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Centre for Regulatory Studies

15 April 2013

Committee Secretary
House of Representatives Standing Committee on Education and Employment
PO Box 61021
Parliament House
Canberra ACT 2600

Dear Committee Members,

Inquiry into Fair Work Amendment Bill 2013 - Anti-bullying Measures

I would like to thank the Committee for the opportunity to make a submission on the Fair Work Amendment Bill 2013 (the 'Bill').[1] My submission is restricted to commenting on the anti-bullying measures contained in the Bill.

Executive Summary

The proposed anti-bullying measures contained in the Bill are a bold reform to a wicked problem. They should be provided with every opportunity to succeed. This submission identifies a number of issues critical to the success of the measures that should be considered and addressed in their development, implementation and ongoing administration. Specifically:

- It is important that the Fair Work Commission ('FWC') is adequately resourced to cope with the large volume and complex nature of applications it is likely to receive.
- Applicants to the FWC should be required to seek to resolve the matter through his/her employer's internal complaint management processes before making an application to the FWC, or to state in the application why recourse to the processes is not appropriate in the circumstances.
- FWC should be required to publish service standards for dealing with applications. Alternatively or in addition, there should be a legislated requirement for the FWC to advise parties to an application of its status and next steps at regular intervals of, say, every 30 or 60 days.
- FWC should be required to negotiate appropriate administrative arrangements with each of the federal, state and territory work health and safety ('WHS') regulators governing their respective roles and responsibilities with respect to referred matters, and to the processes which will be employed once a matter is referred. These arrangements should be clearly communicated to applicants and other interested parties.
- It is important that administrative arrangements exist between the FWC and WHS regulators to avoid duplication and overlap in their management of workplace bullying complaints.
- Applicants to the FWC should be required to advise the FWC, in their application, of the outcomes of any prior investigation of the matter by another regulator or government authority, and why the FWC should consider the matter notwithstanding that prior investigation.
- The new measures (if enacted) should be the subject of a rigorous, broad and independent evaluation

[1] An identical submission also is being made to the Senate Education, Employment and Workplace Relations Committee inquiring into the Bill.

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Introduction

Workplace bullying is an issue that is socially and economically important, technically complex and industrially sensitive. It also is an issue about which there are genuine differences of opinion. As the evidence before the House of Representatives Education, Employment and Workplace Relations Committee (the 'Committee') made clear, while there is consensus on the need to act, there is no consensus on what is the 'best' or 'right' approach. Indeed, workplace bullying has all the characteristics of what has come to be known as a 'wicked problem'.[2] It is a plural, dynamic and complex phenomenon whose causes are multi-factorial; its impacts on individuals are variable and specific to the person, context and circumstances; and potential solutions are numerous and often untested.

Developing and implementing policy solutions to such 'wicked problems' sometimes requires a level of creativity and bravery. Viewed in this context, the proposed anti-bullying measures contained in the Bill are a bold reform to a difficult and challenging problem. They should be provided with every opportunity to succeed.

The focus of this submission is on bringing to the attention of the Committee (and through the Committee, to the responsible Minister and Department) issues critical to the success of the measures that should be considered and addressed in their development, implementation and ongoing administration.

This submission is based on my experience working with WorkSafe Victoria where, as General Manager, Strategic Programs and Support, I oversaw the development and implementation of new operational responses to address workplace bullying. It also is based on research I have recently undertaken as part of my PhD examining the harmonisation of Australia's WHS laws.

Managing and Meeting Expectations

The anti-bullying measures address a need identified by the Committee. The Committee noted that while there are many existing regulatory avenues through which workplace bullying can be addressed, many of these can prove to be lengthy and adversarial with no clear processes and outcomes. It recommended to the Australian Government that it provide individuals with a new and timely mechanism to help them resolve bullying matters quickly and inexpensively. The philosophy behind these reforms has been well received by most stakeholders. Victim support groups and the union movement in particular have been vocal in expressing their support for the reforms and their hope that they will lead to quick access to processes that can deal effectively with the problem. Passage of these reforms is likely to create high expectations in several quarters - disappointing these expectations risks accentuating the psychological harm suffered by victims. Therefore, managing and meeting expectations is critical to reform success.

