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SafeWork SA

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**HOUSE OF REPRESENTATIVES  
STANDING COMMITTEE ON  
EDUCATION AND EMPLOYMENT  
REVIEW INTO BULLYING IN THE  
WORKPLACE**

SafeWork SA Submission

29 June 2012



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## The role of SafeWork SA

In South Australia, workplace bullying falls within the scope of the occupational health, safety and welfare (OHSW) legislation. As the South Australian Government agency that administers the OHSW and industrial relations (IR) legislation, SafeWork SA plays a key role in addressing bullying in South Australian workplaces, including the investigation of complaints of workplace bullying through its OHS inspectorate functions.

As part of its day to day operations, SafeWork SA receives complaints of workplace bullying and conducts investigations of these matters in accordance with the provisions of the *Occupational Health, Safety and Welfare Act 1986 (SA)* (the OHSW Act). The OHSW Act allows SafeWork SA OHS inspectors to refer workplace bullying complaints to the Industrial Relations Commission of South Australia (the Commission) for conciliation or mediation where they have reason to believe that the matter is capable of resolution<sup>1</sup>. SafeWork SA is also able to prosecute an employer or an employee for a breach of the provisions of the OHS legislation.

SafeWork SA also provides education, support and information to employees, employers and the community in general on all aspects of workplace bullying.

## SafeWork SA – the statistics

Since 2006, the number of workplace bullying files opened by SafeWork SA has been steadily increasing (Figure 1). In 2011, the number of new files opened grew to 165, and it is anticipated that this trend will continue in 2012 and onwards.

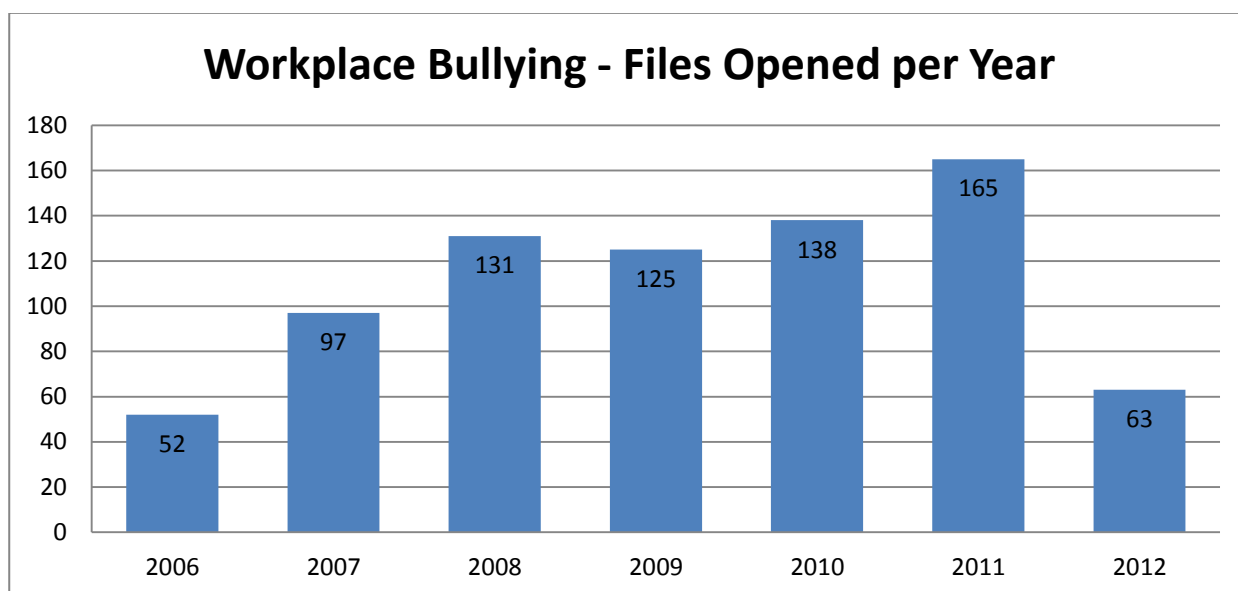


Figure 1

Figure 2 shows the number of days that SafeWork SA investigation files with a workplace bullying component remained open. Since 2011, workplace bullying files have been triaged to the Investigation Team of SafeWork SA, where they are allocated to OHS inspectors with the aim of investigating complaints as quickly as possible. This has been

<sup>1</sup> Section 55A of the *Occupational Health, Safety and Welfare Act 1986 (SA)*

effective in decreasing the number of days that bullying files have remained open over the years since 2006.

