STANDING COMMITTEE ON PUBLIC ADMINISTRATION

INQUIRY INTO WORKSAFE

TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
WEDNESDAY, 9 MAY 2018

SESSION ONE

Members

Hon Adele Farina (Chair)
Hon Jacqui Boydell (Deputy Chair)
Hon Ken Baston
Hon Kyle McGinn
Hon Darren West

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Hearing commenced at 10.12 am

Dr JOHN BYRNE
Acting Commissioner for Equal Opportunity, sworn and examined:

Ms DIANA MacTIERNAN
Manager, Commission Services, Equal Opportunity Commission, sworn and examined:

Mr ALLAN MacDONALD
Senior Legal Officer, Equal Opportunity Commission, sworn and examined:

The CHAIR: I have a few formalities I need to go through first. On behalf of the committee, I welcome you to this morning's hearing. I need each of the witnesses to take either the oath or affirmation.

[Witnesses took the affirmation.]

The CHAIR: Thank you. You will have signed a document entitled "Information for Witnesses". Have you read and understood the document?

The WITNESSES: Yes.

The CHAIR: These proceedings are being recorded by Hansard. A transcript of your evidence will be provided to you. To assist the committee and Hansard, if you are referring to a report, can you please quote the full title of the document. Please be aware of the microphones; make sure you speak into the microphones and do not cover them with any paper. I remind you that your transcript will be a matter for the public record. If for some reason you wish to make a confidential statement during today's proceedings, you should request that the evidence be taken in closed session. If the committee grants your request, any public and media in attendance will be excluded from the hearing. Also, please note until such time as the transcript of your public evidence is finalised, it should not be made public. I advise you that publication or disclosure of any uncorrected transcript of evidence may constitute a contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege.

John, I invite you to make an opening statement to the committee if you would like to.

Dr BYRNE: Firstly, we thank the committee for the invitation to come here today. We are aware of the role of the inquiry into WorkSafe, but the terms of reference do not mention bullying. That is an important issue to the Equal Opportunity Commission. I mention in the context of the Equal Opportunity Act, there was a review in 2007—a review of the Equal Opportunity Act 1984, the report dated May 2007. That is quite old. It did not get implemented; there was a change of government shortly afterwards. One of the issues we considered is whether the Equal Opportunity Act should be extended to include bullying. On page 14 and 15 of that report, there are two pages that address that particular issue. The report is on the Equal Opportunity Commission's website. I do not think I need to read through the one and a half pages of what was said—that will basically come up in the discussion with us—but I confirm that it is an issue of interest to us. We have previously recommended that bullying be included as a ground under the Equal Opportunity Act.

The CHAIR: So that remains the commission's position, that bullying should be included as a ground for discrimination?

Dr BYRNE: Yes, that remains the commission's position. We would like to see the review recommendations implemented. We are working with the minister responsible, the Attorney General, and that remains one of our recommendations; yes.

The CHAIR: I note that in the annual report, you indicated that one of the priorities for the commission was to undertake a review of the act in 2018. Has that review commenced and what is the current status?

Dr BYRNE: That was not really so much a full review as we did in 2007; it is an updating of the review and to work with the Attorney General to see if there is scope to make further changes to the act.

The CHAIR: Could you explain to the committee why bullying should be a ground of discrimination under the Equal Opportunity Act and what benefits that will provide?

Dr BYRNE: Although this is about employment for the committee, bullying is really a major issue across our society. We see that in many areas, in addition to employment. We see that, for example, in bullying on Facebook, which has resulted in some suicides of children. Generally, in my view, society has not fully addressed how it is going to work through that issue. If the bullying is severe enough, of course it may become an industrial matter, or it may become a matter for the police force—a criminal matter. But more often the way bullying occurs, it does not really result in police action, and there is no real mechanism for people being subject to bullying to have that resolved. Unless, of course, their employer or a club they are a member of, an education institution, a school have methods in place that work, there is no mechanism for people subject to bullying to address that. I think society needs to look at that more widely, possibly set up a mechanism. I am not advocating that this is the only mechanism, but one possible mechanism that could be considered would be for bullying to be referred to an Equal Opportunity Commission or Human Rights Commission at a federal level, then you open the powers of those commissions to try to conciliate the matter. If not conciliated, you open the power to go to the administrative tribunal resolution.

So, in my view, summarising, bullying is a widespread issue in employment and elsewhere. If we do not have a mechanism in place, the Equal Opportunity Commission may potentially provide a mechanism to address that. That would not of course stop bullying straightaway, but as in other areas, other grounds of the Equal Opportunity Act, over a period of time, you will find there is a decline in those things. There is much less overt racial discrimination, for example, less overt discrimination against people with disabilities, and among other things, over time it has the effect of changing society for the good.

