also strengthen the employer's ability to rely on the reasonable management action defence if a claim is made.
- WorkSafe may investigate or engage in compliance action where there is a **failure to manage risks** to health and safety.





Unfair dismissal claims

- An employee may apply to FWC for an unfair dismissal remedy if they believe the termination of their employment was “harsh, unjust or unreasonable”. An unfair dismissal remedy may be available where an employee was constructively dismissed.
- Where an employee has been dismissed because of unsatisfactory performance, the FWC will consider whether the employer clearly communicated the concerns and provided the employee with a reasonable opportunity to address those concerns before the dismissal occurred.
- If the employee hasn’t been given a clear and reasonable opportunity to improve their conduct or performance, the FWC may find that a dismissal was harsh, unjust or unreasonable, even if the employer had legitimate grounds for termination.
- The intersection between unfair dismissal claims and avoiding difficult conversations can also be seen in managing redundancy processes.
- **Possible outcomes:** reinstatement or up to six months’ wages.

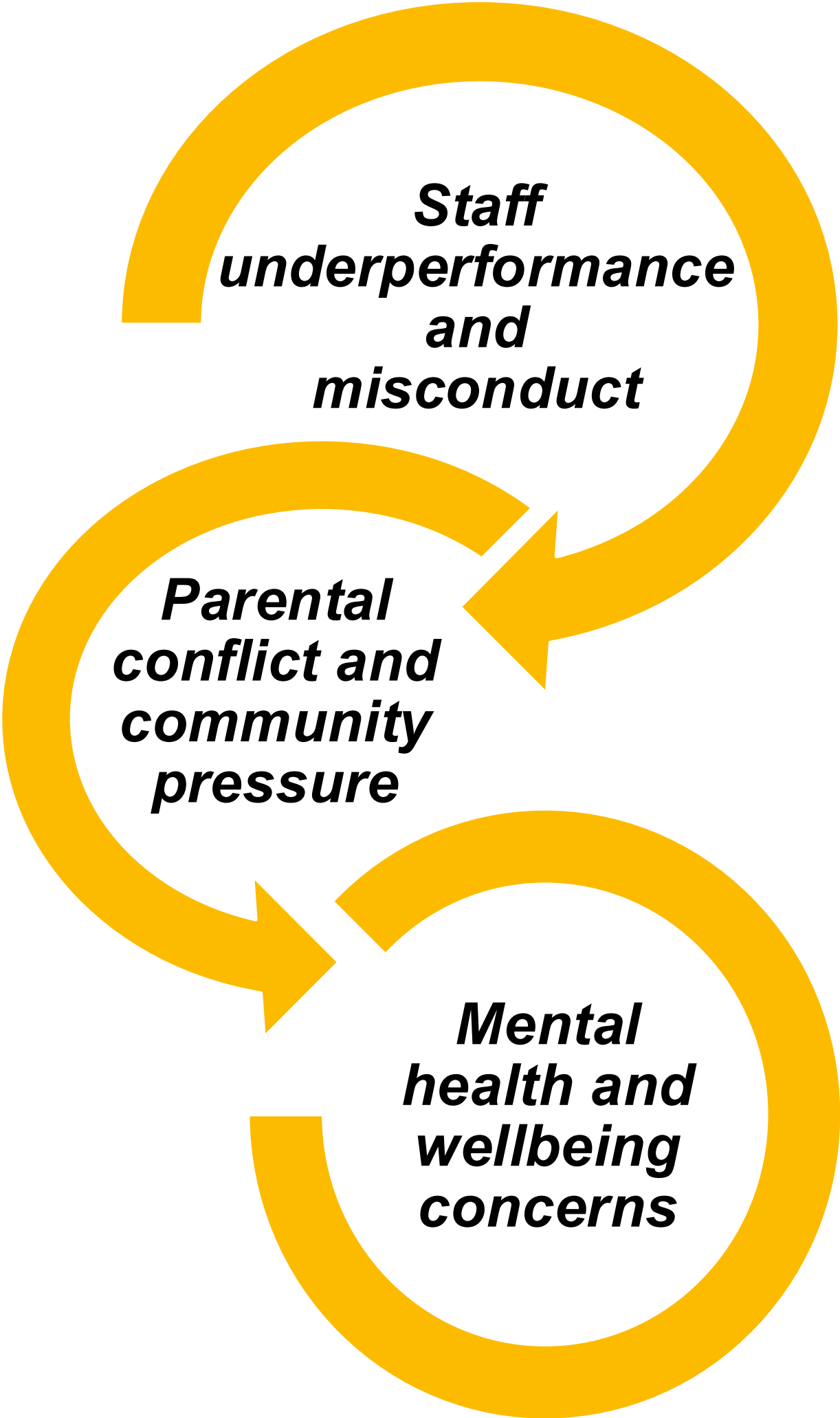
General Protection s claims

- Employers and principals must not take 'adverse action' against an employee or contractor because that employee exercised a workplace right.
- The burden of proof rests with the employer to demonstrate that any adverse action against the employee was not taken for a prohibited reason.
- It is therefore important to have timely and clear communications with employees about their underperformance or misconduct.
- **Possible outcomes:** uncapped damages for economic or non-economic loss, personal liability, penalties.





