

## **Working Paper 60**

# **OHS Inspectors and Psychosocial Risk Factors: Evidence from Australia**

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## **About the Centre**

The National Research Centre for Occupational Health and Safety Regulation (NRCOHSR) is funded by WorkCover New South Wales and WorkSafe Victoria to work to achieve excellence in OHS research and regulation development. The NRCOHSR is a research centre within the Regulatory Institutions Network (RegNet) at The Australian National University (Canberra), and operates in association with the Socio-Legal Research Centre (SLRC) at Griffith University (Brisbane).

The NRCOHSR conducts and facilitates high quality empirical and policy-focused research into OHS regulation, and facilitates the integration of research into OHS regulation with research findings in other areas of regulation. We encourage and support collaborating researchers to conduct empirical and policy-focused research into OHS regulation. The NRCOHSR also monitors, documents and analyses Australian and international developments in OHS regulation and research, as well as related areas of regulation, and produces a web-based series of working papers reporting on research into OHS regulation.

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## **Abstract**

Changes to legislation giving greater prominence to psychosocial risk factors at work have changed the role of government occupational health and safety (OHS) inspectors in many countries. There has been little investigation of how inspectorates have responded to these challenges. Between 2003 and 2007 an Australian Research Council funded project was undertaken that entailed extended interviews with 170 managers and inspectors, collection of information when researchers accompanied inspectors on 'typical' workplace visits, and detailed documentary and statistical analysis. Drawing on this evidence, the paper found that the general duty provisions in OHS legislation clearly incorporate psychosocial hazards at work and inspectorates have introduced guidance material and campaigns, and increased interventions in this area. At the same time, much of the activity has focused on bullying, harassment and workplace stress. In practice inspectors often found bullying type claims were resource intensive, complex and difficult to resolve in comparison to other issues (such as hazardous plant, chemicals or manual handling). There were some concerns about the advisory nature of standards and the remedies available in this area. The need to identify the complainant was also seen to place these workers at risk. Overall, findings highlight the role of training, mentoring, resourcing, legislative provisions and the industrial relations context in terms of inspectors effectively addressing psychosocial risk factors.

## **1. Introduction**

Changes to occupational health and safety (OHS) legislation giving greater prominence to work organization, and increased awareness of psychosocial risk factors in the community have changed the role of government OHS inspectors in many countries. However, there has been little systematic investigation into how inspectorates have responded to these challenges. This paper seeks to begin filling this gap.

Drawing on evidence from a four year research project involving four Australian state OHS inspectorates, this paper explores five specific issues. First, how does OHS legislation address psychosocial risks, to what extent have agencies sought to raise awareness of these issues and what resources (specialist inspectors and training) have been put in place? Second, how do inspectors view the increased recognition of psychosocial factors? Third, how have inspectors handled issues of bullying, harassment and occupational violence in the workplace? Fourth, how has fear of victimization affected worker reporting of psychosocial hazards? Fifth, how might the OHS legislation and associated activities be altered to enable more effective interventions in this area?

## **2. Methods**

In Australia, the division of legislative powers under the federal constitution means that the regulation of OHS has predominantly been a matter for state and territories rather than the federal government, although the latter has taken a more prominent role in the last five years. Between 2003 and 2007 a study (funded by the Australian Research Council) was undertaken with OHS inspectorates in four state jurisdictions (Queensland, Tasmania, Victoria and Western Australia), examining their activities and responses to changing OHS standards and issues, including psychosocial factors. These jurisdictions (four out of a total of ten) were selected as being representative of both small and large jurisdictions (both in terms of geographic size, population size and distribution). In addition to an analysis of agency documents and statistics, detailed interviews were undertaken with 170 agency staff (see Table 1) including 29 senior managers, 21 ex-inspectors and 106 current inspectors using a semi-structured interview schedule that addressed matters of resourcing, selection, training, perceptions of OHS standards, enforcement approach and distribution of tasks. Sixteen senior managers/employer association representatives and union officials were also interviewed to gain additional insights into inspectoral activities. All interviews were recorded, transcribed and the responses entered into a database.

In particular, inspectors were asked to express views about six areas of OHS standards, namely those addressing plant and equipment, ergonomics/manual handling, hazardous substances/dangerous goods, changes to work organisation/psychosocial factors, OHS management systems and upstream duty holders (such as designers, manufacturers and suppliers). With regard to each of these areas, inspectors were asked their opinion about the adequacy of the legal standards, the time they spent on enforcement activity and the approach they took, and the general level of compliance. In addition to this specific set of questions on psychosocial risk factors inspectors also made reference to this area when discussing their training, resourcing, their inspection activities and the enforcement sanctions available to them.

As well as interviews, the project involved two rounds (2004 and 2006) of participant observation in which the researchers spent a day observing each of 42 inspectors. A researchers accompanied each inspector on at least one visit to a workplace where the nature of the inspection, issues raised and actions taken were duly recorded in a notebook (see Table 2). All inspectors accompanied during workplace visits were interviewed, using the semi-structured interview schedule mentioned above. Where possible (about 80 percent of cases) the second round of accompanied visits involved the same inspector accompanied in the first round, and involved a similar type of workplace. When undertaking the second round of visits inspectors were interviewed again to determine whether their views or circumstances had changed since the first round of visits, and to explore any relevant issues raised by the workplace visit – including psychosocial factors. A number of workplace visits specifically involved psychosocial issues, including investigation of worker complaints of bullying and harassment. These matters were subsequently explored in interviews. A number of inspectors volunteered comments in this area without prompting, especially during the second (2006) round of workplace visits, suggesting that their awareness of psychosocial issues was growing.

**Table 1: Interviews conducted with agency staff and others**

	<b>Agency Managers</b>	<b>Others*</b>	<b>Ex-inspectors</b>	<b>Inspectors**</b>
<b>Queensland</b>	<b>10</b>	<b>4</b>	<b>8</b>	<b>39</b>
<b>Tasmania</b>	<b>6</b>	<b>8</b>	<b>6</b>	<b>16</b>
<b>Victoria</b>	<b>7</b>	<b>3</b>	<b>4</b>	<b>26</b>
<b>Western Australia</b>	<b>6</b>	<b>1</b>	<b>3</b>	<b>25</b>
<b>Total</b>	<b>29</b>	<b>16</b>	<b>21</b>	<b>106</b>

\*Policy advisers, ex agency managers, union and employer representatives

\*\* Excludes follow up/second round interview with same inspector

**Table 2: Accompanied workplace visits with inspectors – first round 2004 and 2006**

	<b>2004*</b>	<b>2006*</b>
<b>Queensland</b>	<b>12</b>	<b>11</b>
<b>Tasmania</b>	<b>8</b>	<b>9</b>
<b>Victoria</b>	<b>12</b>	<b>12</b>
<b>Western Australia</b>	<b>10</b>	<b>10</b>
<b>Total</b>	<b>42</b>	<b>42</b>

\*Includes multiple visits in one day and over 40 percent of regional visits (ie outside capital city)

As can be seen from Table 3 below, workplace visits covered a range of industry sectors (matched as far as possible to similar types of workplaces in each round), including construction sites, factories, shops, warehouses, schools, childcare centres, farms, forestry co-operatives and prisons. Visits also included an array of small and large workplaces

and both unionised and non-unionised sites. The visits undertaken were a normal part of the inspectors' task and were not influenced by the presence of the researchers.

**Table 3: Accompanied workplace visits by inspectors by industry sector\***

	2004	2006	Total
<b>Construction</b>	<b>15</b>	<b>8</b>	<b>23 (19.8)</b>
<b>Manufacturing</b>	<b>17</b>	<b>17</b>	<b>34 (29.3%)</b>
<b>Transport &amp; Warehouses</b>	<b>6</b>	<b>6</b>	<b>12 (10.3%)</b>
<b>Retail &amp; Wholesale</b>	<b>7</b>	<b>5</b>	<b>12 (10.3%)</b>
<b>Education, personal and administrative services</b>	<b>18</b>	<b>17</b>	<b>35 (30.2%)</b>

\* Includes multiple visits in one day and over 40 percent of visits regional (ie outside capital city)

### **3. Legislation and Guidance Material Relating to Psychosocial Hazards**

Since the 1980s there have been major reforms to the Australian OHS statutes. The nine<sup>1</sup> general OHS statutes in Australia are based to a large extent on the Robens model with a series of general duty provisions imposing broad obligations on various parties, including employers, self-employed persons, persons in control of workplaces, designers, manufacturers and suppliers of plant, manufacturers and suppliers of substances, and employees (see Johnstone 2004a, chapters 3-5). What these duties entail and how they can be met is dealt with by regulations, codes of practice and guidance material. In essence, the general duty imposed on employers requires employers to maintain, as far as (reasonably) practicable, a working environment that is safe and without risks to health, which is now accepted as requiring employers to implement systematic OHS risk management (see Bluff and Johnstone 2005, 212-219). The Queensland, and to some extent the Commonwealth OHS statutes explicitly require employers to implement risk management principles when complying with the general duty, and the OHS regulations in all jurisdictions outline risks management processes, in some regulations generally, and in all regulations for particular hazards (see Bluff and Johnstone 2005, 220-237). In most of the Australian jurisdictions regulations and codes of practice require OHS representatives, OHS committees and employees to be consulted during risk management processes (see Bluff and Johnstone 2005, 230-31), and this is reinforced by provisions for worker participation in OHS in each of the OHS statutes (see Johnstone 2004a, chapter 9).