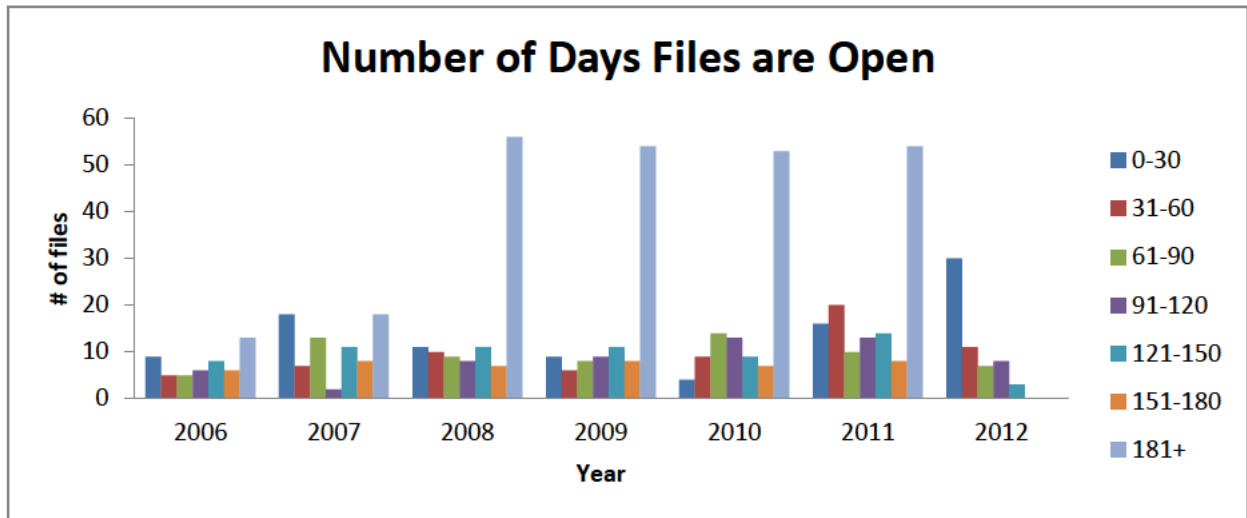


Figure 2

Analysis of the available data also indicates that since 2006, no prohibition notices have been issued and 174 improvement notices have been issued in matters identified as having a workplace bullying component to them.

SafeWork SA statistics also show that workplace bullying files rarely reach the stage of being considered for prosecution, with a total of 35 case conferences<sup>2</sup> taking place on bullying matters since 2006. This data may reflect the complexities of dealing with bullying matters as it is often difficult to establish whether or not the alleged behaviours constituted workplace bullying or rather were reasonable actions taken by an employer.

While prosecution briefs in relation to workplace bullying have been prepared by SafeWork SA in the past, no prosecutions have been pursued in South Australia to date.

Figure 3 indicates that the number of files referred to the Industrial Relations Commission of South Australia for mediation or conciliation under Section 55A of the OHSW Act has also been quite low.