Key challenges in Schools





***Krygsman
-Yeates v
State of
Victoria
[2011]
VMC***

Facts

- Ms Yeates was employed as a teacher at Briagolong Primary School from 30 January 2001.
- She alleged to have sustained an adjustment disorder with mixed anxiety and depressed mood as a result of having her performance as a teacher subjected to monitoring and mentoring and being bullied and harassed by the Principal.
- On 6 September 2010, Ms Yeates lodged a workcover claim which was rejected by the School on the basis that her condition arose wholly or predominantly from management action taken on reasonable grounds and in a reasonable manner by her employer.



**Decision
in
*Krygsman
-Yeates v
State of
Victoria*
[2011]
VMC**

The Court found that the action taken was ‘management action’ based on reasonable grounds. The teacher’s employer had a legal duty and responsibility to respond to and take action in relation to complaints it had received about the teacher’s performance.

However, the management action was not taken in a reasonable manner because:

1. A three-page letter detailing performance-related issues was provided to the worker on her first day after returning from long service leave.
2. Feedback was not provided during the monitoring and mentoring process. Mr Christie (the Principal) commented that having such discussions would not have achieved anything and the delivery to her of the letter dated 22 June 2010, outlining criticisms of her performance rather than discussing the issues in person, “was a less confrontational method”.

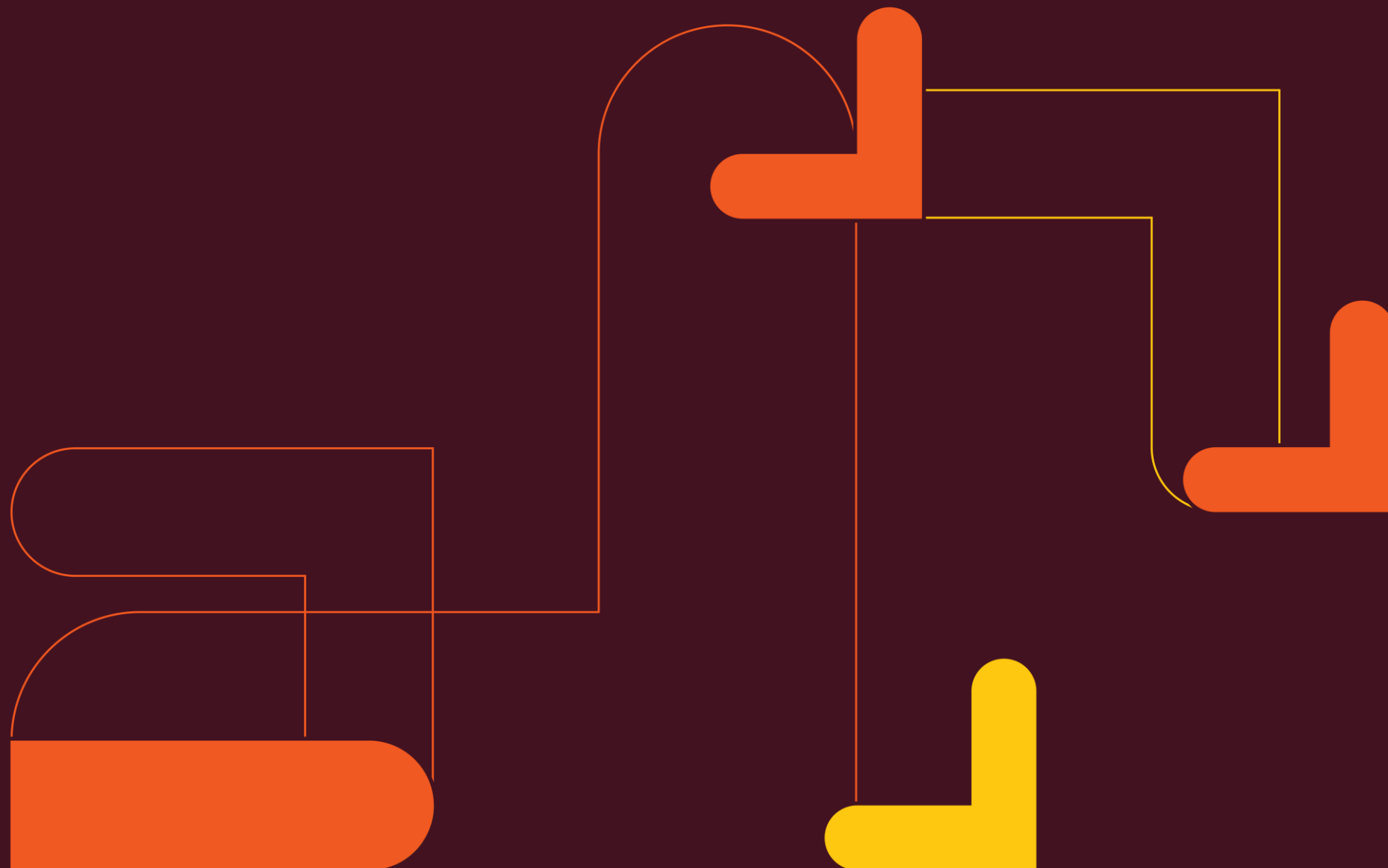


Recent case:
Commonwealth
Department
fined for failing to
address
performance
management
processes as a
psychosocial
hazard