[10.20 am] 10:20:27 AM

The CHAIR: Can I just ask when the Equal Opportunity Commission receives a complaint of bullying, how do you deal with that complaint currently?

Dr BYRNE: Sometimes those complaints of bullying are part of a legitimate ground—racism, sexual harassment. In that case, basically the bullying becomes part of the complaint if the complaint is accepted. But if it does not really relate to a ground, we have to decline to accept the complaint. But we always try to refer people to another mechanism—another avenue. With workplace bullying, some organisations, some employers, Fair Work Australia, is a fair mechanism we can refer them to. But Fair Work Australia is not available for all employees. I would like to ask if Allan or Diana would like to add to those comments.

Ms MacTIERNAN: In terms of accepting, as John just pointed out, we would accept a complaint if that was the type of behaviour that was being demonstrated but there was an applicable ground—we find that that might happen particularly with sexual orientation or people who have transitioned, and age is another one that is quite a regular characteristic. So if the type of discrimination is

manifested through bullying-type behaviour, we would attempt to conciliate those matters. That is, I suppose, what is absent at the moment. If WorkSafe itself progressed a matter of bullying, it has to go through that legislative process, through the Magistrates Court, and the threshold, obviously, is higher because it is the legal threshold as opposed to the civil one. So that is, I suppose, where we saw that there was a gap back in 2007—that there was not really a mechanism to adequately deal with it in this state. We saw that given how many issues that come to us that include bullying, our act could reasonably, potentially, I suppose, cover it.

The CHAIR: Are you saying that bullying as it is covered by WorkSafe does not adequately deal with bullying in the workplace? Are you saying that there is a gap?

Ms MacTIERNAN: It is difficult, I suppose, because as I understand how WorkSafe need to deal with it is that they will try to investigate the matter but, ultimately, if there is no resolution and they are just determined to proceed with it, they would have to go through the Magistrates Court and have the criminal standard of beyond reasonable doubt. That is a more difficult threshold, clearly, for people to try to reach.

The CHAIR: One person's view of bullying might be another person's view of management of a difficult employee. Where is the line drawn? What elements are required to be satisfied to substantiate bullying as an act of discrimination?

Mr MacDONALD: I suppose given that bullying is not really a ground under discrimination law currently in Australia—Diana and John have referred to Fair Work—if we were to proceed with drafting some kind of provision that enabled someone to complain about bullying, we would look to what definitions currently exist in Australia and elsewhere. The Fair Work Act, and I cannot recall it from memory, contains a definition. I believe WorkSafeOnline does provide a definition, but, again from memory, it has to be something substantial that goes beyond simply a reasonable management of an employee or a disciplinary issue or performance issue. The definition would have to encompass something that is more than that—that it is repetitive, unreasonable, it is harsh and does not relate necessarily to either a disciplinary matter or performance issue, or it starts off that way but may persist.

Dr BYRNE: I would like to add to what Allan said. The issue of a complaint of discrimination in employment and performance management is really quite a common occurrence, we find. We find people subject to performance management often complain about discrimination with regard to disability or sex discrimination or age discrimination. We have to filter out those things. That is quite a common situation. Once you have a clear-cut definition of, say, sexual harassment or race discrimination or disability discrimination, then you can apply that criteria. But I say again, it is really quite common for a complaint in the employment area to relate to an employee's performance management; it is really just discrimination.

The CHAIR: When the Equal Opportunity Commission makes the argument that bullying should be included as a ground under the Equal Opportunity Act, you are referring to bullying much wider than just in the employment situation? Is that the case, or are you looking at only adding it as a ground in the workplace?

Dr BYRNE: I should clarify. The specific recommendation in the report in 2007 was really to include a ground in areas which are currently grounds for other things—sexual harassment, for example. The areas where you can make a complaint of sexual harassment are accommodation, employment accommodation and education, not clubs and so forth. So, basically, the recommendations in 2007 would be you extend, you include bullying on those grounds that you already have sexual and racial harassment.

My earlier comments were, one could say, are my personal view that bullying is a much more widespread and you need a mechanism in society to address that. But we have not made a formal recommendation; the Equal Opportunity Act is deemed to include that. We simply think that is an area that could be considered and discussed in society. But it is a long way from starting a discussion to making a recommendation.

