The Health and Safety at Work Act and psychosocial risks: Change the legislation or change our mindset?

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What is the problem?

A number of employers, human resource practitioners and lawyers seem to spend large parts of their working day dealing with the fallout of the often poor workplace culture in Aotearoa New Zealand. This is because there are high reported rates of bullying, 'toxic' culture, and sexual harm. Our systems of work have simply not traditionally been designed to prioritise a wellbeing model of workplace engagement.

The low levels of unionisation in the workforce in Aotearoa New Zealand may contribute to a reactive approach rather than a partnership approach which in other jurisdictions encourages addressing issues proactively on a broad sector basis.

The employment jurisdiction and institutions have developed a framework that is largely focused on individual grievances. Running cases through the Employment Relations Authority (or the Employment Court for breach of contract and statutory duty causes of action) takes significant time and resources. Litigation is generally only resorted to once the employment relationship (and often the person bringing the claim) is well and truly broken. The findings in an individual case seldom result in an improvement in the workplace.

Work-related psychosocial risks are workplace interactions or conditions of work that can negatively affect the health and wellbeing of workers (WorkSafe, 2019). Psychosocial risks include stress, overwork, bullying, harassment and poor management practices. The 2020/2021 UK Trade Unions Congress survey revealed 70% of safety representatives reported stress as being one of their top five concerns at work, followed by bullying and harassment at 48%, and overwork at 35% (Trade Union Congress, 2021). Despite the fact that psychosocial harm accounts for a significant portion of the harm people suffer at work, it has been rare for these risks to be seen as part of a health and safety practitioner's working day. This is starting to change.

It is well established by research that the effects of bullying, sexual harassment, prejudice, overwork, undue pressure, harsh management, low job satisfaction and other workplace stressors can be catastrophic (WorkSafe, 2019). Many research reports, guidelines, and policies start by stating what the unacceptable behaviour or factor is, and then how damaging it can be. Effects include shattered self-confidence, difficulty sleeping and eating, physical and mental health symptoms, heart and other

serious physiological illness, depression and anxiety, sometimes resulting in burnout and even suicide. Impacts on the workplace, the bottom line and the economy are significant, but seldom measured.

Why, then, has there been so little focus by the health and safety community on bullying and other sources of workplace stress and almost none on sexual harassment, as serious and common workplace hazards? There have not yet been cases in the District Court prosecuting breaches of the obligations on businesses to provide a safe and healthy workplace in relation to psychosocial harm.

Traditional, male-dominated sectors such as agriculture and horticulture, forestry, construction, maritime, manufacturing, transport and mining are riddled with physical hazards. Serious injury and death tend to get the most attention, and it is easier to deal with what you can see. Inspectors in the past were trained in inspecting mines, factories and the like, not complex interpersonal issues. It is encouraging to see a gradual change in some traditional male-dominated sectors. For example, the mental health problems besetting the construction industry are now being widely recognised and there are many positive initiatives underway across the sector to promote better awareness and practices in relation to mental health.

The Health and Safety at Work Act 2015 (HSWA) could be more overtly inclusive of psychosocial harm. There is no statutory definition of 'bullying'. Although the Act specifically applies to physical and mental health and section 16 of the Act defines a hazard widely to include a person's behaviour where it could cause harm, most of the specific duties are framed around physical hazards. There are a number of provisions discussing the types of work environments that have to be kept safe, the kinds of physical threats that may exist and a focus on plant, machinery and systems of work. Indeed, section 23 of HSWA lists the types of serious injuries and illnesses that have to be notified to the regulator. None of them relate to psychosocial harm.

In the past, WorkSafe New Zealand did not have specific resources dedicated to addressing psychosocial harm. Since 2017, WorkSafe has been increasing its focus on bullying as a serious workplace hazard. In the absence of a statutory definition of bullying, the 2017 guidelines *Preventing and Responding to Bullying at Work* (WorkSafe, 2017) are practically the legal and HR community's bible. The guidelines make it very clear that businesses have legal obligations to take all reasonably practicable steps to prevent bullying, to minimise harm, to take complaints seriously and investigate.

Many more organisations are implementing or updating policies to address bullying, sexual harassment and discrimination. There is a grey area in terms of definitions where there is a policy that is not aligned with the WorkSafe guidelines, what is the employer to be guided by? Failure to follow the employer's own policy will usually result in a finding of a procedural flaw or an unfair process. Conversely, if a policy is deficient, following it will not be sufficient: the court will assess whether all reasonably practicable steps were taken. My suggested approach (apart from having clear, accessible policies that are fit for purpose) is to always put health and safety obligations at the top of every priority list.