- The Commonwealth Department of Defence became the first Commonwealth employer to be convicted and fined for failing to manage psychosocial risks, following the suicide of a Royal Australian Air Force technician during an intensive performance management process.
- The worker was subjected to four separate Work Plans over a six-month period.
- Comcare's investigation found that at no point during this process did the worker's supervisors refer him for support, place him on leave, or take any other steps to relieve the stress and pressure he experienced, despite knowing he was not coping and experiencing other personal stressors.
- The Department used a draft Work Plan procedure as a performance management tool, but had not provided adequate training to supervisors on the psychosocial risks associated with that process.
- The Department was fined \$188,000 and the court made an adverse publicity order.



Practical strategies





Practical Strategies for Managing Difficult Conversations

BEFORE

- Clarify the objective (e.g. corrective, supportive, investigatory, safeguarding)
- Collect the facts and examples (who, what, when, impact)
- Check policies, procedures and industrial instruments (performance management, disciplinary, safeguarding etc)
- Decide desired outcome and bottom line (e.g. next steps if no improvement)
- Consider the logistics and arrange appropriate setting, time, support (e.g. union rep, HR, note-taker)

WHAT ABOUT THE CONVERSATION ITSELF?

- State the purpose, respectful tone, confidentiality limits.
- Facts & Impacts: neutral examples, be specific.
- Invite their perspective:* ask open questions, listen, acknowledge.
- Look for solutions and agree on actions: SMART actions, support, milestones.
- Close & next steps: confirm record and any follow-up.

AFTER

- Ensure an accurate and fulsome file note has been taken.
- Make sure you and employee are clear about the issue.
- If you can't reach a solution, it might be helpful to contact your peak industry body, or Moores for further assistance



Case Study 1

- You're the HR Manager and Phoebe is the new PE teacher at your school this year. From day 1, she has been brilliant. She is always warm and energetic, is getting exemplary results with your student sports teams and manages to connect with and involve even the most reserved students.
- However, you've started noticing that Phoebe is neglecting some of her responsibilities. She often turns up to class a few minutes late, doesn't always remember to take student attendance, and has still not marked the assessment that her year 12 class sat nearly two months ago.
- Phoebe's manager, Matt, tells you he tried to talk to Phoebe about it last week. She told him she understands these things are really important but she has ADHD which makes some of these tasks more challenging. She is getting more stressed the more the tasks pile up, but didn't want anyone to know because of how the staff speak negatively about neurodivergent students. Matt said she started crying and he didn't want to be unkind, so he ended the conversation and hasn't picked it up since or put any strategies in place.

- What are the issues here?
- How could Matt have handled this differently?
- How could you effectively raise these issues with Phoebe?



Case study 2

Bill is a teacher who has been employed at your school for over 30 years. In the last year, he's had many issues with student behaviour management, and several parents have complained that their child isn't learning anything. To rectify this, you and your Deputy met with him to provide coaching on teaching methods. You also arranged for other staff to cover some of his classes. This includes Ms K, a younger teacher who is curious to adapting her teaching methods to take advantage of technological advances and differing student learning styles.

You receive a parent email advising their child came home distressed following Bill's Year 9 class yesterday. The students were getting rowdy and one of them made a comment about Ms K being a much better teacher. In response, Bill:

- shouted at the class "you jerks are the reason I hate my job" and used a racial slur to describe Ms K
- threw a computer mouse at the wall, stormed out of the class, and slammed the door; and
- left the class unsupervised for the remaining 20 minutes.

Bill's brother recently passed away and you've heard he is separating from his wife. He has been an average performer for many years. Ms K is one of the few people of colour at your school and hasn't yet bonded with other staff, so she doesn't have a big support network.

- What are the issues here?
- How should you address this with Bill?
- Should you raise this with Ms K?
- Do any reports need to be made about Bill's behaviour?



Key lessons

- Be **proactive** in addressing psychosocial hazards and document your consideration.
- Ensure supervisors are trained on how to address performance and conduct concerns, while balancing **wellbeing considerations**.
- When issues arise, **lead with clarity** and directness when addressing performance and misconduct concerns.
- **Keep factual notes**: who was present, what they said, agreed and timelines. Store notes securely.
- Where appropriate, **pair action with support**: coaching, reasonable adjustments, training.
- Ground difficult messages in **shared values** (e.g. student wellbeing, professionalism and respect).
- Remember that sometimes things need to be **escalated** and reported externally, irrespective of impact on staff, e.g. child safety.





Questions?



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