INQUIRY INTO WORKPLACE BULLYING

Terms of Reference

The following submission outlines a few of the issues for consideration when dealing with the regulation or control of workplace bullying.

The prevalence of workplace bullying in Australia and the experience of victims of workplace bullying.

It's important to remember that for all the reported bullying that we know about, the 'dark figure' of unreported bullying could be much larger. Some of the reasons a person might choose to refrain from complaining are outlined below. Solutions dealing with workplace bullying must bear these in mind.

For some people the risk associated with making a complaint is too high. Many workers are critically reliant on a single income and cannot afford any period of unemployment. If a worker is in such a situation, it is easy to see how they might be uneasy about making a bullying complaint – for fear they will lose their job. Although the law can protect workers from unfair dismissal, this would be little consolation for someone who could not afford the lack of income in the period between lodging the claim and it being settled, if proved. It would be less consolation for someone who is subject to a probationary period, where the employer is legally entitled to dismiss an employee without reason and with little notice. As Beale and Hoel suggest, the poverty and desperation of workers will prevent them from making free choices about who they work for.[1]

A person employed casually, on a short term contract or subject to a probationary period might fear that they will be squeezed out of an organisation after making a complaint if the alleged bully is preferred or held in higher regard than the complainant, even if the complaint has merit.

A further complicating factor exists for those workers who are in niche industries. Making a bullying complaint when there is a limited number of employment options might be too risky to consider, regardless of the veracity of the complaint.

An Australian study of OHS inspectorates found that fear of victimisation had a "chilling effect on the willingness of workers to make complaints or act as witnesses even though any recriminatory act represents a clear breach of the anti-victimisation provisions in the OHS legislation in all jurisdictions"[2]. The fact that complainants and witnesses were unable to maintain anonymity also presented a difficulty.[3]

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[1] David Beale and Helge Hoel, 'Workplace bullying and the employment relationship: exploring questions of prevention, control and context' (2011) 25(1) *Work Employment Society* 5, at p13.
[2] Richard Johnstone, Michael Quinlan and Maria McNamara, 'OHS inspectors and sychosocial risk factors: evidence from Australia' (2011) 49 *Safety Science* 547, p553.
[3] Ibid, p553.

The role of workplace cultures in preventing and responding to bullying and the capacity for workplace-based policies and procedures to influence the incidence and seriousness of workplace bullying.

Bullying is not just about individual human behaviour and asking people to be respectful of each other. A Norwegian study has shown that a variety of job stressors and destructive forms of leadership may provide "fertile ground" for workplace bullying.[4] The job stressors of role conflict, role ambiguity, interpersonal conflict, job demands and decision authority all showed strong correlations with bullying, and bullying was more likely to evolve in workplaces where there exists active (tyrannical) and passive (laissez faire) destructive forms of leadership.[5] The study also found that bystanders reported their workplaces to be nearly as stressful as those employees who were directly bullied.[6] Being aware of, and addressing, job stressors within the culture, structure and leadership of a workplace may also be important factors in reducing the incidence of workplace bullying.

Some argue that managers face a credibility problem in tackling bullying issues in the workplace.[7] To begin with, several studies have shown that managers are the main perpetrators of bullying[8]. Also, workers may be unconvinced that managers will investigate impartially, take tough action and discipline other managers.[9] Management have been known to blame victims and dismiss behaviour as being a personality conflict, employee incompetence, insubordination or a strong management style[10], or will initially support the worker but will later close ranks and support the manager[11]. Further, those tasked to deal an allegation of bullying are usually employees of the same organisation, and therefore have their own workplace concerns and career objectives to think of.[12] These people may not wish to jeopardise their own promotion, or may be reluctant to pursue bullying allegations for fear of being victimised themselves.[13]

If they are to be effective, workplace-based policies and procedures must deal with job stressors as well as interpersonal relations, must provide real options for resolving a complaint, must be dealt with impartially, and must be taken seriously by management at all levels. Once a complaint has been made, an independent third party might be better placed to deal with allegations than someone who may have a conflict of interest.