The CHAIR: I note that on page 103 of the commission's annual report it indicates that the number of inquiries and complaints received about bullying decreased from 90 in 2015–16 to 52 in 2016–17. In view of that, do you have a reason for that decrease? If I have understood your evidence correctly, it seems that you go through a filtering process; and, if you can align the complaint that you have received with a ground under the act, it will get recorded as an employment complaint, or it could be what you call some other ground—that is, racial discrimination ground—under the act, so it will not necessarily show up as bullying. When we see those figures in the annual report, are they referring to those complaints that you were not able to align with a ground under the Equal Opportunity Act?

Dr BYRNE: Yes.

Ms MacTIERNAN: Also, when we inquire, there is quite a broad category, so that includes telephone inquiries through our inquiry line, email inquiries and those that come in through the formal complaint form. Those that are not in jurisdiction on the complaint form are classified as an inquiry.

The CHAIR: In view of the fact that those numbers are so low, is there a justification for adding bullying as a ground under the Equal Opportunity Act?

Dr BYRNE: Bullying is found to be happening now more commonly in complaints to us. An increasing number of complaints have come from greater community awareness. The Equal Opportunity Commission cannot deal with those complaints and Fair Work can. Of course, there is information on our website and other websites, so that decline does not completely result in complaints or indeed have them addressed. It simply refers to the fact that there is greater awareness, that we cannot address them.

[10.30 am] 10:29:46 AM

The CHAIR: So the commission's position is that bullying is far more prevalent than the figures in the annual report would indicate?

Dr BYRNE: Definitely.

The CHAIR: I understand that in 2012 when the then commissioner gave evidence before a joint standing committee on education and employment, Mrs Henderson indicated that the Equal Opportunity Commission undertook some training to employers, community members and advocates about workplace bullying. Does the commission continue to provide that training to employers, community members and advocates?

Ms MacTIERNAN: Yes. What we do provide is what we call "calendar" courses or "customised" courses, which is an overview of the act and how the discrimination is described under the act. What we try to do, particularly for people in positions of management or supervisors, is to identify what constitutes bullying compared to harassment, and when bullying does apply under the Equal Opportunity Act and can be captured, and also more particularly to try to make that distinction that you asked earlier about, what is sort of reasonable management and when does that cross over into bullying-type behaviour. It is working through with people so they can clearly identify those differences and also to try to build a workplace culture where that is not acceptable. So we provide those, as I said, through calendar courses. Organisations might send individual officers to attend

those, or, and probably more frequently, we now are getting requests from organisations to go to them and provide training exclusively for their staff.

The CHAIR: Is it your view that there would be greater benefit in having bullying cases mediated rather than having to go through the Magistrates Court under the industrial relations legislation?

Ms MacTIERNAN: We have actually made a submission to the Mark Ritter review of the state Industrial Relations Act and have put that, in the absence of there being a mechanism to deal with bullying, have made a recommendation that in the area of employment, it might be something similar, that they replicate the Fair Work–type provisions, yes. I suppose again—because that is a civil standard in terms of testing—the benefit is as under Fair Work. Fair Work will only take it to conciliation; it is not an arbitrated matter. I suppose that is where you would think that we would probably agree that a conciliated outcome is to try to get the parties to understand mutual obligations are important.

The CHAIR: Would the commission be prepared to provide the committee with a copy of its submission to Mr Ritter on this issue?

Dr BYRNE: Yes.

Ms MacTIERNAN: We can do that.

The CHAIR: We will take that as question on notice 1, thank you. John, do you have a concern? Did you want to consult with your colleagues?

Dr BYRNE: On that particular point, I just want to check whether we are allowed to release them. As I understand the parliamentary process of committees, what is in one parliamentary committee is confidential to the other committee until published. I am not really sure about that. I will check that point out. But if we are allowed to, we will release it to you.

The CHAIR: That is fair enough.

The committee understands that each Australian jurisdiction has a dual mechanism for dealing with complaints of bullying. I suppose we are not 100 per cent clear how other jurisdictions deal with complaints about bullying. Are you able to give us advice on your understanding of how the other Australian jurisdictions deal with bullying, whether it is actually something that is covered by both their equal opportunity legislation and their industrial relations schemes?

Mr MacDONALD: As far as we are aware, there is no Australian jurisdiction that investigates bullying by itself not connected to a ground of discrimination. I cannot say for sure what their industrial or prosecutorial processes are. I imagine they would be similar to what we have in Western Australia at a state level and, of course, there is the Fair Work pathway as well, which is Australia-wide. But I can try to find out for the benefit of the committee what the situation is in different jurisdictions.

The CHAIR: We do not want to put any additional work on a very small office, but if you are able to do that reasonably easily, we will take it as question on notice 2. But if it requires a huge amount of resources, that is something we will take on board ourselves.