The reformed Australian OHS statutes give inspectorates a wide array of powers (to enter workplaces, collect evidence, take photos and other records, interview workers and managers, conduct investigations and the like) and enforcement tools (ranging from verbal directions through to improvement and prohibition notices, the issuing of infringement notices, accepting enforceable undertakings and initiating prosecution).

<sup>1</sup> The tenth jurisdiction is the maritime industry and involves specific-industry legislation.

Interviews revealed that inspectors were generally satisfied with the array of enforcement measures available to persuade or sanction employers who breached legislative standards.

The reformed OHS legislation has also expanded the array of workplaces and hazards that inspectors must deal with. Whereas the pre-1980s legislation tended to impose detailed, technical specification standards (sometimes called ‘prescriptive’ regulation, and requiring a specific safeguard for an identified hazard) and to focus on factories and construction sites and on hardware (for example, machines and scaffolding), the reformed statutes seek to ensure that ‘workplaces’ (generally defined as places where employees or self-employed persons work) are safe and without risks to health. Even though the general duties make no specific reference to them, the broad formulation of the general duty provisions clearly covers hazards hitherto unregulated, such as ergonomic and psychosocial hazards. As one inspector noted in an interview:

... certainly when I started, there was a direct stance, overt stance, that it wasn’t part of the health and safety legislation, and that’s changed I guess. ... I think probably the thing that had a greater impact was the claims data, the trend that it was becoming more and more of an issue for workplaces, and certainly employers were asking more and more for help in: how do we manage this?

As one older inspector observed about a contemporary OHS statute:

Oh look it’s gone huge. I mean, you know, from the days of the old Labour and Industry Act that had about three to four sections related to health and safety, then we had some regulations and specifics, you know, we really then went to an Act that covers everything! We never dealt with manual handling. We never dealt with stress. We never dealt with bullying. We never dealt with, you know, even asbestos.

Since employer’s statutory general duties cover health (and mental health) as well as safety, and workplace changes such as organizational restructuring or downsizing invariably translate into alterations to work processes (such as workloads, task allocations and the like) a wide range of psychosocial hazards fall under the rubric of the legislation. It is also clear that employers’ and self-employed persons’ general duties in the modern Australian OHS statutes protect most, if not all kinds of workers – not just ‘employees’ (see Johnstone, 2006). This was also the view of a number of agency managers and inspectors who indicated that old style, specification standard-based legislation was completely unsuited to dealing with these issues. For example one stated:

I think the conceptual framework on general duties, performance regulations, prescriptive or descriptive codes, can readily deal with those changing workplace arrangements. It’s certainly got the capacity, at least at the general duty level, of dealing with the newly recognised hazards. Things like stress, like workplace violence, like fatigue and there’s certainly capacity within that framework to deal with them. Whether the legislation needs fine-tuning or not is an issue and that will vary from state to state, but I don’t think that’s a problem... I don’t think it could be dealt with by prescriptive legislation. You know, the difficulties you get in trying to put together even a regulation to deal with bullying for example, leads you to the conclusion that it’s difficult even within that sort of construct that now exists to deal with it. So I think the model we’ve got can work. It just needs a bit of tweaking.

At the same time, there were concerns about the need for mechanisms to enforce these duties in practice, with a Western Australian inspector stating:

Fatigue and stuff like that, the extended hours is really having an impact. It becomes another issue because the requirements of the law aren't clear. It becomes wound in and easy for people to escape their duties unless you can investigate it really clearly and link it back to employer duties.

We will explore the issue of enforcement later in this article. Also notable here was the reference, by interviewees from one OHS regulator, to stress as a problem within the agency itself. (In another agency that was not part of this study a union survey in 2007 revealed concerns about bullying within the inspectorate). This was by no means an isolated statement, with inspectors from a number of different jurisdictions (and offices within them) referring to inadequate management of stress in the inspectorate – often though not always attributing it to work overload.

Unlike more traditional areas of risk such as falls from height, plant, and more recently recognized hazards such as manual handling/ergonomics, with several notable exceptions OHS agencies have not developed elaborate codes of practice for psychosocial hazards but some guidance materials have been produced. Examples are Workplace Health and Safety Queensland's *Prevention of Workplace Harassment Code of Practice 2004* and *Fatigue Management Guide 2005*; Workplace Standards Tasmania's *Hidden Hazards* guide; WorkCover NSW's and South Australia's guides on preventing and dealing with workplace bullying. In relation to the Tasmanian guide, there was a long lead time in terms of developing the guide, due in part to employer opposition. A representative of a major employer association was highly critical of the guide:

It didn't provide much in the way of practical help to businesses confronting issues like drug and alcohol abuse and these sort of things, and when I went to them and said, "Listen, I've got a whole lot of businesses out here who are concerned about drug and alcohol abuse. They want to put in place some sort of policy but they want to be assured that if they put it into place, that you guys are going to support them" and they backed away from it at 100 miles an hour, because it's a political issue ..., and they wouldn't support it... [*and when asked about bullying*] Oh yes bullying... again I'm not sure that it's really all that useful. It sort of set out a whole lot of 'thou shalt' and 'thou shalt nots', but I think employers respond better to different approaches. We're quite willing to work with them on all this, but this particular document sort of snuck out of the blue because the union people on the WorkCover Board had a particular view of the world and they thought that might be one way to address some feelings that they had.

A senior union official interviewed saw this hostility as affecting the development of the guide:

...it's been really, really contentious and it will be really contentious releasing it. We were just talking about it today at a meeting because they have a Workplace Safe campaign in October, and they have Safety Awards, and someone at the meeting dared to suggest that that might be an opportune time to launch the Hidden Hazards booklet, and they wanted to do it with seminars, because it is complex. It talks about stress, it talks about bullying, it talks about fatigue and drug and alcohol, and it has been really difficult to try and...The employers' position was, certainly in terms of drug and alcohol, is that you should have

prescriptive policies, random testing, whatever, and you don't deal with what might give rise to the use of drug or alcohol.

In the end, Workplace Standards Tasmania brought in a consultant to do presentations to inspectors and also to industry to raise awareness of what the guide entailed and what it meant in terms of employers meeting their obligations under the legislation. Employer opposition may help to explain why other jurisdictions didn't follow the Tasmanian approach. In Victoria, for example, employers disputed the concept of stress adopted by WorkSafe Victoria and argued they had not been consulted sufficiently with regard to that jurisdiction's *Stresswise* guide (Stensholt, 2007, 43).

Section 55A(3) of the South Australian *Occupational Health, Safety and Welfare Act* 1986 enables an inspector who receives a complaint from an employee that he or she is being bullied or abused at work to investigate the matter. If the inspector has reason to believe that the matter is capable of resolution, the inspector may take reasonable steps to resolve the matter between the parties. If the matter remains unresolved the inspector may, after consulting the parties, refer the matter to the Industrial Commission for conciliation or mediation. The definition of bullying in section 55A(10 and (2) is, however, very legalistic and overly complex. Section 55A(1) defines bullying as behaviour:

- (a) that is directed towards an employee or a group of employees, that is repeated and systematic, and that a reasonable 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.

Section 55A(2) excludes from this definition:

- (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.

In 2004, Workplace Health and Safety Queensland introduced its *Prevention of Workplace Harassment Code of Practice* 2004, as part of a major psychosocial initiative by the Queensland OHS regulator. The code defines workplace harassment as being subjected to repeated behaviour, other than behaviour amounting to sexual harassment (which is covered by the *Anti-Discrimination Act 1991* (Qld), by a person or group of persons (including the employer or co-worker(s)), that is unwelcome and unsolicited and which the person subjected to the behaviour considers (and a reasonable person would

consider) to be offensive, humiliating, intimidating or threatening. Such harassment can be upwards (an employee harassing a manager), downwards (a manager harassing an employee) or lateral (an employee being harassed by a co-worker). The code points out that there is a range of psychological and physical illnesses that may be experienced by a person subjected to harassment. It shows how harassment is a contravention of a range of general duties under the Queensland Act, and specifies that employers should apply a risk management process (with consultation throughout the process) to prevent or control exposures to the risk of workplace harassment.