Sexual harassment has largely remained invisible to the health and safety community. This has been changing rapidly after the #MeToo movement focused attention on the prevalence of sexual harm, including in the workplace. There is now a suite of resources about sexual harassment on the WorkSafe website and many good examples of policies and processes are emerging.

Our attempted solutions

Many forms of unacceptable behaviour towards workers are unlawful by virtue of the Employment Relations Act 2000, Human Rights Act 1993, and the Crimes Act 1961, as well as the Harassment Act 1997 and Harmful Digital Communications Act 2015. The increasing capacity of WorkSafe to investigate and provide resources to address psychosocial factors in unsafe workplaces is a very useful addition to the regulatory environment.

Employees who have been harmed by a failure by their employers to safeguard their welfare in relation to psychosocial factors can also sue their employers under both the Employment Relations Act and common law. Some of the awards in those cases have been significant (for example in two leading cases *Gilbert*[1] and *Whelan*[2]). However, these are the rare exceptions. In the vast majority of cases of workplace harm due to stress, bullying, sexual and racial harassment, prejudice or hostile management practices, the employee simply leaves, broken. Most people simply do not have the mental and financial resources to take on an employer when they are suffering the after-effects of a significant workplace hazard. They also fear reputational harm, career disadvantage and victimisation.

The existence of these litigation options does not mean we should leave addressing these issues to either expensive civil claims or rare criminal prosecutions. The parallel regulators should work together to address accountability, compensation, and remediation (as does happen, to an extent, in, for example, significant industrial or aviation disasters). There is already a tendency of the various legal institutions to have regard to the approach each takes to compensation and sentencing when dealing with similar content. Greater cohesion and alignment of the different options would be sensible.

The approaches taken in other jurisdictions are largely of the guidance variety. A comprehensive exposition of various approaches is set out in a useful WorkSafe report *Psychosocial hazards in work environments and effective approaches for managing them* (WorkSafe, 2019). There are few examples of statutory definitions in relation to workplace stressors and psychosocial harm, including in Australia. The EU standards and guidelines do take a proactive approach, setting out not just definitions of psychosocial hazards but also actions required to prevent harm.

1 Gilbert v Attorney-General [2002] 2 NZLR 342
2 Whelan v Attorney-General [2004] 2 ERNZ 554

Moving forward

The question is, how do we address the need for a significant change in how we all (employers, lawyers, unions, HR/OSH practitioners and regulators) address these issues, to make workplaces safe for everyone? Should we amend the legislation? Should there be specific regulations? Should there be more guidelines and helpful resources? Should those have more formal official status? Should Crown agencies be doing more to educate employers in every sector about their responsibilities and how to meet them? Should WorkSafe be investigating and prosecuting employers for serious failures to eliminate and mitigate psychosocial hazards in the workplace?

The answer in my view, is yes: all the above. We need an integrated approach across all sectors, led by government agencies, employer bodies, and unions. The aim should be to start a national conversation about what healthy work looks like, how to change our workplace culture and how to ensure every worker is safe.

We need a legislative framework to clearly and coherently define psychosocial hazards in the workplace. Having debates and embarking on occasional litigation about what exactly is bullying, for example, is inefficient. That is why I believe we need to codify the case law into the legislation.

The defence to vicarious liability for sexual harassment under the Human Rights Act is that the employer can show they took reasonably practicable steps to prevent such conduct occurring.[3] The Act therefore requires proactive steps to be taken to prevent harm occurring, for employers to avoid vicarious liability for sexual and racial harassment. Health and safety obligations also require a proactive identification, elimination, and management approach. Yet this has not widely been recognised, nor translated into proactive planning to prevent psychosocial harm.

3 Human Rights Act s68 Liability of employer and principals

(1) Subject to subsection (3), anything done or omitted by a person as the employee of another person shall, for the purposes of this Part, be treated as done or omitted by that other person as well as by the first-mentioned person, whether or not it was done with that other person's knowledge or approval.

(2) Anything done or omitted by a person as the agent of another person shall, for the purposes of this Part, be treated as done or omitted by that other person as well as by the first-mentioned person, unless it is done or omitted without that other person's express or implied authority, precedent or subsequent.