Mr MacDONALD: It should not take long.

The CHAIR: In the commission's proposal to have bullying as a ground under the Equal Opportunity Act, do you still see it continuing to also be covered under the industrial relations scheme in our state as well—under the Occupational Health and Safety Act—or do you see it actually being removed from that act and being given to the Equal Opportunity Commission?

Dr BYRNE: We would not see other acts being changed if WorkSafe can deal with it or Fair Work can deal with it; we would not see that changing, if it adds to ours, as a ground for us. But we would

think that there would need to be some constraints on a person taking it, first, to another organisation, then if conciliation fails and they are not happy with the outcome, shopping around for another organisation. That is a significant problem now with some discrimination complaints, because the Equal Opportunity Act does not preclude people coming to the Equal Opportunity Commission after first going to Fair Work—Fair Work deals with some of the things that overlap with us—or first going to the Australian Human Rights Commission. That is somewhat troubling, because that puts the respondents in two separate processes. It is not entirely fair to the respondent to address a second round of conciliation. So we would not be changing that other legislation, but perhaps a constraint on people shopping around and going to only one complaint-handling mechanism. I also point out that there are some employers in Western Australia—the state government, for example, and some private sector employers—who are not subject to Fair Work, yet if bullying occurs in those organisations, they have currently no other organisation than WorkSafe to address it.

Hon DARREN WEST: I have done a bit of a google search here while we have been talking. Is there a standard definition on what bullying is? We can identify it clearly in extreme examples, but, as the Chair said earlier, there is often some ambiguity around whether it is management of, for want of a different word, a difficult employee or bullying? Do you have a standard definition? Is that different from other people's definitions, because it is an area that conjures some ambiguity around what actually is or defines workplace bullying?

Dr BYRNE: We do not have a standard definition, no. As Allan mentioned, that would have to be developed if we developed the act. But that issue of performance management occurs on other grounds. Generally, you find that there is a grey area in any area of discrimination. Some are obvious; some are quite overt discrimination. Like in disability discrimination, there is a more grey area of how it interacts with performance management. That has to be teased out when a complaint is received. Similar issues occur with sexual harassment. It is where the line is; the precise line is very difficult to define generally. If the complainant feels uncomfortable with what has occurred to him or her, then we try to conciliate that without worrying too much about where the line precisely is.

Ms MacTIERNAN: In terms of the training we provide, I cannot remember exactly what we identify there, but it is basically behaviour that is meant to demean or belittle a person, and not when a person is exercising their management responsibilities—you know, as sort of capturing it—but the intent is to demean or to belittle a person.

[10.40 am]

The CHAIR: When the former commissioner gave evidence in 2012 before the standing committee, she indicated that usually when the commission is dealing with a harassment complaint, the complainant has already left the job, so there is not a likelihood of that person being subjected to further harassment as a result of the complaint. In the case of a bullying complaint, I could see the situation arise in which the person is making that complaint while they are still employed by the employer and actually trying to get a stop to the bullying. How would you handle that in terms of not exposing that person to further harassment or possible termination? Are there any protections under the act?

Mr MacDONALD: The act does contain victimisation provisions. That is across all grounds currently in the act. The victimisation provision says that if anyone, not just the employer or respondent, does anything that is detrimental to the complainant because they have made a complaint or they have asserted their rights, or whatever it might be under the legislation, then that constitutes victimisation and that is a further ground under the act. We would envisage that if for any new

ground that is added to the act, whatever it may be, including bullying, the victimisation would apply to that new ground just as it does to the others.

On your point about the contemporaneous bullying for someone who is still employed, my understanding is that the Fair Work Act has jurisdiction only to cover that situation.

The CHAIR: But that would not cover all employees within this state; it would cover only those employees who are under the commonwealth?

Mr MacDONALD: That is correct—or a corporation. But the complainant or the applicant in a Fair Work application for bullying, my understanding is that they still need to be a current employee. It is not something that they can lodge after they have left work or have been terminated.

Hon KYLE McGINN: Along that line, I think you have 21 days for an unfair dismissal; would that be similar to bullying?

Mr MacDONALD: No. Even if someone alleges that they have been terminated because of discrimination, bullying or victimisation, they have 12 months under the Equal Opportunity Act to lodge a complaint.

Hon KYLE McGINN: After the termination?

Mr MacDONALD: That is correct. In fact, there is provision there for out-of-time complaints, where the commissioner can use his or her discretion to accept a complaint that is older than 12 months. But that is up to the commissioner once the complainant has lodged a good cause explanation, and that is put to the other side as well, the respondent, for input.