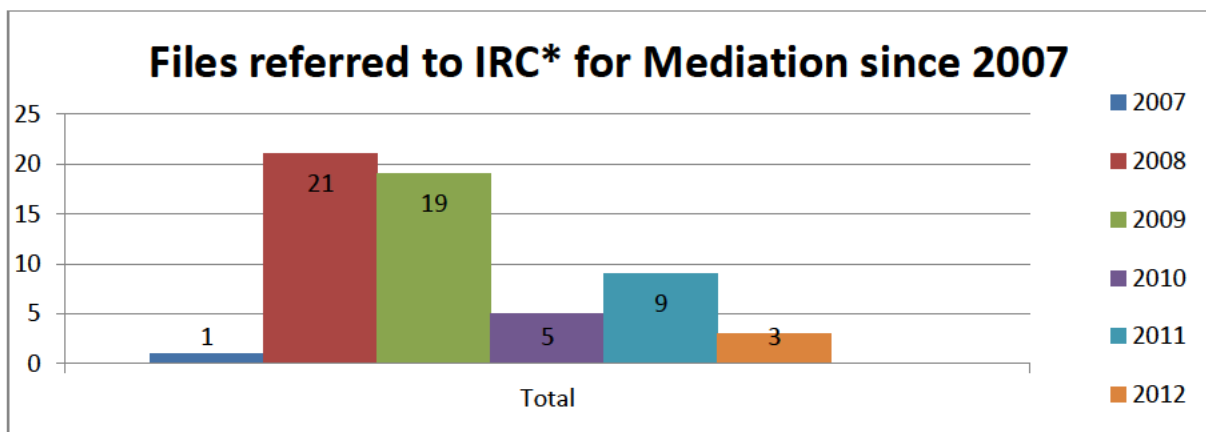


Figure 3: \*Industrial Relations Commission of South Australia

<sup>2</sup> Case conferences take place in order to establish whether the matter should be prepared for potential prosecution.

SafeWork SA is currently undertaking a further review into how to best manage complaints of workplace bullying with a view to building on the experience of OHS and IR Inspectors, and ensuring that SafeWork SA is approaching the investigation of bullying complaints in the most effective manner. A key challenge in this process is the complexity of the issues. The Inspectors face the practical difficulties of filtering a myriad of individual personalities and behaviours, emotions and attitudes in order to determine a 'neat' solution to the problem that all parties are happy with.

## **South Australia's current Occupational Health, Safety and Welfare legislation**

SafeWork SA administers the OHSW Act, which regulates the prevention of bullying in workplaces in accordance with Sections 19, 21 and 55A.

Section 19 of the OHSW Act requires that all employers provide a safe working environment, and this applies to all areas, including the employees' mental health and wellbeing.

Section 21 (1a) of the OHSW Act requires that an employee must take reasonable care to avoid adversely affecting the health or safety of any other person through an act or omission at work.

Within the parameters of Section 19 of the OHSW Act, SafeWork SA attempts to address workplace bullying as it does all other occupational hazards in the workplace. In addition to this, Section 55A of the OHSW Act makes express reference to 'inappropriate behaviour towards an employee'. The provision does the following:

- defines 'bullying' as repeated and systematic behaviour that a reasonable person, having regard to all circumstances, would expect to victimise, humiliate, undermine or threaten the employee or employees;
- provides exclusion provisions, including that reasonable administrative action taken in a reasonable manner by an employer in relation to an employee's employment, is not considered as coming within the scope of the provision;
- allows for an investigative process by an inspector to occur once a complaint has been received;
- provides for the referral of a complaint, if there is no resolution after reasonable steps have been taken by the parties, to the Commission for action within five days after the matter has been referred; and
- confers jurisdiction on the Commission to mediate or conciliate a bullying dispute once referred by an inspector.

Inappropriate Behaviour as defined under Section 55A does not:

- include very severe and isolated incidences, that is, one-off incidents of bullying;
- include all persons within a workplace, such as independent contractors and volunteers;
- provide any direction in relation to the prevention of bullying; or
- provide power to the Commission to make orders in relation to the matters that have been referred.

Section 55A came into effect in August 2005. The provisions arose from a recommendation in the Stevens Report.<sup>3</sup> In effect, Section 55A establishes a mechanism to facilitate bullying investigations and ultimately to give the inspectorate the capacity to refer a complaint to the Commission for resolution.

In general, the existing South Australian regulatory framework provides a useful framework for dealing with workplace bullying. However, certain limitations do exist.

SafeWork SA notes that in due course (once the *Work Health and Safety Bill 2011 (SA)* is passed by the South Australian Parliament), nationally harmonised work health and safety (WHS) legislation will replace the South Australian OHSW Act and Regulations. However, SafeWork SA provides the following information based on its current provisions in order to assist the committee in its consideration of workplace bullying in the broadest context.

### **Definition of bullying**

As there is currently a definition of 'inappropriate behaviour' in Section 55A of the OHSW Act, SafeWork SA is able to make the following comments in relation to the issue of defining 'bullying'.