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[4] Lars Johan Hauge, Anders Skogstad and Ståle Einarsen, 'Relationships between stressful work environments and bullying: Results of a large representative study' (2007) 21(3) *Work & Stress* 220, p239.

[5] Ibid, p236.

[6] Ibid, p240.

[7] David Beale and Helge Hoel, 'Workplace bullying, industrial relations and the challenge for management in Britain and Sweden' (2010) 16(2) *European Journal of Industrial Relations* 101, p104.

[8] Ibid. See also Helen LaVan and Wm. Marty Martin, 'Bullying in the U.S. workplace: normative and process-oriented ethical approaches' (2008) 83(2) *Journal of Business Ethics* 147.

[9] Beale and Hoel, above n 7.

[10] LaVan and Martin, above n 8, p156-7.

[11] Beale and Hoel, above n 7, p10.

[12] Ibid, p10.

[13] Ibid, p8.

It is also worth considering the academic arguments of Beale and Hoel. They argue that there are two unchallenged assumptions about workplace bullying: (1) that it is within an employer's ability to eradicate bullying; and (2) that it is in the employers' interest to do so.[14] They make some interesting arguments about efficacy and potential of workplace policies and the significant limits capitalism places on them.[15]

Whether the scope to improve coordination between governments, regulators, health service providers and other stakeholders to address and prevent workplace bullying.

South Australia is the only jurisdiction to specifically refer to bullying in Occupational Health and Safety legislation, although all States' and Territories' safe work authorities offer publications on the topic. The model Work Health and Safety legislation (that has so far been adopted by ACT, NSW, NT, Qld, Tas and the Commonwealth) does not specifically refer to bullying but merely defines "health" as including "psychological health". In my view, if bullying is addressed consistently across all jurisdictions (whether through OHS legislation or by other means) it would make it easier for the general public to understand and for media reports to maintain relevancy across the country.

Whether there are regulatory, administrative or cross-jurisdictional and international legal and policy gaps that should be addressed in the interests of enhancing protection against and providing an early response to workplace bullying, including through appropriate complaint mechanisms.

As mentioned above, the model legislation does not refer to bullying in its text. It would not be inherently obvious to all employers and managers that bullying presents a risk to psychological health. Further, there is no common definition of 'bullying' across all States and Territories, although each of the safe work authorities'[16] have published guides on workplace bullying and refer to similar elements in their definitions. These are that bullying:

- Can be directed towards a worker or a group of workers
- Creates a risk to health and safety
- Involves unreasonable or inappropriate behaviour
- Is repeated
- Does not include reasonable management action.

Some specifically refer to a 'reasonable person' test. The difficulty with these definitions and what a 'reasonable person' might consider is appropriate behaviour is that:

1. What is unreasonable in one workplace may be reasonable in another[17]; and

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[14] Ibid, p7.
[15] Ibid, p13.
[16] WorkSafe Vic, WorkCover NSW, etc.
[17] Consider what might be appropriate in a stock trading firm versus a public library.

2. Some researchers argue that, within a single workplace, it is "unlikely that employer and employees would draw the line between what is reasonable and acceptable at the same place"[18].

If a regulatory approach to bullying is taken, there are many evidential issues that need to be considered in drafting legislation. For example:

- How would the burden of proof be satisfied in situations where bullying occurs on a psychological and manipulative level without witnesses?
- Should the burden of proof move from the complainant to the respondent once a prima facie case has been established? Should any presumptions be included?
- Does psychological injury have to occur before an organisation can be prosecuted or is the risk of psychological injury sufficient? Is it sufficient that anxiety or distress has resulted from the behaviour?[19]
  - If actual injury has to occur, what level of injury is required and what expert evidence will have to be called to prove the injury?
  - What burden of proof is required to link the behaviour with the injury, anxiety or distress?
  - If only a risk of injury is required, how is the risk determined?
- What defences should be available to organisations?
- Should a worker be required to mitigate their risk of injury by attending psychological counselling or reporting unacceptable behaviour early on?
- Should there be specific repercussions for making a false accusation of bullying?