Dr BYRNE: Could I clarify a point about the majority of complaints in employment? The person is still employed; it is a minority where the person has left the employment. I am not so sure of the statistics across all the grounds, but I would say that is probably true of sexual harassment also. In the majority of complaints in sexual harassment, in my experience, which is fairly brief, basically the person is still employed. So we do have that situation that people making a complaint against an employer need protection against victimisation. At any time they can then lodge a further ground of victimisation, so to what the employer has done. That needs to be conciliated. If conciliated, it goes to the administration tribunal.

The CHAIR: Having read your last annual report, I note that victimisation is the second highest of the grounds under the employment area, and that it is actually up 1.6 per cent on the previous year, which indicates there is an ongoing problem with victimisation for people who actually bring a complaint to the Equal Opportunity Commission. That message does not appear to be getting through to the employers, that it is actually an offence to victimise a complainant because they have lodged a complaint. Is there more that needs to be done in that area when the initial complaint is being dealt with to try to reduce that victimisation complaint rate?

Ms MacTIERNAN: Can I clarify one point as well? It might be that because somebody can file under victimisation, even if they have dealt with the matter internally, it is adverse behaviour that follows an internal complaint as well as a formal complaint under our act. Some of those might be filed at the same time when we get it, so we get it in the first instance. It is probably fewer that are subsequently received following the filing of a complaint with us. But I will let John answer your substantive question.

Dr BYRNE: I agree that victimisation is a significant issue that we certainly want to see employers be more aware of it. But we draw a distinction between a complaint that identifies victimisation and that victimisation being found to be substantiated through the conciliation or administrative tribunal process. Quite often we find people ticking a number of boxes to give more power to their

complaint, with some of those boxes being ticked falling away, but because the complaint was there, it is just reported in the statistics. There is not necessarily a precise relationship with what the statistics show and what the substance is.

The CHAIR: Would it be useful for a complainant to have a complaint mechanism through the Equal Opportunity Commission if they have already been forced to leave their job due to bullying?

Dr BYRNE: Yes. Similar to sexual harassment, yes. Bullying—that is discrimination. Yes, it is very important if people have left their employment as a result of some adverse discrimination to have a mechanism for resolving that, and that applies also to bullying.

The CHAIR: What is the outcome in those circumstances, because it is obviously not the same as you would have, or you would hope to have, under the industrial system of reinstatement, because I am not aware of any cases?

Dr BYRNE: Generally, if they have left the employment, we can generally seek an order of reinstatement of the employment through the equal opportunity legislation. We try to get conciliation between them. Conciliation can include some degree of compensation. It is possible that it would go to the State Administrative Tribunal, which can also award compensation for what has happened up to a maximum of $40 000, which is a little low. But, basically, you still get some outcome by lodging a complaint.

The CHAIR: The outcome you are trying to get is to provide some compensation for the complainant and also an education role in terms of the employer?

Dr BYRNE: Compensation and closure—closure is important also.

Ms MacTIERNAN: We probably would not get an order for education of the employer, but through conciliation. That is not an uncommon resolution—the organisation will undertake training of supervisors and managers or even all staff where it has been deemed that there has been inappropriate behaviour.

The CHAIR: But the mere process would also have an educative role.

Ms MacTIERNAN: Yes. But sometimes that is an explicit outcome, and sometimes that is the one that people actually seek to occur.

Mr MacDONALD: The State Administrative Tribunal, apart from its compensatory power, has a power to, in effect, make good the damage of the discrimination through other means. It is a fairly broadly worded provision, but in our experience they have very rarely exercised the power of reinstatement. The only case I know of in the discrimination jurisdiction where that has occurred was an employee of a government agency who was still employed as a public servant, but the discrimination meant that they were no longer in the job they previously occupied. So the tribunal made an order that they be reinstated back to that position—that they be reinstated back into employment with the WA state government because that person was already employed. That is the only example I know of where the tribunal has done that.

The CHAIR: Is compensation the usual outcome or remedy?

Mr MacDONALD: Yes.

The CHAIR: I think you answered this question earlier but I want to make sure that I got the answer correct. All the other states and territories in Australia do not include bullying in their equal opportunity legislation; is that correct?

Mr MacDONALD: Yes, to the best of my knowledge. I can check that just to make sure.

[10.50 am]

Hon KYLE McGINN: Are you aware of any jurisdictions outside Australia that include it?

