

Submission to Australian Productivity Commission Workplace Relations framework inquiry

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I wish to make some comments about the anti-bullying laws outlined in Section 4.3 of the Commission's Issue Paper 4.

Broadly, I support the FWC anti-bullying provisions. They provide a further solution in the suite of strategies that are needed to reduce the burden of workplace bullying on Australian workers.

Utilisation of the provisions

The anti-bullying provisions are relatively new, only having been in operation for just over a year. Around 700 applications have now been received by the Fair Work Commission (FWC). Data on the submissions received by the FWC have been readily available at regular intervals, which is a welcome development.

Some of the data have been used to support a range of different arguments, however. In contrast to the high number predicted by some lobby groups prior to January 1, the number of applications has been arguably low and a low number of claims have proceeded to a formal decision. In general, I do not believe that these lower than expected numbers of claims reflect negatively on the procedures used by the FWC. The expected numbers were somewhat inflated, and there are many documented reasons why the numbers of claims were unlikely to be so high¹.

Some have recently argued, on the basis of the number of claims to the FWC outlined above, that the levels of bullying in Australian society are low, and that therefore the FWC provisions are not needed². This kind of argument is flawed for several reasons.

¹ see for example <http://theconversation.com/changing-workplace-bullying-laws-will-not-open-floodgates-21153>

² see Kelly, 25 Feb, 2015 The Australian, "Bullying umpire sits idle" <http://www.theaustralian.com.au/national-affairs/industrial-relations/fair-work-commission-sits-idle-on-workplace-bullying/story-fn59noo3-1227237618723>

Firstly, claims to the FWC say nothing about the levels of bullying in the Australian population. These data only indicate number of claims to the FWC – there are many threshold factors that influence why people may not be motivated to make a claim, or are precluded from making a claim (eg. state government employees). These are not population based data, nor a representative sample, so generalisations of this nature cannot be made.

Secondly, in many ways it is not surprising that the FWC has had a small number of the total claims that have proceeded to a formal decision. Several factors impact on this.

(a) There is evidence that many claims are withdrawn following resolution between the parties before a formal decision process by FWC (indicated at FWC anti-bullying forum, Sydney, March 12, 2015). Early resolution is highly desirable, both in terms of the outcomes for all parties, and the efficacy of the FWC process.

(b) The features of the jurisdiction which mean that people have to be currently working, and have an ongoing risk of bullying, means that claimants presumably want to continue working with their employer. In this context, it is reasonable to expect that some claims would refer to less serious behaviour(s), as some people may simply leave the workplace following more serious behaviours. Less complex scenarios are more amenable to early resolution, and/or may not meet all the criteria to be classified as workplace bullying. None of this is to say that the FWC has not and will not receive complex, serious cases of workplace bullying – merely that features of the legislation can influence the nature of the claims, and the nature of the actions required. Some of these features could explain, at least in part, why some of the claims do not proceeding through to a formal decision.

In short, a range of features of the legislation have likely influenced the number of claims. Arguments about the number and nature of claims, as this bears on the suitability and efficacy of the jurisdiction, need to keep this in mind.

It should also be noted that recommendations have been made by the NSW Legislative Council to extend provisions similar to those that exist in the FWC anti-bullying laws to NSW public servants³. Accordingly, extension of these provisions, rather than contraction of them, is actively being considered.

Complementarity

The FWC provisions are complimentary to existing WHS responsibilities regarding workplace bullying. They provide a mechanism for relatively fast resolution of issues facilitated by an independent body. The same kind of

³ see

<http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/084690796FDC2E79CA257B97001A735E>

mechanism is not really available under WHS provisions, which have a different focus and scope. The creation of a mechanism for fast redress of issues was recommended by the House of Representatives Standing Committee on Employment and Education (2012) because of the gaps between existing options which left people exposed to unfavourable and risky workplace conditions for long periods of time.

It could be argued that WHS regulators can and should do more in this space, recognising that their role is more focused on assessing whether employers uphold their duties under the relevant WHS acts. These duties clearly relate to managing the risk presented by psychosocial hazards such as workplace bullying.

Better planned and coordinated actions of the WHS regulators in relation to FWC claims and outcomes should be considered. One of the concerns with the FWC provisions is the follow up of agreed actions between employers and employees. Orders are enforceable, and secondary claims could be made, however, monitoring of continuing risks is imperative, and falls under an organisation's normal WHS duties. To this end, monitoring of the management of these risks, and of the progress towards implementing the resolutions made in the FWC process over the medium and long term, could be a role for WHS regulators. Consideration would need to be given to the mechanism(s) by which regulators would be informed about FWC outcomes, and the formality of these procedures, in order to facilitate the oversight of these risk management procedures.

Communication

The transparency with which the data on the FWC provisions have been made available is commendable. Further data and analysis are required over the medium and long term to further evaluate the jurisdiction.

Consideration could be given to ways of communicating with stakeholders about the kinds of resolutions made (either in mediation between parties, or in conciliation with a FWC member). Examples of what has been agreed in the FWC process would help demonstrate to organisations what strategies they could implement proactively, or preventatively, to avoid having to come to the commission. Proactive actions are of course already part of the risk management activities that organisations should be undertaking, and need to continually improve. Communication of the interventions proposed and enacted would help inform this process, however.

I am happy to be contacted by the Commission should further commentary be required.

Note.

I provided training to the Commissioners of the FWC in late 2013, regarding basic information on workplace bullying research, the kinds of behaviours that might be expected in bullying claims and related information.