(3) In proceedings under this Act against any person in respect of an act alleged to have been done by an employee of that person, i*t shall be a defence for that person to prove that he or she took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing as an employee of that person acts of that description.* (emphasis added)

We should be describing (in regulations as well as policies) a wide range of actions that constitute sexual harm in the workplace as a hazard to be eliminated, rather than using the current definitions in human rights and employment legislation which are too complex and unduly focus attention on whether the impact on the victim really was so bad.[4]

In my experience, few employment lawyers understand the implications of these provisions of the Human Rights Act about vicarious liability, let alone employers. Insufficient attention is paid to prevention strategies, education, picking up on issues before they escalate, and upskilling managers, HR practitioners and employees. Too much emphasis is being given to making it easier for victims to speak up or saying, "we can't do anything without a formal complaint".

Failures by employers to be proactive in putting action plans into effect should have the same consequences in an enforcement action as neglecting to be proactive in preventing physical harm, for example not guarding machinery.

Many causes of workplace stress and harm (the impact of microaggressions in relation to sexism, ableism, racism, and prejudice towards the LGBTQI community, for example) are simply not even recognised by employers, so they are not identified as hazards. If they are not recognised, there is no hope of implementing an action plan to eliminate them.

4 Human Rights Act, s62

(1) It shall be unlawful for any person (in the course of that person's involvement in any of the areas to which this subsection is applied by subsection (3)) to make a request of any other person for sexual intercourse, sexual contact, or other form of sexual activity which contains an implied or overt promise of preferential treatment or an implied or overt threat of detrimental treatment.

(2) It shall be unlawful for any person (in the course of that person's involvement in any of the areas to which this subsection is applied by subsection (3)) by the use of language (whether written or spoken) of a sexual nature, or of visual material of a sexual nature, or by physical behaviour of a sexual nature, to subject any other person to behaviour that—

(a) is unwelcome or offensive to that person (whether or not that is conveyed to the first-mentioned person); and

(b) *is either repeated, or of such a significant nature, that it has a detrimental effect on* that person in respect of any of the areas to which this subsection is applied by subsection (3). (emphasis added)

Rather than guidelines setting out useful tips on how to prevent psychosocial hazards causing harm, in my view, we need these set out as requirements in regulations, as occurs for the management of physical hazards in certain sectors. We have seen what happens when self-regulation is matched with non-prescriptive definitions in other areas of health and safety.

Regulators need to take psychosocial harm far more seriously. WorkSafe is in the process of recruiting and training inspectors to do preventive work and catch dangerous workplace practices, toxic environments, and near-misses. WorkSafe now has a full suite of powers to compel compliance, including prosecution and significant penalties. We need sticks as well as carrots.

Government agencies have a significant role to play in educating employers and employees alike in what healthy work looks like and how to create respectful, safe work cultures. New Zealand is a nation of small/medium-sized businesses that do not have the resources to get all of this right by themselves. Educating by enforcement does not work; panel beaters and dairy farmers do not read Employment Relations Authority and Human Rights Review Tribunal decisions. It is famously easy to set up a company and be an employer in Aotearoa New Zealand: we need to ensure people can as easily comply with their important legal obligations to provide a safe and healthy workplace for everyone.

Health and safety professionals need to educate themselves and categorise bullying and sexual harassment, and other psychosocial hazards as serious, pervasive, and capable of causing serious harm. Together with their HR colleagues, they need to ensure PCBUs (directors and senior management) are aware of the legal and business risks to the organisation if these hazards are not sufficiently addressed. The human and business costs are huge, but we don't always measure this. What we don't measure, we can't manage.

New Zealand workplaces are notoriously low in productivity: in my experience and based on the research about the impacts on performance, absenteeism, and turnover of psychosocial harm, this is one of the factors. The links are clear in every engagement survey report I have ever read. Workplaces that genuinely value employee wellbeing have fewer employment relations issues, lower absenteeism, retain staff longer and stand out as "the ones to watch".

Connect the dots

We do not currently have workplaces that are safe, healthy, and respectful for everyone. We do not connect the dots between:

- psychosocial harm factors
- poor management practices
- a culture where it is too dangerous to speak up
- inappropriate policies and processes that harm people
- a lack of diversity and inclusiveness
- low productivity
- ill health, burnout
- difficulty attracting and retaining excellent staff.

Government agencies, regulators, unions, employers and their advisers need to work together to make sure we do all we can to:

- change the regulatory framework to clearly define what is prohibited and what PCBUs need to do to prevent psychosocial harm
- educate and upskill ourselves, managers and staff about psychosocial harm, how we need to change our workplace culture and the need for individuals to contribute to this change
- senior people need to role model exemplary behaviour
- provide excellent policies, processes and support
- where necessary, investigate and hold people accountable.

References

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