Mr MacDONALD: Not actually aware of it, no. Usually, when we look for touchstones for legislation or countries that have similar kinds of legislation as here, we look first to the common law countries like the UK and Canada, because often their processes are directly applicable. But I could not tell you as we speak which ones do or do not.

The CHAIR: When the former commissioner, Mrs Henderson, appeared before the standing committee on education and employment in 2012, she was asked the following question, and I would appreciate your answer to this question today: even if bullying were included in the Equal Opportunity Act—and as you said it makes sense to include it—how do we resolve an individual issue before it escalates before the damage is done to give people what they really want, which is just to have the bullying stopped?

Dr BYRNE: There is no simple answer to that at all. We try to deal with things very quickly—get back to a person within a day or two, saying we acknowledged your complaint. Generally an appointed conciliation officer contacts them within a week. But then you have to get through the investigation to make sure that we are on good grounds before we get to the respondent. We cannot really have a magic wand and make it stop immediately. That really relies on the employer to have good human resources practices to make sure that happens, or a principal of a school making sure that they have good practices in place to resolve bullying between two students. We cannot wave a magic wand to stop individual cases. The key thing about equal opportunity legislation is partly the remedy for an individual discrimination case, but, more significantly, the long-term effect of reducing that level of discrimination and bullying. We do not have a mechanism in society to address bullying, but if we resolve cases quickly, over time it will reduce the incidence.

The CHAIR: Can you just clarify whether your position is that you would prefer WorkSafe to retain the jurisdiction for bullying in addition to the Equal Opportunity Commission also having a jurisdiction for bullying, or would you prefer bullying just to be dealt with under the Equal Opportunity Commission?

Dr BYRNE: I would prefer the existing jurisdiction to deal with bullying to continue to do so—WorkSafe and Fair Work. In addition, they could come to us if not covered by those if our remedy is better, but not double dip and go to both.

The CHAIR: Has the commission gone to the extent of considering what sort of bullying provision it would like included in the Equal Opportunity Act—how that would look?

Mr MacDONALD: No, we have not drafted our own bullying provision. In some ways, since the review was done over 10 year ago, whilst it remains our view that it should be there, there has not been a lot of work done on it since then because there has been no action taken on that review. So, if, at first instance, the Attorney General, for example, was interested in that ground being put into the Equal Opportunity Act, that is when the real work would begin. We would obviously look to other jurisdictions and to best practice, including what WorkSafe do as well.

The CHAIR: The committee's very able clerk has reminded me that I need to take a break for a couple of minutes so Hansard can swap roles. I am going to adjourn the hearing for a couple of minutes to allow that to happen and we will reconvene.

Proceedings suspended from 10.54 to 10.56 am

[10.56 am]

The CHAIR: Thank you very much. Just recapping on some of the issues that we have already covered. Can I just get some clarification? If there was a bullying provision under the

Equal Opportunity Act, would that also apply to children under the age of 18 years so that you capture that bullying —

Dr BYRNE: That comes back to the areas that it covers. For example, sexual harassment covers the areas of employment, education, and accommodation, and if a child in those areas, for example, a child under the age of 18, was employed—we have 16-year-olds who claim sexual harassment and that is considered—it is covered. If it was in an appropriate area, it would not necessarily cover—for example, in the schoolyard because that is not really what is meant by the education area. Irrespective of age, we cover, but it comes down to the areas being considered for each ground. Allan, can you explain that a bit more?

Mr MacDONALD: Yes. Basically, there are a couple of statutes in Australia that expressly provide for complaints by minors. Most do not, including the Equal Opportunity Act. But the case law suggests that there is nothing in equal opportunity legislation that prevents a minor from lodging a complaint in his or her own right, often with the help of a parent or a support person. It would be a judgement call as to the capacity and the ability of that complainant to run their own complaint. That would be a case-by-case judgement.

The CHAIR: Now, if bullying were to be included under the equal opportunity legislation, can I just ask this question in the context of an example? There have been some issues at Busselton Senior High School, which have been widely reported in the newspapers, where teachers have been subjected to bullying and assault by students. Would you see the bullying in the context of any inclusion of a ground under the Equal Opportunity Act covering or including a situation where a teacher alleges bullying by a student? Feel free to say that you have not turned your mind to it at this stage. I am just trying to understand how it will work, because it is an issue that has been raised before our inquiry about WorkSafe and ensuring there is a safe work environment for teachers.

Mr MacDONALD: I think I can speak for all of us that we probably have not turned our mind to that, but I can tell you that under the commonwealth Sex Discrimination Act, there is provision or the ability to have a complaint to hold someone who is 16 or over liable for sexual harassment in the workplace. That is my understanding. I am not aware of that being the case in any other jurisdiction. That is my understanding under the Sex Discrimination Act. Parliament there has deemed a 16-year-old to be responsible for their conduct.