In light of these high expectations, it is reasonable to assume that unions and others may recommend to people suffering workplace bullying that their first avenue be an application to the FWC pursuant to the new measures contained in the Bill. As a result, it is not unreasonable to expect that the FWC will receive a significant number of applications. This was the experience of WorkSafe Victoria when it introduced its new operating model for dealing with workplace bullying.[3] Indeed, it is possible that the FWC could become the de facto clearinghouse for workplace bullying complaints.

It is therefore important that the FWC is adequately resourced to cope with the volume and complexity of applications likely to be received. The Explanatory Memorandum states that the financial impacts of the proposed measures will be announced as part of the 2013-14 Budget. It is hoped that the Budget provides adequate resourcing and does not underestimate the volume and complexity of the task that has been conferred on the FWC. Not only will the FWC need additional staff to receive, process, investigate and hear the applications, it also may need different (additional) skills sets to those already possessed.

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[2] See for example: Brian Head and John Alford, 'Wicked Problems: Implications for Policy and Management', paper delivered at the Australian Political Studies Conference, 6-9 July 2008, Brisbane, Australia.

[3] On implementation of its new operating model, WorkSafe Victoria experienced a spike in complaints of workplace bullying compared to the historical trend.

It also is possible that the promised quick and independent FWC process may induce some workers to apply for an order instead of availing themselves of their employer's internal WHS and complaints management processes. This would be an unwelcome development. It should be the preference for these matters to be resolved at the workplace by the workplace parties themselves. In many instances it would not be unreasonable for the FWC to refer an applicant back to the employer's internal complaint management processes as the first step in trying to resolve the matter. It might therefore be appropriate for the anti-bullying measures to require the applicant to have first sought to resolve the matter through his/her employer's internal complaint management processes before making an application to the FWC, or to state in the application why recourse to those processes is not appropriate in the circumstances.

The Bill requires the FWC to start to deal with the application within 14 days after the application is made (proposed section 789F). The note to the section states that this could include informing itself of the matter under section 590, conducting a conference under section 592, and holding a hearing under section 593. However, no time frames are specified by which any of these steps must be taken, or the process completed. While I am not necessarily arguing that such timeframes should be legislated (the issues to come before the FWC are likely to vary in complexity and sensitivity making such timeframes difficult to specify), it is important that the high expectations likely to have been created by these reforms are managed sensitively and appropriately. The FWC should be required to publish service standards by which it plans to deal with these issues. Alternatively (or in addition), there could be a legislated requirement for the FWC to advise parties to an application of its status and next steps at regular intervals of, say, every 30 or 60 days. This also would encourage proactive case management by the FWC.

Minimising Overlap and Confusion

In the Second Reading Speech for the Bill, the Minister for Employment and Workplace Relations, Financial Services and Superannuation states: 'The Bill is designed to compliment, not replace, existing work health and safety obligations on employers and workers and work done by work health and safety regulators.'

This is an important and appropriate policy setting. Our knowledge and understanding of workplace bullying is not at the stage yet where what is the 'best' or 'right' approach is well known and accepted, and the scope for innovation small. It is an issue that has benefited, and will continue to benefit, from the continuous cycle of experimentation, observation, review and improvement that comes from having multiple state based regulatory regimes.

Having decided (rightfully in my opinion) to retain federal, state and territory WHS regulatory regimes' coverage of workplace bullying, it is important that overlap and confusion between existing WHS regulatory regimes and the new FWA anti-bullying measures are minimised (if not avoided all together).[4]

Although not expressly provided for in the proposed amendments, it is clear that the FWC may refer a matter to a WHS regulator where it considers it necessary and appropriate.[5] The nature of that referral, and the respective roles, responsibilities and obligations of the FWC and the WHS regulator with respect to a referred matter, are not clear. Will the FWC retain an oversight role? Is the WHS regulator expected to keep the FWC involved and/or informed? Can the WHS regulator refuse a referral (for example, because it has already investigated the matter)? The movement of matters between regulators creates the risk of matters 'falling between the cracks', and of mis-matched and disappointed expectations (for example, because the WHS regulator's investigation may be less comprehensive or timely than the FWC led the applicant to expect). It is essential that the FWC negotiates appropriate arrangements with each of the federal, state and territory WHS regulators and that both the FWC and regulators are clear and consistent to applicants and other interested parties as to their respective roles and responsibilities and to the processes which will be employed once a matter is referred.