The more common response of Australian OHS regulatory agencies has been to produce guidance material and publicity on a select group of psychosocial hazards, principally bullying/harassment, occupational violence and workplace stress. For example, by 2007 WorkSafe Victoria had produced guidance material on bullying and violence at work, working safely in community services, *Stresswise* (a risk management approach to stress in the public sector) and fatigue management in forestry together with additional educational material on stress and bullying. Even so an administrative review of the Victorian OHS Act recommended further action in the area of psychosocial risks, especially stress (Stensholt, 2007: 43-4). In 2006, Workplace Health and Safety Queensland developed guidance material for people making complaints about workplace harassment, and material outlining what to expect from the inspectorate. It has recently produced four two-page information sheets on occupational stress (*Overview of Occupational Stress, A Risk Management Approach to Occupational Stress, Implementing an Occupational Stress Risk Management Process* and *Risk Factors for Occupational Stress*), as well as a five page information sheet for small business on psychological health.

Although the production of guidance material has been limited there was a general acknowledgement both by inspectors themselves and their managers that work organization and psychosocial hazards were an important emerging issue. A Tasmanian inspector observed:

Bullying and harassment is, since I've been at Workplace Standards in the last four years, the number of phone calls that helplines, Trims, really has increased significantly. I think people are becoming more aware of their rights with regard to bullying, for instance, and they're rising within the workplace perhaps. People that are being foolish within the workplace and not giving a care to workplace health and safety issues, Section 9 ... The employer does have a duty of care to employees and ... employees to... other employees – under Section 16. But I think this is going to be an ongoing greater concern over time. What can we do about it? I guess we can educate, we can enforce, we can retrain.

A number of inspectors pointed to the effects of changes in work, such as the introduction of lean production or downsizing and cuts to staffing, as the reasons underpinning the rise of bullying and stress complaints. Typical comments included:

And workplace bullying. The expectations are greater, the increased workloads leading to more stressful situations and assault, customer assault, particularly in retail.

Call centers and other areas of service work, especially those mostly employing women, were seen as especially problematic with one inspector observing:

...we get complaints here almost daily from those sorts of organisations. I mean we had a – I think this was a pretty shocking one – but we had a woman ring up a couple of weeks ago and say she's seven months pregnant and her employer won't allow her to sit. And she has to stand all day in a position where she couldn't do her job seated, and I just think that's outrageous.

Other areas referred to frequently included fatigue and changing hours of work arrangements. A Western Australian inspector (trained as a hygienist) observed:

And of course the hours of work. I mean we've done some big management stuff around the road transport industry (referring to a mandatory code for managing fatigue in trucking) but we've only got a draft code of practice out (a code dealing with hours of work more generally) now as far as just working hours in general industry. And the draft code talks about how you assess hours and work it out.

Union officials also saw psychosocial factors as an important issue. A Tasmanian union official pointed to how changes in work practices were impacting on workers:

...if you look at aged care for example, the critical shortage of funding creates, and from what we've heard, employers just make them work harder, make the employees work harder, and it's just continuous and it's going to get worse and worse before it gets better. Continuous reduction in people's hours, in their, you know, it's a predominantly part-time workforce already, but they're always getting their hours cut but their work isn't cut. So there's this constant pressure to do the same amount, and like an 80-bed nursing home, they're not going to close down and throw out 10 residents because they've had to reduce the number of carer hours by 10 per cent or whatever. They just expect you'll just do it.

Unions have been critical of the level of activity of inspectorates in relation to psychosocial hazards. One Victorian union official, who had previously worked as an OHS inspector, observed:

But if we look at now where all the emerging issues are, and the issues that the inspectorate should be starting to focus on, they're more the psychosocial issues around work intensification and increased workloads and basically some of the stressful factors associated with intimidation, bullying and harassment and performance management, which is really making a big impact in a lot of areas and I think that, you know, WorkSafe really needs to start to get their head around how that can be better managed, because they do contribute to a number of the claims and sometimes people won't put in a stress claim but they'll put in a manual handling claim, but related... It really is related back to the stress issues in their workplace, you know.

#### **4. Structure, Resourcing, Recruitment and Training of Inspectors**

An assessment of the capacity of inspectors to address psychosocial hazards needs to consider how the inspectorate is organised, staffing levels and any changes to recruitment and training. As we noted earlier, post-Robens OHS legislation has broadened both the coverage of workers and the array of hazards that inspectors must consider, including psychosocial hazards. This has increased the demand both on the inspectorates' resources and the knowledge base of individual inspectors. Under general duty-based legislation inspectors need to make judgements that are often complex in terms of identifying hazards and evaluating existing control measures. It is difficult to see how this can be done effectively without detailed knowledge of OHS, especially in the case of psychosocial hazards which are not as readily observable as, for example, the absence of a guard on a machine.

With regard to Victorian, Western Australian and Tasmanian state inspectorates, groups of industry teams are housed in a series of city, suburban and regional offices (with team representation reflecting the scope of economic activities in that area). In Queensland, there are specialist construction inspectors, specialist health inspectors, three specialist psychosocial inspectors and a co-ordinator, and general industry inspectors located in the various regional offices. There are also head office inspectors specialising in hazardous substances, ergonomics, plant, construction and psychosocial issues. These structures have evolved over the past decade following experience. While several agencies have experimented with having generalist OHS inspectors this did not prove to be very successful because it required inspectors to cover too wide a range of workplace specific knowledge and was not conducive to industry specific standards development (such as one-stop codes of practice), campaigns or enforcement strategies. Industry teams, on the other hand, provided more focus for inspectors to hone their skills and knowledge base (in the context where every industry and workplace contains a wide range of potential hazards), to secure consistency in enforcement practices within an industry and for less experienced inspectors or those requiring specialist expertise or experience to draw on the knowledge of another team member. It also provides a foundation for targeted industry-based prevention campaigns. Interviews with managers and inspectors in state agencies indicated that they were generally supportive of this structure.

Over the past decade inspectorates have increasingly focused on proactive modes of enforcement based on strategic targeting of issues and industries, and de-emphasising walking-the-beat type activities (random inspections) or responding to complaints/information or incidents (though the latter remains important). This was evident in the workplace visits we did with inspectors. As can be seen from Table 4, almost two thirds of the visits that we observed were proactive while responses to complaints or information provided by the public accounted for 18.6 percent of inspections, and investigations of incidents (usually causing injury or death) accounted for a further 16 percent. It is likely that our sample of observed visits contains more proactive visits than is the norm in most inspectorates, as most inspectorates struggle to ensure that inspection activities are driven by targeted programs rather than responses to complaints and workplace incidents.

**Table 4: Reason For/Nature of Visit by OHS Inspectors**

	<b>2004</b>	<b>2006</b>	<b>Total</b>
<b>Proactive/targeted visit</b>	<b>39</b>	<b>37</b>	<b>76 (64.4%)</b>
<b>Response to complaint/information</b>	<b>12</b>	<b>10</b>	<b>22 (18.6%)</b>
<b>Investigation</b>	<b>9</b>	<b>10</b>	<b>19 (16.1%)</b>
<b>Other/unclear</b>	<b>1</b>	<b>0</b>	<b>1 (0.85%)</b>
<b>Total</b>	<b>61</b>	<b>57</b>	<b>118</b>

Emphasis on targeted visits (rather than complaints or incidents-based inspection or ‘walking the beat’) as a key component of recent OHS enforcement activity in Australia (and probably elsewhere: see Johnstone, 2004b) distinguishes OHS inspectorates from industrial relations inspectorates where much enforcement activity remains complaint-based (Maconachie and Goodwin, 2006). The problem with complaint-based enforcement is that it relies on workers in particular to notify the inspectorate of potential breaches of the legislation and, as the discussion below will show, this is highly problematic, not the least because workers fear such reporting will bring retribution from the employer. Proactive enforcement is seen as maximising the impact of limited inspectoral resources and agencies often set targets in this regard.

At the same time, interviews with inspectors indicated that achieving these proactive program targets and responding to all complaints and reported incidents, injuries and fatalities was often difficult, especially in industries like manufacturing, construction, transport and storage where compliance problems appeared to be common. More generally, there was a virtually universal view amongst state OHS inspectors that while support resourcing (cars, computers, information retrieval systems and the like) was generally adequate they lacked sufficient staff (by an order of 50 to 100 percent) to carry out their tasks effectively and to visit enough workplaces to secure an optimal level of compliance. In short, resourcing has not kept pace with logistical demands on inspectorates. Further, targeted programs generally dealt with traditional hazards (such as falls from heights, machine guarding and manual handling) rather than psychosocial hazards. This has had implications for the capacity of inspectors to address psychosocial hazards.

Although inspectors generally supported attention to psychosocial issues, a number pointed to resourcing constraints and several believed that, in the context of limited resources, there was need to strike a balance if not return to traditional areas of focus. For example, one inspector observed:

And I think that we are slowly progressing through these areas that we traditionally didn’t look at, like the stress, the occupational violence and that sort of thing, and I think we just have to find the right balance, because we tend to, you know, workplace bullying for a while there was the flavour of the month, and there were a lot of resources put into that at the expense of other places where, in my view, there were really serious physical hazards that should have been looked at. Because we’ve only got limited resources... Let’s focus on the areas where we know there are serious risks to life, limb and health through

hazards that are readily dealt with, that can be dealt with, that can be resolved, and possibly not focus as much on things like bullying and stress and those sorts of things.