Dr BYRNE: The analogy here is if a 16-year-old student sexually harassed a 25-year-old teacher, would the teacher be able to complain under the Equal Opportunity Act against the student?

Mr MacDONALD: Well, because the sexual harassment complaint would have to be in the area of employment, the complaint would obviously involve the employer. Yes, potentially, it could be done, I suppose. You could lodge a complaint naming a 16-year-old student as the harasser. The only thing is —

The CHAIR: It does not require that harasser to be also an employee?

Mr MacDONALD: That is how it used to be expressed. The sexual harassment provisions in the Equal Opportunity Act were amended in about 1993 to remove that. It is a much broader provision. As far as I am aware, it has never been tested by the State Administrative Tribunal or the Supreme Court, but there is an argument there that it could apply to minors effectively in the workplace. Before 1993, it had to be someone who was employed by the same person as the complainant. Interestingly, under the racial harassment provisions, which are identical in their expression, that still applies. Racial harassment still has to be done by a person who is an employee of the same person, but the sexual harassment provisions were amended in 1993 to remove that. It is possible.

The CHAIR: John, did you want to add something?

Dr BYRNE: Basically, the respondent in this case would not necessarily be the 16-year-old person; it might be the employer for not taking measures to make sure that that did not happen. The case would be more strongly against the employer for vicarious liability of that occurring in the workplace. Would you comment on that, Allan?

Mr MacDONALD: As the act is currently worded, under the vicarious liability provisions, if a teacher were to lodge a complaint of sexual harassment, say, against a student, the employer or the principal of that person can be held vicariously liable. It is arguable there that clearly the education department or the school is not the employer of the student and it is also arguable that the school is not the principal of—I am using the word "principal" in terms of principal and agent—that the harassing student is not an agent of the school either. That student might be the only person who could be legally named under that complaint. If the same provisions were introduced to cover bullying, the same issue would apply. The vicarious liability provisions apply only to principal and agent and employer.

The CHAIR: Let me check that I am getting this right. Then the case would need to be brought against the student; it could not be brought against the employer?

Mr MacDONALD: The only other way that the school could be implicated —

The CHAIR: I indicate that John nodded to that.

Mr MacDONALD: Yes, that is right. The only other avenue that you can extend liability to someone else is through a provision that says that anyone who causes, induces, instructs or assists someone to do an unlawful act is also committing an unlawful act. I cannot imagine it, but you might have a situation where a student sexually harasses a teacher at school and somehow the teacher is able to allege that the school, perhaps, was so negligent or acquiesced so much to what was going on that they named them as jointly liable under that provision. That would require quite a bit of evidence to get there, but arguably could it be done? Yes, it could. They could name the school using that pathway.

The CHAIR: Would you see this as the way you would want the bullying provision under the Equal Opportunity Act to operate?

Mr MacDONALD: I am saying this off the top of my head. I think that if you have a vicarious liability situation in employment, I think that pretty much speaks for itself and the usual method of naming respondents would apply; that is, if bullying is an unlawful act under the Equal Opportunity Act, then the employer is liable unless they can show that they took reasonable steps to prevent the bullying, and that is the way the law is applied at the moment. In education, it would have to be thought about in some other way, because the vicarious liability provisions do not apply to that situation. It would only be, obviously, if it was a teacher being bullied by a colleague or by a principal, and then the employment vicarious liability would cut in.

The CHAIR: John, did you want to add to that at all?

Dr BYRNE: It does not exclude the possibility of framing the legislation in a way that if the school had not taken good steps to stop students bullying teachers, the school becomes liable. You could frame the legislation to capture that situation, I should think.

Mr MacDONALD: You could, yes.

Ms MacTIERNAN: I think that in a very general sense, we did have a complaint some years ago that was from a teacher who alleged she was being bullied by students on the basis of her race and that type of behaviour. We did accept that as a complaint. I do not think it was resolved. I cannot remember the outcome. It might have been lacking in substance, but there is a bit of a precedent.

It was named against the school, but that was the type of behaviour that was occurring that was deemed to be possibly racial discrimination or racial harassment.

The CHAIR: Of the bullying complaints that have been received by the EOC, do you ask whether that person has sought resolution of that bullying complaint through WorkSafe or do you refer them to WorkSafe?

