



Centre for Regulatory Studies

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Committee Secretary  
House of Representatives Standing Committee on  
Education and Employment  
PO Box 6021  
Parliament House  
CANBERRA ACT 2600  
AUSTRALIA

Dear Committee Members,

### **Review into bullying in the workplace**

I would like to thank you for the opportunity to make a submission to the Committee's inquiry into workplace bullying. I also would like to congratulate both the Minister for Employment and Workplace Relations and the Committee on Education and Employment for conducting this inquiry. Inquiries such as this provide an excellent forum for the transfer of knowledge and practice among and between the jurisdictions which provide the fuel for innovation, experimentation and inter-jurisdictional learning in policy making. It is a demonstration of our federal system of government operating as intended.

#### Executive summary

This submission focuses on which level of government is best placed to address workplace bullying - an issue that is socially and economically important, technically complex, and industrially sensitive, and about which there are genuine differences of opinion. This submission argues that primary regulatory responsibility for addressing workplace bullying should remain with the States and Territories where different approaches can be trialled, lessons learned and shared, and a cycle of continuous improvement established. The Commonwealth's role should be to support, fuel and energise this process by supporting research into the issue and facilitating the transfer of knowledge and practice among and between the jurisdictions.

## Personal background

I am an Associate with the Centre for Regulatory Studies in the Faculty of Law at Monash University where I teach part time while undertaking a PhD investigating the harmonisation of Australia's occupational health and safety (OHS) laws. Prior to joining Monash University, I held a series of senior positions with WorkSafe Victoria, the States' OHS regulator and workers' compensation insurer, including General Counsel, Secretary to the Board and senior executive responsible for self-insurance. My last position was General Manager, Strategic Programs & Support in which I was responsible for managing the development and implementation of WorkSafe Victoria's OHS compliance framework (of Act, Regulations, Codes, guidance and rulings), and its strategic programs and projects to address the most prevalent and costly causes of workplace death and injury. One of those causes was workplace bullying, and in this role I oversaw the development and trialling by WorkSafe Victoria of a dedicated team of specially trained inspectors to target workplace bullying.

## The nature of workplace bullying

Workplace bullying is a serious and growing problem that imposes significant and unnecessary costs on workers, their family and friends, and employer and peers. It also imposes significant costs on society generally though the provision of medical and like support, social security payments, and lost productivity. As such it is both socially and economically important.<sup>1</sup>

Work (and therefore workplace health and safety and workplace bullying) also are central to our individual and collective sense of self and wellness. Management of the issue goes to the heart of the employment relationship, of inter-personal relationships within the workplace, and of overall workplace culture. Therefore, how we approach the regulation of workplace bullying has broad public policy, social, economic and legal dimensions that make it both technically complex and industrially sensitive.

There are genuine differences of opinion about how best to address the issue. There is a rich body of Australian and international research on the causes, impacts and potential strategies for addressing workplace bullying.<sup>2</sup> This research demonstrates that workplace bullying is a plural, dynamic and complex phenomenon – that its causes are often multi-factorial, its impacts individual and varied, and its potential solutions numerous and often untested (let alone rigorously evaluated).

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<sup>1</sup> For a recent assessment of the prevalence and cost to the community of workplace bullying see: Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Occupational Health and Safety* (2010), pp. 279-288.

<sup>2</sup> A search of some of the more prominent research databases bears this out. For example, searches for 'workplace bullying' during the past 10 years produced the following results: OSH References Collection – 259 references; CRCnetBase – 256 references; AGIS Plus – 68 references; LegalTrac – 65 references; and APA-FT – 77 references. These results underestimate the volume of information however, as they do not include the numerous monographs and government reports on the topic.