Lack of resourcing and the need to address more immediately visible threats was commonly cited by inspectors as reasons for not spending more time on psychosocial risks. A Western Australian inspector referred to the wide array of issues inspectors must consider before referring to a problematic bullying case they had just been involved in:

I'm going through a complaint by a person who put a complaint into WorkSafe about bullying and intimidation in the workplace and bullying in the workplace and intimidation can vary with perspective and because of my actions that person who made the official complaint has now put in a complaint against me because I haven't actually...I didn't confirm her allegations. I found examples of bullying and intimidation in the workplace but because they weren't hers she's put a complaint in...So there are things that we've...we weren't trained for that and there are things now, because of these issues there's going to be some more training in regards to how we deal with those. We deal with a lot of, I suppose, emotional issues now. In the old days it used to be fairly clear cut.

Similarly, a Queensland inspector believed there was political aspect to the shift:

I mean I nearly fell off my chair the other night where I saw a full page [*newspaper spread*] there about bullying in the workplace, but I never saw a full page spread about, "We've written a new [*code of practice*] to stop people getting killed off roofs." So it's a political issue.

Recruitment and selection has undergone profound changes within state inspectorates over the past 15 years. Originally, inspectors tended to be selected from persons with a trade background (overwhelmingly male) but in recognition of the broader coverage of workplaces, hazards and expanded role of inspectors encompassed in post-Robens OHS legislation, inspectors have been recruited from a wider range of sources including non-trade industry experience, the public sector and those who have either undertaken some OHS-related roles (such as health and safety representatives or those undertaking OHS tasks for firms) and/or those with specific tertiary qualifications in OHS or a related field. In some areas, most notably construction, industry background is still viewed as essential (for reasons of knowledge of the complex array of hazards and subcontracting networks, as well as credibility). At the same time, an increasing emphasis is being placed on inspectors having OHS qualifications (diploma or degree) as well as relevant specialist skills (such as forklift truck driver's licence in the case of inspectors dealing with manufacturing).

Our study revealed that there also have been significant changes to training packages provided over the past decade reflecting in part a recognition of the increased demands placed on inspectors by OHS legislation, current and emerging OHS challenges (such as those associated with psychosocial factors like bullying in the workplace), the often complex judgements inspectors have to make, and to enhance their understanding and capacity to deal with investigations, management systems/practices, worker consultation and inter-personal communication. In most states, agencies have developed specialist programmes over the past decade to deliver this training, with modifications being made on the basis of experience. For example, Queensland, Western Australia and Victoria offer specialist courses of around three to six month's duration (including periods of supervised workplace interaction where skills can be tested and honed). Of the agencies reviewed, only Tasmania didn't offer an integrated in-house training program, relying instead on a mixture of externally available or in-sourced courses as an adjunct to the 'buddy-system' where an inexperienced inspector would accompany a more experienced counterpart for a period of time (another jurisdiction made use of cameras in mobile phones to enable inspectors to check their assessment of a particular hazard). The major reason for this was the agency's limited budget.

Overall, our research found that the level and quality of training of OHS inspectors had improved markedly in the past decade and that inspectors were generally adept in utilising these new skills in workplace visits. Areas of improvement identified included time spent on developing interpersonal skills and communication. Despite some specific criticisms (such as the need for more training in investigation and the dovetailing of training with work experience and mentored learning) our interviews revealed a high level of satisfaction amongst state OHS inspectors with the training regimes now in place and a general view that training had improved over time. This included long-serving inspectors who had not benefited from the new regime but worked alongside those who had. At the same time, a number of inspectors identified psychosocial risks as an area that required further training as it was becoming more important. For example, asked if there were areas where more training was needed one stated:

Things that we're getting a lot of work in that's psychological...Yes, bullying and that sort of stuff. Different issues to what they were way back then. *[Could do with extra specialists]* I think.

In several jurisdictions inspectors were also encouraged to undertake a formal course in OHS (provided by Technical and Further Education [TAFE] colleges or universities) if they did not already have qualifications in this area. Inspectors we interviewed were generally positive about this. For example, a Victorian inspector referred to the value he obtained from undertaking a Certificate IV in OHS with Footscray TAFE College followed by a Graduate Diploma in Occupational Hazard Management at Ballarat University. The inspector stated he had got support both from the department as well as a scholarship through the National Occupational Health and Safety Commission:

I was able to generate and upgrade my skills in areas which were much broader than the inspectorate itself. It was looking at sort of, you know, the broader issues around occupational health and safety law; looking at sort of the engineering issues in more detail; looking at some of the hygiene issues in more detail; looking at sort of the body issues, you know, the human body and its impact on health hazards and stuff like

that...And also using your skills, interpersonal skills about how you can relate to people and you can educate and train people to try and do the right thing. So I felt that was pretty good.

Workplace visits with state inspectors confirmed the value of this training, with inspectors generally displaying significant skills in identifying priority OHS issues and dealing with difficult situations (such as those where multiple duty-holders are responsible for an incident or contravention and handling difficult inter-personal situations). At the same time, specific training in psychosocial risk factors was a limited component in the foundation inspector training programs. An exception was a Queensland project in 2006 which involved measuring the skills of the existing OHS inspectors, developing competency requirements and then developing training programs:

... so what we'd expect all inspectors to be able to do in the area of psych, and then progressively what we'd expect the more specialist inspectors to be able to do. And so the competencies are mapped out for each of those levels and then a training program is designed for each of those. But at the base level we've got general advanced training and an expectation that they should be able to do some very basic harassment complaints. And provide general advice to employers about managing risks for psychosocial issues in general and then it builds on. So we've got some specific training sessions on some of the six main hazard areas that are covered in the initiatives. Some are better formed than others. We've got a three-day workplace harassment investigation training that we do, so when I say 'we' I mean usually the parts that everyone needs to do and does, but also we get the Legal Unit and some of the general investigators do parts of that as well. So yes, it's been a very, very structured .... Having said that, there's enough challenges and that's mainly to do with turnover. There are some inspectors that really don't want to have a bar of this kind of work and we don't push them if they don't want to.

As with a number of other areas, inspectors could undertake additional and more specialized training in the form of internal or externally offered short courses on particular subjects. In this regard, several agencies (such as the Victorian regulator) offered or provided access to training in bullying/harassment and occupational violence and made this the basis for accrediting inspectors to deal with these issues. WorkSafe Victoria used these inspectors within particular industry teams to deal with bullying. As one noted "I'm a bullying designated inspector so I look after bullying-type activities, type work", and another Victorian inspector, in describing the extensive post-induction training he had received, observed:

I'm also a bullying 'triage' inspector. That required two or three more days. So the answer to your question, yes I've done significant training since and there has been updated training along the way on other aspects. Every time a regulation changes or a code of practice changes we're called in for mandatory training.

Some Queensland inspectors also referred in interviews to their experience with psychosocial issues:

Like bullying complaints and stuff like that, we used to get those and I used to get a lot of those because they thought I had a fair way of dealing with people and we'd go and deal with it. As soon as they brought up a harassment complaint we've got a particular number, 1800 number or 1300 number, to call and it has to be dealt with from Brisbane,

just because of the issue itself, you know what I mean? Ah they've got a special department for it, whereas we do everything.

As we noted above, Workplace Health and Safety Queensland in 2004 undertook a major psychosocial initiative, which we discuss in the following section.

## 5. The Queensland Initiative

Workplace Health and Safety Queensland began developing a psychosocial initiative in 2004. The impetus for the initiative came from having two inspectors with training in psychology, clear compensation data that showed a high level of claims with a psychosocial component, an increasing number of complaints and reported incidents raising psychosocial issues (particularly harassment), requests from employers for assistance with psychosocial issues, and, as noted above, a gradual recognition and (as we noted earlier in this article) acceptance by inspectors that psychosocial issues did fall within the scope of the employer's general duty provision. Funding for the program began in 2004, and four specialist psychosocial inspectors were appointed, three each covering two of the six regional offices in Queensland and one coordinator in head office in Brisbane. These inspectors had to be recruited at a relatively senior - principal inspector - level in order to attract suitable people. Recruitment has tended to be from within the inspectorate, because, as one interviewee noted:

It's difficult to find people with the skills base because our experience has been that lots of the people that apply tend to be clinical psychologists and they don't have the systemic framework that you kind of need to be able to *[be an inspector]*.

From its inception, the aim of the psychosocial strategy was to:

- Reduce the incidence and severity of psychosocial injuries;
- Improve the capacity in industry to prevent and manage the risks of psychological injury occurrence; and
- Build the capacity of the government to influence psychological injury outcomes.