Few studies have been done to look at the situation from the perspective of the alleged bully.[20] One practising occupational health and counselling psychologist has suggested that while in some cases there is a clear victim/bully relationship, it is much less common than the literature might suggest.[21] Further, when the full history and context is considered, it is often difficult to determine which employee is the bully and which is the bullied.[22] For example, Tehrani suggests that passive-aggressive bullies use "secrecy, manipulation, obsessional and evasive behaviours as tactics to get their own way [and] if the victim of passive aggression retaliates, the passive aggressive bully will frequently move into the position of hurt victim"[23]. OHS inspectors have reported finding it difficult to balance and resolve the competing claims of workers and their employers, particularly when

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[18] Helge Hoel and David Beale, 'Workplace bullying, psychological perspectives and industrial relations: towards a contextualized and interdisciplinary approach' (2006) 44(2) *British Journal of Industrial Relations* 239, p242.

[19] See Britain's *Protection from Harassment Act* 1997 and *Majrowski v Guy's and St Thomas' NHS Trust* [2006] UKHL 34.

[20] A notable exception is: Moira Fay Jenkins, *Workplace bullying: the perceptions of the target, the alleged perpetrator and the HR professional: integrating stakeholders' voices to improve practice and outcomes* (Doctor of Philosophy Thesis, University of Adelaide, 2011).

[21] Noreen Tehrani, 'Counselling and rehabilitating employees involved with bullying' in Ståle Einarsen et al (eds), *Bullying and emotional abuse in the workplace: international perspectives in research and practice* (Taylor & Francis, 2003), p280.

[22] Ibid, p282.

[23] Ibid, p282.

there is fault on both sides.[24] These issues also need to be considered when deciding whether a regulatory response is appropriate.

Whether the existing regulatory frameworks provide a sufficient deterrent against workplace bullying.

There do not seem to have been any prosecutions under the South Australian OHS legislation with regard to bullying and further investigation should be undertaken to determine why. Is it, for example because the legislation is deficient? Or is it because offences are too difficult to prove?

An Australian study conducted between 2003 and 2007 found that no prohibition notices had been issued by Queensland inspectors in relation to psychosocial issues and only one infringement notice had been issued for breach of an improvement notice.[25] Although improvement notices were being issued, they were being withdrawn by regional managers when employers appealed the notices. This was because of a lack of clarity of the legal requirements for proving psychosocial issues and a lack of confidence that the courts would uphold the decisions.[26] The study also found that no psychosocial prosecutions had been undertaken in Queensland.[27] Psychosocial issues were seen as messy, time consuming and difficult to resolve, and it was suggested that, by the time inspectors became involved, the situation had become irretrievable.[28]

The most appropriate ways of ensuring bullying culture or behaviours are not transferred from one workplace to another.

In some countries it has been shown that workplace bullying is primarily perpetrated by people in management or positions of power.[29] It is unclear whether this is the case in Australia. Insufficient inquiry into a person's management style and/or qualifications at the hiring stage could put workers at risk, as could the failure to properly monitor that person's management style during probationary periods and beyond. Consideration should be given to whether there should be guidelines for hiring or promoting workers to positions that involve supervision of other staff (this might include positions where workers approve rosters, decide work hours, conduct performance reviews or allocate work on a regular basis) and what minimum referee checks should be done. Consideration should also be given to whether employers should be required to periodically review a person's performance as a manager (and their management style) to detect bullying.

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[24] Johnstone, Quinlan and McNamara, above n , p554.
[25] Ibid.
[26] Ibid, p554.
[27] Ibid, p554.
[28] Ibid, p554.
[29] Beale and Hoel, above n 7; LaVan and Martin, above n 8.

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