The definition of 'inappropriate behaviour' in Section 55A clarifies its intended scope. The definition of bullying can also potentially assist the dispute resolution process. At the very least, it can act as a support for preventative measures to be established in workplaces as well as providing a heightened awareness among employers and employees of the consequences of inappropriate workplace behaviour. However, the use of a statutory definition of bullying does necessitate a regular review of the provision given that bullying is a developing area of law. For example, the developing issue of cyber bullying was not necessarily contemplated when s55A was included in the OHSW Act.

One of the limitations of s55A has been noted by SafeWork SA in relation to the measure of what constitutes 'systematic' bullying behaviour. Systematic refers to having, showing or involving a method or plan. Whether behaviour is systematic or not depends on an analysis of the circumstances of each individual case with the general guideline in mind. Experience suggests that, in practice, this measure is difficult to ascertain or apply.

In 2008, SafeWork SA undertook a review of Section 55A<sup>4</sup>. One of the issues considered during the review was that there was further potential for broadening the definition to cover severe and isolated incidents. As the provision requires the inappropriate behaviour be repeated and systematic, it therefore does not extend to isolated and potentially severe incidents. An analysis of the closed file bullying complaints reveals that almost a quarter of those complaints did not fall within the scope of the provision<sup>5</sup>. This included a proportion of cases where the alleged incident was serious, but not repeated and systematic.

In the 2008 review, the question arose as to whether or not the broadening of the coverage of the provision to include severe and isolated incidents would be a positive

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<sup>3</sup> Stevens, G 2002 report of the *Review of the South Australian Industrial Relations System* pp127-128.

<sup>4</sup> 'Final Report on the Review of Section 55A', prepared by SafeWork SA to the Hon Paul Caica MP, Minister for Industrial Relations, September 2008

<sup>5</sup> Ibid.

development to this area of law. There have been competing views on this issue<sup>6</sup>. Some stakeholders have indicated in the past that severe and isolated incidents do occur in workplaces and should be covered by a definition of bullying. Others thought that there should be no change to the provision.

Significantly, such isolated incidents can already be dealt with pursuant to the general provisions of the OHSW Act given the primary duties under the legislation to ensure the health and safety of employees, in particular section 19, which will be similarly reflected under the harmonised WHS legislation.

There have also been suggestions that the scope of the bullying provisions within the OHSW Act be broadened to expressly include all persons at a workplace, rather than being limited to employees only.

The current provision applies to inappropriate workplace behaviour directed towards an employee or group of employees. However, it is recognised that a workplace can have interactions with persons other than employees, such as volunteers, labour hire workers and contractors. The question is whether or not they should be expressly captured by the bullying provision. Within this context, SafeWork SA notes that the harmonised work health and safety laws include a definition of 'worker' rather than 'employee' and moves away from the traditional employer/employee relationship when placing work health and safety duties on persons conducting a business or undertaking.

In accordance with Section 19, the principal focus of the OHSW Act is the requirement of the employer to ensure that, so far as reasonably practicable, an employee is safe from injury and risks to health. In addition, Section 25 of the OHSW Act imposes duties on all persons not being an employer, employee or occupier of a workplace, for example a visitor to the workplace. Section 4(2) of the OHSW Act extends the coverage of bullying provisions to some labour hire and contractor relationships, and Section 4(3) extends the coverage to volunteers. However, potentially, these sections are not clear enough in their scope and coverage to expressly include labour hire workers, contractors and volunteers within the scope of the bullying provision.

That said, as noted, once the harmonised WHS legislation passes through the South Australian Parliament, this issue will be resolved as the duty of care provisions of the *Work Health and Safety Bill 2011* (WHS Bill) refer to a 'worker' rather than an 'employee'. Under the WHS Bill, a definition of 'worker' encompasses all employees, contractors, labour hire workers, volunteers and any other persons who carry out work in any capacity for a person conducting a business or undertaking.

### **Powers of the Industrial Relations Commission of South Australia**

SafeWork SA would also like to comment on the current arrangements that exist in South Australia, where referral of bullying disputes can be made by an OHS inspector to the Industrial Relations Commission of South Australia (the Commission) for mediation or conciliation. SafeWork SA notes that this arrangement will not be expressly provided for in the WHS legislation.

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<sup>6</sup> Ibid.

The Commission is a statutory authority conferred with jurisdiction to attempt to resolve the bullying matter on referral from an Inspector by virtue of Section 55A(3). The Commission has authority to hear and determine any matter relating to or arising from an industrial matter and any jurisdiction conferred by any other legislation, and has a high level of competence to deal with these issues.