From 2004, the four psychosocial specialist inspectors spent much of their time on a series of initiatives. The initial focus was on workplace harassment and was strongly reactive, developing processes and procedures to respond to harassment complaints and reported incidents. In order to make more strategic use of the resources of the specialist inspectors, three levels of intervention were developed in 2005, based on the classic responsive regulation approach of tailoring the inspectorate's response to the ability of the duty holder to self-regulate (see Johnstone 2004b). As an inspector said:

We've developed a new policy to actually be able to address a lot of those complaints without a lot of inspector intervention. So complaints that come in from larger-type workplaces or workplaces that have dedicated human resource management areas, if the frequency and severity of the harassment behaviours is fairly low level we go back to the organisation and ask them to do their own internal investigation and we review it.

The second level of intervention is where it's still fairly low level of behaviours and frequency of behaviours, but workplaces that maybe don't have the dedicated HR area ... what we do is work with them to get them to look at maybe getting an independent person

to come in and investigate the harassment complaint and then we would ask that they send us that investigation report. We look at it. Then the inspector would spend some time ... where we had someone from the workplace come out. And we really... it's not quite coaching but it's almost, spending some time with them, telling them that the psyche area is just as important as every other area. ... just making it that it is an issue and they can understand that they can do something about it, and it's really not that difficult, particularly if they've already got a level of strategies in place, like this company did.

Then the third level of intervention that we have is where there's a high risk from the severity and frequency of behaviours, or when you contact the workplace they basically are telling inspectors where to get off. If they're not interested in any level of any in-depth intervention with that then we have to do a fairly full-scale investigation. So with that, we go through the whole process of interviewing the person that the allegations have been made against. We would look at spending some time with the employer and going through like any other investigation: "Look you've got these risks that you're not controlling".

*[At the first]* two levels the inspectors are able to, within policy, intervene without the expectation that a notice has to be issued. But in saying that, with both those first two levels I talked about, if the inspector can't gain any sort of level of compliance or assistance then we jump to the third level, yes.

As this description of the approach to inspection suggests, the specialist psychosocial inspectors have not undertaken the typical role of an inspector. As one of them noted in an interview:

... we're not really inspectors in the true sense. We're really more advisors. We coach, we support, we do project work, we set frameworks, that sort of thing. ... There's been a pretty clear message that we are not in the enforcement phase with regard to psychosocial issues – although it's there if it is warranted. ... We are giving people improvement notices. That's about it.

One psychosocial specialist inspector noted that they did about 120 investigations year:

But I didn't do them myself. I coached people and some responses I did without leaving the office. So I'd say with two thirds of them I didn't leave the office to be able to close up the issues. *[I worked by phone]* ... getting evidence and questioning, getting the employer to take action to resolve things. *[And then following up by]* email. ... Sometimes its a letter. If people are indicating a willingness to work with me, I might just reinforce it with an actual proper letter, but if its going pretty well its email.

An initial difficulty was that, because there was a *Prevention of Workplace Harassment Code of Practice*, from the outset there was a perception that psychosocial issues were principally workplace harassment. As one psychosocial inspector noted:

We have identified what we see as the psychosocial hazards, and they are psychosocial risk factors that are related to occupational stress. Within that is workplace harassment. One of the things were trying to do is to change the view that psychosocial is harassment – harassment is just a very small component of psychosocial.

In 2006, the psychosocial inspectors developed a program to address workplace stress. Where employees made claims for compensation for stress, their employers were required to attend a seminar addressing general stress risk factors – and then were expected to manage stress issues themselves. An inspector explained:

General stress risk factors is next on the agenda. So this year the seminars are all about general risk stress factors. .. You can provide information about our initiative, our legislation, the risk factors, ideas for managing it, but we can't train ... like, "This is what you need to do. You need to go to your workers and you need to ask these people these things. You need to get the staff". That's up to the obligation holder to take that on. So you try to open their mind to thinking about how they would carry that out in the workplace. ... We haven't got a lot of documentation that we can leave, but we refer them to the UK Health and Safety Executive website, because there's loads of information about stress management standards. And we are doing this planned seminar series, which is in response to those stress claims. So if I am an employer with an accepted stress claim, I get a letter saying "You need to know that we know you've got an accepted stress claim and also that you are required to attend a seminar".

The seminars included a general industry module and then sections targeted to specific sectors (for example construction, education or health and community services). Recently, the focus has broadened to six general areas where psychology may affect OHS: workplace harassment, occupational stress, fatigue, cognitive issues in design, safety culture and safety behaviour. Harassment and stress still account for about 80 per cent of the work of the specialist psychosocial inspectors.

The psychosocial inspectors have placed great emphasis on systematic approaches to OHS management. As one inspector observed:

... what we're trying to do is make the link complete between human resource management and occupational health and safety management. They're not two separate issues. And so many times we go into big organisations where there's been a workplace harassment complaint, and it's been completely and absolutely dealt with by HR, and the workplace health and safety area hasn't been involved at all – or the risk management area. So in a lot of organisations, HR doesn't even sit with risk management. It's so separate. *[So]* I try and get them to sit together. And we go through where it went wrong. That's a great thing about reviewing their policies and procedures. So you look at this and the way the health and safety people look at it, maybe this mightn't have happened. An example of that was a local sporting club in this area that had grown from having about 45 employees to about 400 employees, because it's in an area where high consumers, etcetera, have just increased the revenue out of sight. They had a harassment complaint. That was really a performance management issue and also an issue to do with the individual involved, with the psyche problems that person had. HR dealt with it throughout the whole – HR dealt with the whole process. When I sat the HR manager and the health and safety person down together, it sort of just, it was like a revelation to both of them that, "Oh my god! If I'd have known you were doing this, I wouldn't have done that". And as soon as you sat them together it just meshed, absolutely beautifully.

In the past few years the Queensland inspectorate has developed some proactive programs. Some have been focused on general education and awareness raising, including a very large series of risk management seminars focused on the public sector

and targeted areas in the private sector. There has also been a large 'People at Work' project, funded by an Australian Research Council Linkage Grant (with the University of Queensland) which has elements of both advisory and compliance campaigns. It involves 45 organisations and 15 inspectors who have been trained to interface with each of the 45 organisations and collect data to do a risk assessment. The university conducts the data analysis and provides a report back to that organisation identifying their risk factors for psychological injuries. Each organisation then receives a risk profile report which shows what the risk factors for psychological injury are, broken down into up to ten workgroup levels. They also receive, from the inspector, information about how to interpret the data and best practice approaches to manage the risk. The organisation has full discretion to decide what to do. Twelve months after the risk profile report is compiled the process is repeated and a new risk profile is compiled to assess changes. Not only should the project enable 45 organisations to develop risk management approaches to psychosocial issues, but the inspectorate will gather very important data of psychosocial risk factors across a range of industries.

In the past year there has also been a national compliance campaign on violence in health care. This was coordinated by across all states and territories through the Heads of Workplace Safety Authorities.

## **6. Compliance, Enforcement and Inspectors' Views on Dealing With Psychosocial Hazards**

A number of inspectors, including younger tertiary trained inspectors, expressed concerns about dealing with psychosocial hazards and the level of compliance amongst employers. Referring to the 'hidden hazards' a female inspector in Tasmania noted:

I still don't think those hidden hazards are being addressed by employers generally, like other hazards are that you commonly find. These hidden ones are still sort of overlooked in my opinion, and are the hardest ones for us to go in and sort of address and sell to them as being areas that they need to look at.

From the employer perspective problems were also identified. Asked about changing work arrangements, many inspectors indicated that this constituted a serious challenge especially in the context where many employers already had problems complying with the basics of OHS legislation. Referring to compliance one stated:

Average. I think that the awareness, you know, having procedures in place for training staff about bullying not being... yeah just... we have lots of small manufacturing places and they're flat out knowing even about the OHS Act, let alone that it, you know, for physical health, let alone for mental health.

Even large public sector employers were seen as often failing to manage risks in this area. One senior agency manager referred to her conversation with an OHS practitioner for a large education provider who expressed frustration at getting policies implemented at school level because:

...when you're on a central payroll, for a school, some of those longer-term injuries or absences, particularly when they're psychosocial, solve the problem for them. And so they're not interested in getting that person back to work very quickly at all because

they're being paid, either on sick leave or on compensation, through a, you know, something that the individual employer in that case thinks well he isn't really accountable for, and the work environment is more harmonious without that individual.

A significant level of enforcement activity was apparent in the workplace visits where we accompanied inspectors. While inspectors took no formal action beyond preparing a report in half the workplaces visited, in 33.9 percent of visits an improvement notice was issued and in 11.9 percent a prohibition notice was issued preventing further operation of a machine or work method because the imminent danger it posed to safety (see Table 5). Table 5 does not include the more serious action of court prosecution because these decisions are not made during the visit. The inspector prepares information and makes a recommendation that is then reviewed.