The ability of the FWC to refer matters to WHS regulators is facilitated by proposed section 789FH that states that the provision in *the Work Health and Safety Act 2011* (Cth) (and its corresponding provision in

[4] Concerns with respect to overlap and duplication also exist with respect to the ability of victims of workplace bullying to bring a claim under federal, state or territory anti-discrimination legislation or for 'adverse action' under the FWA. This submission focuses on overlap with federal, state and territory WHS laws only.
[5] See paras 91, 92 and 117 of the Explanatory Memorandum.

corresponding state and territory WHS laws) that would ordinarily prohibit a proceeding from being commenced or an application being made or continued under those WHS laws in relation to the bullying, do not apply in relation to an application under section 789FC. However, section 789FC also will make it possible for a person to initiate multiple actions in relation to the same matter, one under the FWA and one under WHS laws. If this occurs which process should take priority or precedence? Or is it envisaged that the two processes would operate simultaneously? Here too it is important that administrative arrangements exist between the FWC and WHS regulators to avoid duplication and overlap in their management of workplace bullying complaints.

Section 789FF(2) identifies matters that the FWC must take into account when considering the terms of an order. Included in these matters are outcomes of an investigation into the matter undertaken by another person or body. Presumably this includes an investigation undertaken by another regulator such as a federal, state or territory WHS regulator. The amendments therefore would permit a person to make an application to the FWC about a matter investigated and concluded by another regulator. This raises an issue about fairness to the employer and other persons the subject of the application. While the prior investigation and its findings/conclusions would presumably become evident in the course of the FWC's investigation of the matter, it could nevertheless create a level of uncertainty, confusion and stress for the people involved. Measures to guard against abuse (intentional or unintentional) of the FWA process should be considered. One possible measure would be to require applicants to advise the FWC, in their application, of the outcomes of any prior investigation of the matter by another regulator or government authority, and why the FWC should consider the matter notwithstanding that prior investigation.

Evaluation

It is vitally important that the new measures (if enacted) are the subject of rigorous and broad evaluation. Such an evaluation should extend beyond a mere desk top exercise that counts the number of applications and their outcomes, and the time within which they are resolved. Rather, it should extend to understanding the impact of the FWC process on the culture and behaviour of the workplaces involved, and the extent to which the FWC's processes and orders produced safer and more productive workplaces. The resources required to conduct a proper evaluation are not insignificant. However, given the social and economic impacts of workplace bullying, it is important that a timely, rigorous and independent evaluation of the proposed new anti-bullying measures be made.

Conclusion

The anti-bullying measures contained in the Bill are a bold reform. They also are reforms that are likely to (arguably already have) raised expectations about what the law will be able to achieve in addressing instances of workplace bullying. Therefore, it is important that the resources devoted to their implementation are commensurate with the importance of the issue and volume and complexity of matters they may bring to the surface. It also is important that comprehensive arrangements are put in place between the FWC and WHS regulators to ensure the reforms do not create unnecessary overlap and confusion with existing federal, state and territory anti-discrimination, OHS and workers compensation regimes, and the blurring of roles and responsibilities that has come to characterise the operation of Australia's federal system of government in many other areas. The suggestions contained in this submission are designed to achieve this outcome. Most of them do not require change to the wording of the proposed amendments. Most can be dealt with administratively. However, it is submitted that it is essential that these administrative arrangements are put in place before the proposed amendments commence operation to give these important and promising reforms every chance of success.

Yours sincerely

Eric Windholz