The role of the Commission is to provide an approachable, low cost and effective service once a bullying matter is referred to it by an inspector. Once referred, bullying matters are dealt with by way of mediation and conciliation offered by the Commission. Mediation and conciliation is undertaken by experienced and qualified professionals who work with the parties to come to a mutually agreed resolution of the matter.

The Commission does not have arbitration powers to resolve bullying complaints. SafeWork SA notes that pursuant to Section 55A, a restriction is placed on the Commission in making recommendations where agreement cannot be reached between the parties. Therefore, the Commission cannot compel a change to take place in the workplace or for a resolution to occur if the parties do not agree to it. In addition, no penalties apply under Section 55A. In some cases this may be detrimental to the outcomes that the process has intended to achieve, as there is no further procedure to pursue if mediation or conciliation fails. In the case of mediation or conciliation failing, the only option to pursue further is to revert back to Section 19 for prosecuting an employer or Section 21 for prosecuting an employee.

During the 2008 review of Section 55A<sup>7</sup>, the question arose as to whether the Commission should be conferred with arbitration powers to resolve bullying complaints. However, there was divided opinion on the matter. Ultimately, Section 55A does not reduce the ability for SafeWork SA to issue improvement and prohibition notices, or to take other OHS compliance and enforcement actions, regarding inappropriate behaviour. Further, SafeWork SA is able to undertake prosecutions for a related breach of the OHSW Act, in particular breach of Sections 19 or 21, where such is warranted and appropriate.

## **Nationally harmonised Work Health and Safety legislation**

The South Australian WHS Bill, which, once passed, will replace the existing South Australian OHSW legislation, is currently before the South Australian Parliament. The WHS Bill does not contain a specific provision regarding workplace bullying similar to section 55A of the OHSW Act.

SafeWork SA notes that the provisions of the WHS Bill are sufficiently broad enough to capture those incidents of workplace bullying in what is anticipated to be an effective and perhaps more robust manner than does the current OHSW Act. The WHS Bill does this by defining 'health' as meaning 'physical and psychological health' and by including a Code of Practice on Workplace Bullying.

SafeWork SA notes that the definition of 'health' contained in the WHS Act currently exists in the Victorian occupational health and safety legislation. Further, Victorian legislation does not contain any specific bullying provisions similar to Section 55A of the OHSW Act. Despite the absence of such specific workplace bullying provisions, the Victorian regulator

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<sup>7</sup> Ibid.



was able to prosecute the perpetrators and employer responsible for an incident of workplace bullying which resulted in the death of an employee. The prosecution was successful with significant monetary penalties for all parties involved.

This demonstrates that a similarly broad scope of workplace duties prescribed under the WHS Bill will be sufficient in ensuring that workplace bullying is caught by these general OHS provisions.

In addition to the general provisions of the WHS Bill, a yet to be finalised Code of Practice on Workplace Bullying will define the scope of the provision as it relates to workplace bullying.

Under the WHS Bill, Codes of Practice are intended to provide practical guidance for duty holders to achieve standards of health, safety and welfare. It is also intended that Codes of Practice will be admissible in court proceedings. For example, a court may regard a Code of Practice as evidence of what is known about a hazard, risk or control, and may also rely on it when determining what is reasonably practicable in the circumstances.

Compliance with the WHS Bill and WHS Regulations can be ensured by following another method other than the one specified in the Code of Practice if it provides an equivalent or higher standard of work health and safety than the Code of Practice. An inspector may refer to an approved Code of Practice when issuing an improvement or prohibition notice.

It is expected that a Code of Practice on Workplace Bullying will strengthen the definition of psychological health in the WHS Bill and it will also have evidentiary status in court proceedings. The Code of Practice will provide a constructive tool for inspectors to evaluate the policies, procedures and practices of workplaces in the area of psychological health. It will also assist businesses and workers in identifying their rights and obligations when it comes to inappropriate behaviour in the workplace.

The details of the finalised Code of Practice on Workplace Bullying are yet to be released, with the final version expected to be available in the second half of 2012.

SafeWork SA notes that once the national work health and safety legislation is enacted in all of the states and territories, this will greatly improve the national evidence base on workplace bullying due to the uniform statistic gathering and record keeping provisions across the whole of Australia.