**Table 5: Actions taken by inspectors during accompanied workplace visits**

	<b>2004</b>	<b>2006</b>	<b>Total (percentage)</b>
<b>None/information provision or entry report</b>	<b>34</b>	<b>25</b>	<b>59 (50%)</b>
<b>Verbal directions</b>	<b>17</b>	<b>13</b>	<b>30 (25.4%)</b>
<b>Improvement notice</b>	<b>19</b>	<b>21</b>	<b>40 (33.9%)</b>
<b>Prohibition notice</b>	<b>7</b>	<b>7</b>	<b>14 (11.9%)</b>
<b>Dangerous Goods Licence Granted</b>	<b>6</b>	<b>1</b>	<b>7 (5.9%)</b>
<b>Total workplaces visited</b>	<b>61</b>	<b>57</b>	<b>118</b>

\* Total % more than 100 because multiple actions taken in same workplace

At the same time, few workplace visits that we accompanied inspectors on entailed an explicit consideration of psychosocial hazards. A number of inspectorate managers and inspectors believed that insufficient attention and resourcing had been devoted to proactive programs in relation to health, including psychosocial hazards. One of the managers observed:

... we haven't been successful in putting the pressure on health in workplaces. This is why we keep getting the RSI issues, and why we keep getting stress and bullying cropping up, because there's no one there who'll go out specifically on a program as part of their team environment, dealing with those.

In keeping with a greater recognition of psychosocial hazards amongst agencies there was evidence of increased enforcement although, again, this activity appeared selective. Illustrating this, a Victorian inspector referred to changes in his agency and how instances of bullying and bastardisation were dealt with under a general duty provision:

...occupational violence, bullying, none of those were a consideration in the early days, but there is a fairly strong emphasis on stress now. We've had some problems of our own in this organisation in relation to that. Yep, we have been getting involved in allegations of bullying and we have done a couple of prosecutions on – well it's not really. It

depends on how you define bullying. The ones that we've prosecuted are apprentice-bastardisation-types... Yes, well they run around setting each other on fire or nailing each other to the walls with nail guns and that sort of stuff. And I mean there is no offence called workplace bullying so you end up with, if there is going to be any charge it's under 21 [*the employer's general duty*] in the Act or it's under 25 [*the employees' general duty*].

It was clear that despite the increased attention to psychosocial issues by inspectorates, when it came to enforcement – particularly prosecution – psychosocial issues were not considered to be as important as traditional physical hazards. This is well illustrated by the Queensland *Enforcement Framework*, which specifies that a full investigation will be conducted for 'Type 1 events, which (i) involve death or grievous bodily harm to workers or a member of the public or (ii) are, as a result of a work activity or exposure to substances, likely to kill or cause grievous bodily harm to a worker or member of the public. Psychosocial inspectors have commented that it is unlikely that the inspectorate's senior managers responsible for allocating cases for investigation will include incidents involving psychosocial issues:

... when a manager has 20 cases coming through the door, the finger that has sort of been cut off are always the ones that we're going to send an inspector out to. So the enforcement framework doesn't help in that regard because it uses grievous bodily harm as a model and the psych stuff just doesn't fit well into that. ... Yeah I think the things that hazardous substances and all that stuff has in its favour is it's part of the standard auditing stuff that inspectors always kind of cover whenever they go to any workplaces, which so far the psych stuff isn't and we're trying to get it in there but it's not easy. There's more resistance internally than there ever is externally and yeah, it's ironic that industry, in the industry sector communities and in the general interface with industry are very much saying, "Please help us," and yet to try and get the inspectorate to see it as important. So yes and I do think those systemic things are the key though.

For these reasons there have been very few attempts to initiate a prosecution under the OHS legislation for contraventions involving psychosocial issues.

Other inspectors expressed frustration at the difficulty of dealing with these cases and made comparisons to the greater certainty when dealing with other potential hazards such as plant. One inspector who had handled a large number of cases in the health sector described them as often messy:

I get a lot of our bullying complaints as well, and particularly from Health and Community Services. They're very, very messy. The worst one I've handled was in local government. [*They hit each other and it was actually too difficult to resolve*]. But in local government you get a lot of complaints from disgruntled ratepayers and disgruntled ex-employees and whatever, so you get very curly complaints of that nature, whereas some of the other complaints may be health and quite straightforward.

Another inspector described the case of a trolley retriever for a supermarket who complained he was being humiliated and manhandled. He found the case to be very difficult because it became apparent that the worker didn't take direction well from his employer, continuously questioning why he should be doing things and attributing malicious motives to the employer when the latter tried to take him to pub for lunch to

smooth things over. At the same time, while the employer was keen to retain the worker's services he had displayed a lack of sensitivity (the worker was religious and a non-drinker). The inspector found the worker's immediate supervisor to be physically demonstrative in a way that some might see as aggressive (he waved his hands around and had called the worker a "f...ing idiot"). The inspector was able to deal with the manhandling issue but was not satisfied that systematic bullying had occurred. While the inspector had obtained an apology and promise of changed behaviour from the supervisor the worker was dissatisfied with this, wanting the supervisor sacked. The inspector explained:

You're actually dealing with multilevel things and things that fall outside of OHS that you need to actually be able to find what you're dealing with and not go off running on a tangent for something else. It's interesting.

The risk that investigation of such complaints could amount to a no-win situation was referred to by a number of other inspectors. Several stated that their poor experience with handling bullying and harassment cases had influenced their (lack of) enthusiasm about receiving such assignments. In several offices it was indicated this had had a general dampening effect on the attitude of inspectors. For example, a female inspector stated:

...whenever a bullying and harassment call comes through our helpline and we hear about it, it's always, "Oh who's going to get it?" It's one that you don't look forward to getting because they can be so messy and because it's such a personal issue. You're going in there saying to someone, "You've been accused of doing these things and..."

Several senior agency managers also pointed to the complexity of the area and the often belated stage by the time inspectors were involved. A senior manager from Western Australia stated:

It's our uncertainty over psychosocial and how we deal with those. There are a whole lot of issues around the breakdown of the relationship. Was it caused by...? And when I mean relationship I mean some of those stress-inducing things. Do they result in bullying and do they result from organisational issues at work?...I am fascinated by the increase in, say, stress claims in the Victorian public sector and whether you're correlating that to the change in the organisation of the public sector, the expectations, I don't know...and the inspectors actually say in cases such as bullying, by the time we get involved, you've virtually got an irretrievable situation so what can we do? And yet it will take an inordinate amount of our resources. Now how do you actually then balance that? And they're problems from a management point of view.

The same manager acknowledged the difficulties encountered by inspectors but indicated that the problem was too important to ignore even if the intervention could only address management processes rather than assisting the individual worker involved:

You've got to do something... all the evidence is that occupational violence, low-level occupational violence particularly, is a growing problem... In the individual cases the inspectors are going to run into, they're right. By the time they've encountered them, they're usually in a real [*unclear*]. But the individual, there's not much you can probably do, except to try and make sure the company's got things in place that it doesn't, maybe, happen in the future.

One Queensland workplace visit that addressed psychosocial issues highlighted the potential complexity an inspector may have to deal with. In this case a cleaner had complained about being harassed by other cleaners and tenants as well as centre management in the shopping centre she cleaned. It appeared the complainant had a lift (confined space) phobia and needed to spend a lot of time with security guards while she cleaned lifts. Amongst the complexities in this case was the fact that no complaint was directed to the cleaner's employer (although the employer still has responsibilities) and performance management issues. Questions of inadequate performance by a worker complaining about harassment, bullying or occupational violence were not infrequent – indeed a number of inspectors raised this. For the inspector it was often difficult to resolve whether performance problems were genuine, manufactured to de-legitimize the workers' complaint or how to balance competing claims when (as often appeared to be the case) there appeared to be fault on both sides. While poor performance does not justify harassment the line between reasonable cajoling and intimidation can be thin and subject to interpretation, especially when the inspector only had a series of complainant and witness statements to draw on.

Overall, the observations of workplace visits closely matched the comments made by inspectors in interviews regarding complexity, resource-usage and poor outcomes. For example, a Victorian inspector highlighted both the complexity of cases and outcomes which were often unsatisfactory if not demoralizing:

When our guidance came out initially – this is a couple of years ago – we got them coming in thick and fast. When they did come in thick and fast, we found them to be extremely time consuming, because we would go out together so that we could discuss it amongst ourselves and come to a determination about whether it was repeated, unreasonable behaviour that had led to whatever, and also whether it was our jurisdiction... and I think we've had three in recent times that the bullying – the one that's complaining about the bullying – has been the bully in the first instance. And because of that fact, they have been very unhappy with the outcomes and we've worn a lot of flak, as in complaints and all sorts of things to the group leader and John Merritt [*the head of WorkSafe Victoria*] and so on... But luckily for us we've got none on the books at the moment and we pray every day that no more will come in, because it is such a grey area and it is so emotive and so personal to people and it's a he-said, she-said, that you cannot investigate, that you cannot validate, that you cannot verify and people who generally put the complaints in, are generally wounded people for some other reason other than what has gone on with the scenario. Point for example in the last one that we got involved in, she didn't get a promotion that she wanted and so therefore the person that took on her job, her behaviour, which was not acceptable, which hadn't been managed, brought about her new manager reciprocating in kind and being called a bully and an harasser.