## OHS and harmonisation

Australia's OHS laws have recently undergone a process of harmonisation that was meant to see each jurisdiction enact a model uniform Work Health and Safety Act, Regulations and Codes of Practice. The goal was for these laws to be operational by 1 January 2012. Six months later, however, only five out of nine jurisdictions have harmonised OHS laws in place, most with differences. A number of hypotheses have been advanced to explain why the initiative has so far produced disappointing results. While some point to traditional federal/state tensions compounded by the recent election in a number of States of Conservative governments, the reality is that State governments of all political persuasions have both enacted and made changes to the harmonised laws in response to local needs and circumstances. Thus, the focus of analysis should be on what led local stakeholders to petition their State governments for changes to the harmonised laws. Here several forces are at play including each State's local economic circumstances and industrial relations culture and environment, resistance to change by local interests concerned to protect hard fought for rights and benefits, and a growing realisation among some stakeholders that harmonisation is complex, contested and involves trade-offs producing both winners and losers.<sup>3</sup> Also important have been genuine differences of opinion about how best to address issues that are complex and contested.<sup>4</sup> Generating a national consensus on how best to address workplace bullying is likely to be equally difficult.

## OHS, workplace bullying and federalism

One of the benefits of a federal system is that it acts as a generator of creativity, experimentation and inter-jurisdictional learning in policy making. Inter-jurisdictional competition over time encourages the development of policy innovations which, if successful, are diffused across jurisdictions to the benefit of all citizens: if one State's innovation is successful, the other States will observe and copy (or even improve upon) it; on the other hand if a State's innovation is unsuccessful, the other States will observe and avoid repeating the same mistakes. Numerous social and legal innovations commenced in one State before being improved upon and diffused across jurisdictions (e.g., road safety

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<sup>3</sup> The Regulatory Impact Statements prepared for the harmonised laws and a recent Productivity Commission report make clear that OHS harmonisation will produce both 'winners' and 'losers'. The 'winners' are the predominately larger multi-state businesses who will no longer have to comply with as many overlapping and duplicative regulatory requirements, workers and society generally; the 'losers' are the mostly smaller to medium sized single-state businesses who will bear additional transition and ongoing costs not matched by benefits to them. See: Access Economics, *Decision Regulation Impact Statement for Model Occupational Health and Safety Act*, Report for Safe Work Australia (2009); Access Economics, *Decision Regulation Impact Statement for National Harmonisation of Work Health and Safety Regulations and Codes of Practice* (2011); Productivity Commission, *Impacts of COAG Reforms: Business Regulation and VET, Research Report, Volume 2 - Business Regulation* (2012).

<sup>4</sup> For an examination of the harmonisation process and the different stakeholder interests see: Windholz, Eric, 'Evaluating the Harmonisation of Australia's OHS Laws: Challenges and Opportunities' (2010) 32(2) *Asia Pacific Journal of Public Administration* 137-162; Windholz, Eric, 'The Evolution of Australia's Harmonised OHS Laws: Questions for Today and Tomorrow' (2011) 39 *Australian Business Law Review* 434-450. For a summary of the status of the implementation of the Work Health and Safety Act, Regulations and Codes of Practice, see: COAG Reform Council, *Seamless National Economy: Report on Performance* (2011); Productivity Commission, *Impacts of COAG Reforms: Business Regulation and VET, Research Report, Volume 2 - Business Regulation* (2012); and the Safe Work Australia website - [www.safeworkaustralia.gov.au](http://www.safeworkaustralia.gov.au).

campaigns, environmental protections, and equal opportunity and anti-discrimination laws).<sup>5</sup> These benefits have been evident in the development of OHS law in this country also, as illustrated by the evolution and diffusion across jurisdictions of consultation, participation and representation, union right of entry, and enforceable undertaking provisions, for example. The dynamic process of experimentation, reflection and learning inherent in our federal system has served the continually changing and evolving area of workplace health and safety well.<sup>6</sup>

The benefits of a federal system are all ready being applied to the area of workforce bullying with a number of jurisdictions having conducted inquiries into the issue in which they examine and learn from the experiences of other jurisdictions. For example, Queensland appointed a number of OHS inspectors in 2004 to focus specifically on bullying and harassment and to mentor other inspectors. In part as a result of learnings from the Queensland experience, Victoria commenced a trial of a team of dedicated inspectors to target workplace bullying, which resulted in the full implementation of a dedicated bullying prevention inspectorate in 2009;<sup>7</sup> and the ACT Greens have recently proposed legislation for the creation of a dedicated bullying inspectorate there.<sup>8</sup> Another example is the Victorian government's enactment last year of amendments to its Crimes Act to make workplace bullying a criminal offence punishable by a jail term of up to ten years,<sup>9</sup> which change the former Queensland Labor government was investigating following.<sup>10</sup> Similar processes of evolution and diffusion also can be seen in the spread and fine-tuning of other bullying interventions such as guidance, workshops and the use of alternate dispute resolution mechanisms. The result is that currently there are a number of different models being employed for addressing the problem of workplace bullying from which lessons will be learned and future improvements made.