## **Education and support services provided by SafeWork SA**

SafeWork SA provides the following means of providing education and support services to prevent and respond to workplace bullying:

- The SafeWork SA Help Centre receives and responds to enquiries or complaints from members of the public in regards to workplace bullying. This could be via phone-call, written or face-to-face.
- Inspectorial interventions – this may include preventative measures, investigation and enforcement activities where required.
- Information sessions on workplace bullying are conducted by SafeWork SA staff to external stakeholders on request.

- The prevention and management of workplace bullying, including cyber-bullying, features prominently during the programme of events during the yearly SafeWork Week event.
- The SafeWork SA website features information on bullying including practical guides for both employers and employees on the prevention and dealing with workplace bullying.

SafeWork SA has also been a research partner in a project to identify the means to objectively measure and examine psychosocial risk factors, including bullying, in South Australian workplaces. The University of South Australia, Centre for Applied Psychological Research in partnership with SafeWork SA and SA Health was awarded an Australian Research Council Linkage grant for research entitled “State, organisational, and team interventions to build psychosocial safety climate using the Australian Workplace Barometer and the StressCafé”.

The project utilises the Australian Workplace Barometer which is a national survey measuring psychosocial risk factors that impact on people’s wellbeing and effectiveness at work. The survey covers issues such as:

- Demands and pressure
- Resources, supports and control
- Job satisfaction and engagement
- Bullying and violence
- Work-family balance
- Physical health and psychological wellbeing
- Burnout and cardiovascular risk

The results of this national surveillance project shifts attention away from lag indicators, such as compensation claims, to assess lead indicators and psychosocial risk factors to identify groups at risk for targeted prevention and intervention. This research has looked at the Psychosocial Safety Climate as a lead indicator of common psychosocial risk factors at work and ultimately the psychological health and safety of workers.

This research is still in progress, with the lead researcher being Professor Maureen Dollard, University of South Australia, Centre for Applied Psychological Research.

Given the significant negative impact that workplace bullying can have both on the individual and the workplace, SafeWork SA would welcome further opportunities for education and support services to be provided to the community, particularly in regards to the prevention of bullying.

## **Workplace bullying policies and procedures**

Section 20 of the OHSW Act requires employers to prepare and maintain OHS policies in the workplace. Therefore, if bullying exists or there is the potential for bullying to occur in the workplace, SafeWork SA would expect workplace bullying policies and procedures to be developed and adhered to by the employer. This policy should be developed in consultation with staff and include both strategies for the prevention of workplace bullying as well as resolution processes for workplace bullying reports.

## **Interaction between OHS and Industrial Relations**

Workplace bullying is an issue that is currently dealt with by way of OHSW legislation. SafeWork SA currently employs OHS Inspectors to respond to OHS matters, including workplace bullying complaints. It is the role of the OHS Inspectors to attend to workplace bullying complaints, to investigate these matters, and to ultimately facilitate the resolution of the dispute or refer it to the Commission for conciliation or mediation.

SafeWork SA also employs IR Inspectors, whose role is to respond to and investigate IR complaints and other matters that are governed by both the South Australian and national IR legislation.

In its experience as an agency that administers both the IR and OHS legislation, SafeWork SA considers that workplace bullying may be best handled by addressing the perceived 'gap' that currently exists between the management of IR and OHS matters and that a more holistic approach to bullying issues may be required.

The reason for this is that although bullying presents an OHS risk to the complainant's psychological health and safety, the assessment and investigation of the complaint requires a skill set that is quite different to those involved in addressing physical hazards.

Further to this, it can also be suggested that intrinsically, bullying is to some extent an IR issue with a focus on human resources and people management. As such, it may be more effectively dealt with by way of grievance procedures or formal processes that are more closely aligned with behaviour management practices rather than OHS.

Unlike physical hazards that are common to types of OHS complaints outside of bullying, the ability to recognise and respond to psychosocial risks, such as bullying in the workplace can be a more complex and challenging process. In order to overcome the difficulties in assessing psychosocial risks, it is important for inspectors handling bullying complaints to have a good working knowledge of the factors that lead to, and increase the likelihood of such hazards arising in the workplace.