Interviews with employer and union representatives also revealed concerns about dealing with psychosocial hazards. One union official believed the shift to process standards had not helped this:

Particularly I find that with a lot of the process stuff is that it's very difficult to pin an employer down on it. Like for example, with stress or with workload or with hours, you know, like for example we've just had, not that long ago, a case on the west coast for the miners, but I represent ambulance officers who would easily work 56 hours a week on a regular basis, and you can say it's a health and safety issue, but you can't actually... The

only way you can deal with it effectively is through industrial means, not through health and safety means...And it's the same with bullying. Nursing homes, hospitals, where there's bullying. Right. Harassment, bullying, and you can get to a point where it's identifying if the employer is prepared to even accept that it exists, because it's often the employers that are doing it. You can't... It's very hard to deal with it and say, "You must do this or this or that happens". You just really have to deal with it industrially I think.

It is important to note that a number of inspectors identified performance management as an issue in its own right, affecting even the willingness of workers to raise complaints. One inspector pointed to this as well as the growing use of contractors and the general de-collectivist shift in industrial relations:

I think that the changes in workplace relations and in aspects of contracting and, you know, things, I think what's happened there is, people are [less?] reluctant to raise health and safety issues. The level of knowledge in health and safety has been reduced and yes, the inspectors might not get the complaints but people who are not very prepared to talk about issues and also a lot of it because of performance management systems that were brought in place certainly reduced the, basically the willingness of employees to speak up.

As already noted, most interventions by inspectorates with regard to psychosocial hazards appear to be the result of complaints from aggrieved workers. Since these complaints almost always entail criticism of the behaviour of other workers or managers that must be then investigated they place the complainant in a difficult position of risking further victimization. Inspectors generally try to keep the identity of a complainant worker anonymous (difficult in small workplaces) but this is impossible in the case of a bullying allegation as one inspector explained:

The only... times where we know definitely that they cannot remain anonymous is when we're dealing with a workplace bullying complaint or a harassment complaint. They have to know that we can't maintain that anonymity.

An inspector from another jurisdiction (Queensland) made a similar observation:

...we still have to I suppose let him know who the complainant is. They have a right of response and usually even writing a letter really gets things up and again it's almost always going to be, you know, working in some of these trade-type places so I don't hold out much hope that our advisory standard can make any difference in those situations. But we have to go through the motions.

This lack anonymity needs to be seen in the context of more general fears of victimization for reporting OHS issues. In our interviews inspectors were asked if they believed fear of reporting was a significant issue and, further, were they aware of any particular instances of victimization. Sixty percent of inspectors replied in the affirmative and half of these were able to nominate specific instances where they believed a worker who had made a complaint had been victimized through dismissal or some other action. While such actions are a clear and serious breach of OHS legislation, inspectors noted that it was often difficult to obtain the evidence to prove victimization (especially in the context of weakened industrial relations laws). One inspector stated that workers making complaints were generally aware they were placing themselves at risk of victimization:

I think they need to know that when they make a complaint that that is possible and we can't guarantee that they're going to have a job once they've done that. So I guess they make a complaint hopefully, well usually, out of desperation. Nothing has been done about it and the only way they're going to get some action is to get someone, an external agency in to advocate for them. So I think a lot of them do make the complaint knowing that that's a possibility, or they hope that we can just keep it confidential, under your hat. And sometimes you can get around that, yes.

A Tasmanian inspector referred to the case of a young worker who was harassed, suffered an injury and then withdrew his workers' compensation claim:

He was driving for a delivery business, a small pie van, and he had to be back by a certain time: "and don't you be bloody late otherwise you won't have a job". Well that fellow had a serious motor accident, and we did pursue the issue to a degree, but he later rang in and asked us to drop everything because he'd had a gut full of it. I think mentally he was sick and tired of it, and he may have been advised by his doctor, perhaps, you know, whether to actually go through with the claim, to worry about getting himself fixed before he did.

Another Tasmanian inspector referred to a particularly difficult case she had dealt with where a number of complaints had emanated about the intimidatory behaviour of a manager of a disabled care facility (with about 30 employees). During her initial interview with the facility CEO (the immediate superior of the manager accused) the inspector became aware this was an ongoing problem with similar allegations made some years before (resulting in audits of the company by the Health Department, which provided funding support). The inspector obtained copies of the audits and made further enquiries at which point the CEO became less cooperative, complaining to the Minister that the investigation was bordering on intimidation and harassment (and informing the inspector he had done this). The inspector kept her regional manager fully informed of developments and carefully documented her actions at all stages so that her manager could draft a response to the Minister. At this point the investigation was further complicated by lawyers attending meetings and meetings being held where workers were told they should not go to go to Workplace Standards to complain as this was contrary to the workplace dispute resolution process. While this was a clear breach of legislation the agency made the judgment that as unions were already aware and involved and there had already been too considerable correspondence they should focus on the investigation. The inspector noted that it was agency policy that if there was a formal complaint (ie where the complainant is prepared to identify themselves to the agency) to go on, but if no-one is willing to issue a signed statement, then to ask general enquiries of the company, to provide evidence of systems to manage the issue. The inspector observed:

... because no-one had made a complaint, we couldn't take it any further. But so in the end we said to the company, "You've showed us a system. We haven't been able to test or see whether it's working and being used, but if we are to receive a formal complaint in the future we'll be back to investigate those complaints". So unfortunately we weren't able to go any further because people were too scared to...I hated it. I spent... I didn't feel like... well I was restricted. I couldn't have done any more, given that they weren't able to... You know, if they can provide evidence where they've raised issues and nothing has been done about it, I would hope that I'd be able to put up a case to management to argue why this should be prosecuted, because to me it's a serious offence. But if we don't... if it's just hearsay, one person's word against the other, unfortunately we really can't go down that

path. And in most cases, all the ones I've worked on, they haven't been able to really give us evidence that something's happened. There hasn't been the witness there to testify.

In addition to inspectors, unions have the power to visit workplaces to investigate OHS breaches, although federal industrial relations legislation has made this more difficult as has the growing number of non-union workplaces. Since unions provide critical logistical support to employee health and safety representatives these only tend to be found in unionized workplaces, removing another option for workers making a complaint. Inspectors interviewed referred to several cases involving unions. In one Victorian case the issue was complicated by the fact that the employer resisted union access to the site and the object of the complaint was bullying by the health and safety representative. In this instance, the inspector had been called in and had viewed the two union officials' credentials, confirming they had a right to enter the workplace.

In one state jurisdiction (New South Wales) unions also have the power to launch prosecutions under the OHS Act – a power that is used only occasionally due to the costs involved (although unions have won every case we are familiar with). Concerned at the trauma being suffered by its members during armed bank robberies, the Finance Sector Union (FSU) had been campaigning for improved security barriers to protect bank tellers for a number of years. Faced with employer resistance to these claims the FSU inspected four bank branches following robberies and used the evidence to successfully prosecute the banks concerned under the OHS Act (*Geoff Derrick v Australian and New Zealand Banking Group Ltd* [2003] NSWIRComm 406; *Peter Presdee v Commonwealth Bank of Australia* [2005] NSWIRComm 389, *Geoff Derrick v ANZ Group Limited* [2005] NSWIRComm 59; and *Geoff Derrick v Westpac Banking Corporation* [2006] NSWIRComm 76). This led to the introduction of barriers and a significant decline in both robberies and affected staff. The union took the initiative not because of any conflict with the state OHS inspectorate (WorkCover NSW) but because the latter was unable to pursue the issue in the same systematic manner due to resourcing constraints. This provides a good example of how unions can pursue psychosocial issues under OHS legislation although it needs to be stressed that the option of launching a prosecution is confined to NSW and too expensive in any case to be used on anything but a very selective basis. Another successful trade union prosecution, this time initiated by the Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales, addressed inadequacies in staffing, information, and communication which led to a teacher being assaulted by a student at a school for physically and intellectually disabled students (*see O'Sullivan v The Crown in Right of the State of New South Wales (Department of Education and Training)* [2003] NSWIRComm 74).

## **7. Is the Law Adequate?**

In one respect the old-style specification type of regulatory standards were clearly unsuited to deal with psychosocial hazards. However, a number of inspectors were critical of whether the move to process standards had really filled this gap. An experienced Western Australian inspector in the hazards area gave the example of

working hours and the need to take account of aspects of work routines that were by no means apparent unless very detailed research was carried out:

But again our draft code says you assess the working hours. You assess the work from that. And again because it's a very process-oriented code there's no information. Okay, how do you assess the demands of the job? How do you assess those things? How do you match those with the hours they're working? And they even, even itself can get quite complicated, the working hours business you know. I did an investigation to become a project involving medical scientists, where they only worked a seven and a half hour day but they were on call-out. So these people knock off at 4.30 and they can be called back at seven o'clock, at nine o'clock, at 9.00 am, at 3.00 am, but only for 20 minutes or so. So the total hours they actually worked accumulatively was no more than about 40 a week. But what I eventually got around to actually doing was I went through six months of timesheets, and what I actually looked at wasn't the hours of work, and that was what I was able to actually get to make a correct assessment.