#### Regulating issues for which there is no consensus about 'best practice'

Productivity Commission Chair Gary Banks makes the point that a national approach is more likely to be warranted where the 'best' or 'right' approach to an area of regulation is relatively well known and

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<sup>5</sup> For an examination of the benefits of a federal system and examples of successful policy innovations that have been diffused across jurisdictions see: Twomey, Anne and Withers, Glenn, *Federalist Paper 1 - Australia's Federal Future*, A Report for the Council for the Australian Federation (2007) available at <http://www.caf.gov.au/Documents/AustraliasFederalFuture.pdf>. Also see Windholz, Eric, 'Federalism in Australia: A Concept in Search of Understanding' (2011) 17(2) *The Journal of Contemporary Issues in Business and Government* 1-18.

<sup>6</sup> See Walsh, Cliff, 'Competitive Federalism - Wasteful or Welfare Enhancing?' (Paper presented at the Productive Reform in a Federal System: Roundtable Proceedings, Canberra, 27-28 October 2005) 76; Windholz, Eric, 'The Evolution of Australia's Harmonised OHS Laws: Questions for Today and Tomorrow' (2011) 39 *Australian Business Law Review* 434, 442.

<sup>7</sup> For an overview of the initiatives see Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Occupational Health and Safety* (2010), Chapter 11- Psychological hazards.

<sup>8</sup> The ACT Greens [introduced](#) the *Work Health and Safety (Bullying) Amendment Bill 2011* in December 2011, but it did not pass through Parliament.

<sup>9</sup> *Crimes Amendment (Bullying) Act 2011* (Vic), colloquially known as Brodie's law after a young woman who committed suicide after being subjected to workplace bullying.

<sup>10</sup> Dick, Cameron, 'Reference group to examine workplace bullying', Media Release of the Minister for Education and Industrial Relations, 10 July 2011, available at <http://statements.cabinet.qld.gov.au/MMS/StatementDisplaySingle.aspx?id=75615>.

accepted and the scope for innovation small.<sup>11</sup> Should the evidence to the Inquiry confirm that there is no consensus about what is the 'right' or 'best' approach to workplace bullying, then great caution should be exercised before committing to a national approach. Moreover, even if we are confident that a 'best' or 'right' approach can be designed today, that may not be the case in the future. As Banks also observes, technological progress and social change will create new problems, change old ones, and render known policy solutions sub-optimal or obsolete, with the result that the law becomes old, out-dated and imposes unnecessary costs on business and society.<sup>12</sup> We already have seen this in the case of bullying with social media and new forms of communication increasing workplace bullying's complexity. A federal system guards against this by providing for a continuous cycle of state based experimentation, observation, review and improvement.

### Conclusion

OHS generally, and workplace bullying in particular, is socially and economically important, technically complex and industrially sensitive. It is a policy arena where what constitutes 'best practice' and 'good' regulation is heavily contested. It also is a policy area where technological progress and social change is constantly changing the nature of work and work practices, thereby creating new problems, changing old ones, and rendering known policy solutions sub-optimal or obsolete. It is a policy area where different people with different perspectives will come to different conclusions about the appropriate balances to be struck, which conclusions will change with changes in the social, economic, political and industrial environments in which they are made. It is with respect to such policy areas that the competitive dynamic underpinning Australia's federal system and the continuous cycle of experimentation, observation, review and improvement it engenders is of particular value. As a result, primary regulatory responsibility for addressing workplace bullying should remain with the States and Territories, with the Commonwealth – as it is through the current inquiry - supporting, fuelling and energising the process by funding research and facilitating the transfer of knowledge and practice among and between jurisdictions.

Yours sincerely

Eric Windholz

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<sup>11</sup> Banks G, "Regulation for Australia's Federation in the 21st Century" (Speech delivered at the Melbourne Institute/The Australian Economic and Social Outlook Conference, Melbourne, 2-3 November 2006) 9.

<sup>12</sup> *Ibid.*