Building on the findings of the Australian Workplace Barometer, which is a national survey measuring psychosocial risk factors that impact on people's wellbeing and effectiveness at work, a training program is planned to be run by the Centre of Applied Psychological Research for SafeWork SA OHS inspectors this year. It is intended that this program will support the OHS Inspectors' knowledge base in relation to inappropriate behaviour and in particular to recognise and respond to psychosocial risk in the workplace.

## **APPENDIX 1**

### ***Occupational Health, Safety and Welfare Act 1986***

#### **Section 55A—Inappropriate behaviour towards an employee**

- (1) For the purposes of this section, bullying is behaviour—
  - (a) that is directed towards an employee or group of employees, that is repeated and systematic, and that a responsible person, having regard to all the circumstances, would expect to victimise, humiliate, undermine or threaten the employee or employees to whom the behaviour is directed; and
  - (b) that creates a risk to health or safety.
  
- (2) However, bullying does not include—
  - (a) reasonable action taken in a reasonable manner by an employer to transfer, demote, discipline, counsel, retrench or dismiss an employee; or
  - (b) a decision by an employer, based on reasonable grounds, not to award or provide a promotion, transfer, or benefit in connection with an employee's employment; or
  - (c) reasonable administrative action taken in a reasonable manner by an employer in connection with an employee's employment; or
  - (d) reasonable action taken in a reasonable manner under an Act affecting an employee.
  
- (3) If—
  - (a) an inspector receives a complaint from an employee that he or she is being bullied or abused at work; and
  - (b) the inspector, after an investigation of the matter, has reason to believe that the matter is capable of resolution under this section, the inspector may—
  - (c) take reasonable steps to resolve the matter between the parties himself or herself; and
  - (d) if the matter remains unresolved after taking the steps required under paragraph (c), after consultation with the parties, refer the matter to the Industrial Commission for conciliation and mediation.
  
- (4) A reference under subsection (3) will be made by written instrument that complies with any prescribed requirements.
  
- (5) The inspector must ensure that the parties are furnished with a copy of any reference under subsection (3).

- (6) If a matter is referred to the Industrial Commission under subsection (3), the Industrial Commission must attempt to resolve the matter by—
  - (a) conciliation; or
  - (b) mediation,as the Industrial Commission thinks fit.
- (7) For the purposes of this section—
  - (a) conciliation is a process where the parties meet with the conciliator with a view to the conciliator identifying the issues and resolving the matter by making recommendations if the matter is not settled by agreement; and
  - (b) mediation is a process where the mediator seeks to resolve the matter by facilitating an amicable agreement between the parties.
- (8) The Industrial Commission must seek to commence any conciliation or mediation within 5 business days after the matter is referred to the Industrial Commission under this section.
- (9) For the purposes of any conciliation or mediation, the Industrial Commission may (subject to subsection (10))—
  - (a) interview the parties separately or together; and
  - (b) inform itself in any other way as it thinks fit.
- (10) The person undertaking a conciliation or mediation must—
  - (a) at the request of a party, attend at a workplace (on at least 1 occasion) for the purposes of the conciliation or mediation;
  - (b) deal with the matter with a minimum of formality.
- (11) For the purposes of any conciliation, the conciliator may call a compulsory conference of the parties.
- (12) The Industrial Commission may at any time bring any conciliation or mediation to an end if the Industrial Commission considers that the conciliation or mediation will not result in the resolution of the matter.
- (13) Subject to subsection (14), nothing said or done in any conciliation or mediation under this section may subsequently be given in evidence without the consent of the parties to the conciliation or mediation.
- (14) The terms of any agreement between the parties to any conciliation or mediation may be given in evidence in subsequent proceedings (without the restriction imposed by subsection (13)).
- (15) The Industrial Commission must inform the Department when any conciliation or mediation under this section is concluded or brought to an end.

- (16) The Industrial Commission and the Department may consult from time to time about the processes and arrangements that should apply under this section, and prepare and publish information and guidelines to assist persons who may become involved in conciliation or mediation under this section.
- (17) The President of the Industrial Commission may make rules relating to—
  - (a) representation before the Industrial Commission in connection with the operation of the section; or
  - (b) the conduct of the parties to a conciliation or mediation under this section; or
  - (c) any other matter that, in the opinion of the President, is necessary or convenient for the purposes of any conciliation or mediation under this section.