Earlier in this article we noted that the inspectorates' enforcement policies and procedures inhibited prosecution of psychosocial issues. The few attempts to launch a prosecution have exposed a second difficulty – the inadequacy of the law, and in particular, the lack of clarity of the provisions regulating psychosocial issues. As one informant said:

It's really difficult to gather the proof [*required for a successful prosecution*] ... the harassment stuff is, in some ways, easier if there's hard evidence in the form of things recorded or emails or people have written things.

These difficulties in evidence gathering have inhibited the use of improvement notices as well:

The stress stuff we've had difficulties even with writing notices, notices being approved, yes.... you've got to allege that there's a contravention of the Act. ... And be sufficiently confident that it can't be appealed.

Queensland inspectors reported that there have been no prohibition notices and only one infringement notice (for a contravention of an improvement notice) for psychosocial issues. There have been about ten improvement notices a year for harassment issues, but few, if any, for other psychosocial issues. One inspector explained that improvement notices are issued for “failure to manage the risk of harassment in the workplace ... It's about failure to manage psychosocial risk, in particular workplace harassment”. The Queensland inspectorate's view is that improvement notices cannot be issued for failing to conduct a risk assessment – but only for failure to implement appropriate controls. As one inspector noted, “there is high level evidence that needs to be collected to issue a notice”.

Many of the notices issued had been withdrawn by regional management after an appeal by the employer. A clearly identified issue was that the legal requirements for psychosocial issues were not clear enough, so that the regulator was not confident that enforcement action in relation to psychosocial issues would be upheld by the courts. As an informant explained:

... in some ways I wish it had have got to the stage where it could properly have been tested and then there would have... but in all these things we learn a lot and it's more about... it's less about the substantive risk and more about the way that evidence is collected. ... I still think there's work to be done in terms of people getting to the point as you say where they feel confident that the nexus is there between these risk factors and a health outcome. ... There's still a very strong tendency to push it back towards surely any defence would argue that it's just about this person. ... and not about these work factors being so horrendous that any normal person is more likely to experience some kind of discomfort from being exposed to that on a day-to-day basis. ... So in their mind I think there's greater uncertainty but one expects uncertainty in the decision-making process that aren't there in other areas. ... So yeah, I do think that the legislation doesn't help but I'm not sure how it could look, that would work unless with the health issues in a general way... I think we're at a stage now to more systematically look at asking the question, how could the legislation serve us better and so I think going back four years we weren't at that stage yet because we still had to do a lot of work to do with the models and the frameworks and all that kind of thing. So I do think we're at a stage where we should in the next four years be looking at that. ... because I would like to consider whether there is anything about regulation changes too, in terms of the definition of work-caused illness and how psych stuff fits into that ... Coming up with risk management frameworks for psych injury in general is not something that most organisations in Queensland would even want to commit resources to. If it was legislated perhaps they would.

One Queensland inspector compared the inspector's experience with psychosocial issues to the inspector's experiences with ergonomic issues a many years previously:

I thought it was going to be about not having the knowledge, or not seeing that that's important, and those things turned out to not be the case at all. It was more about they didn't feel that the legislation would back them up in the decision-making.

A number of inspectors in our study were highly critical of the state of the legislation when it came to dealing even with psychosocial issues like bullying and violence where there was clear guidance material. One inspector stated:

When you get into the areas of harassment and bullying and those sorts of workplace dispute situations, you find that our Act is not good enough to manage some of those situations so you think, what other jurisdiction might be able to deal with that? And you find that the equal opportunity legislation covers some of those issues. But their legislation is even weaker than ours so they duck-shove all those things to us... And in cases of assault for instance, police will not get involved in cases of workplace assault unless there's a serious outcome.

While inspectors were generally confident they had the array of enforcement tools to address situations they encountered, psychosocial risks was a notable exception. A number of inspectors expressed the view that investigating these issues expended considerable resources for what was, in their view, often a unsatisfactory outcome. Typical was this comment:

Yes I think we spend a lot of our resources on those sort of, the ones that are hard to come to any good conclusion. Like, you know, bullying in the workplace is fairly... You've got one employee who thinks they're being bullied and the employer who sort of denies it and you go through a process and in the end all you seem to achieve is

writing them a notice to have a bullying policy and train everybody and all that but I don't know if it does achieve a certain level of compliance. Probably makes them aware that someone is watching them.

Another inspector pointed to the advisory nature of the Queensland code of practice and the alternative options workers might want to pursue:

...yes so it really does depend on the situation but again the person who has been the source of my only complaint for this whole year, you know, as soon as she says something, "I want compensation" or "I want retribution of this" we're supposed to say, "Well we cannot offer that. I can tell you exactly what I can do and if you want anything more, anti-discrimination and going through that process is your only option."

This suggests that it is important to have psychosocial issues regulated at least by approved codes of practice (as is the case with workplace harassment in Queensland – see above), rather than simply by guidance material. Not only does this send a strong signal to employers that psychosocial issues are important, but it is "something that drives inspector behaviour as well", as a psychosocial inspector noted.

There have been a growing number of cases in Australia where workers alleging bullying or harassment have made workers' compensation claims or have taken common law action against their employers (see for example *Cranston v Consolidated Meat Group Pty Ltd & Another* [2008] QSC 41). However, while these cases may affect the practices of particular employers, they are still too isolated and often prolonged by lengthy appeals (see for example *Nationwide News Pty Ltd v Naidu & Anor*; *ISS Security Pty Ltd v Naidu & Anor* [2007] NSWCA 377) to have a general deterrent effect. As such, they are not an alternative to intervention by OHS inspectors.

## **8. Conclusion**

Inspectors regard psychosocial risks as a growing issue and linked to changes to work arrangements. The OHS agencies have responded, especially in the areas of bullying, harassment, workplace violence and stress, issuing guidance material, conducting some awareness raising campaigns and providing training for inspectors to undertake these tasks. Only one agency (Tasmania) has produced a more general guidance material on psychosocial risks and it appears employers have been quite resistant to this. Another jurisdiction (Queensland) has appointed a specialist team of inspectors to focus on bullying and harassment cases and to mentor other inspectors in this regard. Recently Queensland has broadened its approach to psychosocial issues, and is now also focusing on workplace stress and fatigue. These actions appear to have had some impact, especially with regard to larger employers. It should also be noted that OHS inspectors are able to intervene in cases to protect workers in industries and jobs where redress to the mechanism of EEO/anti-discrimination legislation is not a practical alternative. Further, their focus on changing policies and structures is liable to lead to more effective solutions at a general level than the highly individualised remedy afforded by an action under anti-discrimination laws.

Nonetheless, as the cases cited in this study illustrate, individual cases of bullying and harassment often seem to be a byproduct of changes at work and the decline of mechanisms for ensuring justice at the workplace, especially the role of unions. While inspectors might be able to persuade employers to alter their practices (where this was found to be at fault) the outcome for individual workers who made complaints was seldom seen as satisfactory and the inspector could themselves be targeted by a range of aggrieved parties. A number of inspectors saw the law, especially the sanctions available, as inadequate. Whether better protocols and policy supports – especially in the area of training and resourcing - could be introduced to address this requires consideration. Campaigns targeting some underlying causes of bullying behaviour, such as poorly executed downsizing/restructuring, as well as vulnerable groups of workers (such as female immigrant cleaners) might also prove valuable. At the same time, attention also needs to be given to changes in workplace relations more generally to ease the burden on OHS inspectors to address problems whose extent has been exacerbated by the withdrawal of regulatory protections in other areas (notably industrial relations).

Our account of inspectorates' approaches to psychosocial issues shows that most inspector activity is concerned with responding to individual complaints and that these were often difficult to address with because the parties' different perspectives often became "the issue". This suggests to us that inspectorates need to be more proactive in their inspection and enforcement strategies and develop models for targeted interventions focussing on high risk employers and/or industries, rather than getting bogged down with individual disputes. For a discussion of the more proactive approach taken to psychosocial issues in Sweden, see Engman (2003).

We conclude on an optimistic note. The Australian inspectorates approach to regulating psychosocial issues can take heart from developments in areas like ergonomics. The inspectors we interviewed noted that the Queensland inspectorate's experience with ergonomic issues over the past decade provided a good 'role model' for the psychosocial initiative. Over a decade ago, ergonomic issues were regarded as a 'poor cousin' to the mainstream OHS issues, but over time ergonomics has developed as a strength of the inspectorate, and to a large extent has been mainstreamed into the inspectorate's functions. Psychosocial inspectors reported to us that the progress of ergonomic issues within the inspectorate showed that perseverance with psychosocial issues had a strong chance of paying off.

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