Ms MacTIERNAN: When we receive inquiries, we certainly suggest that they make that contact. Of course, if they have already left the employment, they do not have that option. Again, we are not sort of mutually exclusive, so if they are pursuing that matter through WorkSafe, they can still take the matter up with us. It is not one of the ones compared with Fair Work where we will not deal with the issue at the same time. As in a lot of matters, we also would suggest to people, "Have they looked at any internal grievance procedure that they might have irrespective of what the alleged behaviour is?" But they are not compelled to do that before coming to us, but sometimes we would recommend that it is a sort of easier mechanism to try to deal with it internally rather than the thought of coming to us.

The CHAIR: Of those people who have perhaps already sought resolution of the bullying complaint through WorkSafe, have they provided you with any feedback about whether they were satisfied with that process and whether they were able to seek resolution?

Ms MacTIERNAN: It may be more in inquiries that they have made contact and often it is because they have left employment that WorkSafe cannot assist them.

Dr BYRNE: We do get that type of feedback; when a person is dissatisfied with the outcome at WorkSafe, they will lodge an identical complaint with us for a second go at getting it resolved. That, unfortunately, happens moderately often. I would say maybe about five per cent of our complaints have first been made to the Human Rights Commission or WorkSafe. The Human Rights Commission would be things like discrimination and disability discrimination. It might be a matter that Worksafe and we can both consider generally. They sometimes come to us because they are not satisfied with the decision or outcome, but not the process. That is the type of feedback we get.

The CHAIR: Do you think that the Fair Work Act remedies for victims of bullying are sufficient; and, if yes/no, why?

Ms MacTIERNAN: This is me personally speaking. In terms of because they can only issue orders —

Dr BYRNE: They can be quite—sorry. It would generally be okay if the person is still employed, but if they have left employment, then it is not a satisfactory remedy.

Ms MacTIERNAN: But I suppose systemically what might be the limitation there is that there is no finding. If you had quite an extreme case, and you might get orders to stop that type of behaviour but you are not addressing, as compared with other Fair Work pieces under the Fair Work Act where you might have a hearing that sets a precedent and then starts to really modify behaviour in certain workplaces—that is, I suppose, the limitation in terms of the Fair Work Act.

The CHAIR: Has the commission had any discussions with WorkSafe in relation to including bullying under the Equal Opportunity Act and what were the outcomes of those discussions?

Mr MacDONALD: Not recently, no.

Ms MacTIERNAN: WorkSafe did convene up until recently or up until about two years ago a committee of different government agencies that sort of had a bit of a finger in the bullying pie, so to speak. That was to look at mechanisms to work cooperatively together on those issues, but I do not know whether that was an explicit part of that discussion.

The CHAIR: I am just waiting to see whether John wants to add to it. I am giving him a chance to catch up.

Dr BYRNE: It was not discussed in my period of acting.

The CHAIR: What would you consider to be the greatest benefits to workers if workplace bullying is included as a ground under the Equal Opportunity Act? Here we are talking about workers who are employed at the time that they are making the complaint. What would be the benefit?

Dr BYRNE: The benefit is to have that matter addressed, to get closure and to get compensation, as with any grounds of discrimination. It really derives a benefit to have the matters considered and addressed.

The CHAIR: Are there any other questions by committee members?

Hon DARREN WEST: No.

The CHAIR: John, if you do not mind I am going to ask a question a little bit from left field because I have been reading the Public Sector Commission's "State of the Sectors" report. If we are going to be having any impact on addressing discrimination, you would hope that the first place we would be able to be effective is in the public sector. In reading the report, I was a bit alarmed. I found out that the percentage of Indigenous Australians employed in the public sector has declined from three per cent in 2013 to 2.7 per cent in 2017. Those figures are really low to begin with, but there has been a decline and also the percentage of people from culturally diverse backgrounds has decreased from 13.7 per cent in 2009 to 12.9 per cent in 2017. The percentage of people with a disability has decreased from 4.8 per cent in 2012 to 1.7 per cent in 2017. They are very depressing figures. You would think that in this day and age they would be improving, rather than decreasing. I suppose my question is one of frustration. I mean, what do we have to do to turn things around? We have had the equal opportunity legislation and the commission established now for quite some time. You do an excellent job in terms of providing training, raising community awareness, but in the very sector where we should be able to impact on the outcomes, it seems that we are going backwards.

Dr BYRNE: Yes. I agree with your concern and I share your concern. The public sector is trying to set targets to do that and report against those targets. But what I think is that CEOs and directors general need a mechanism as well as the targets. It is not widely known that the Equal Opportunity Act in fact provides a mechanism for doing that, and each ground of discrimination, whether it is race discrimination against CALD people or disability discrimination, or any form of CALD discrimination or Aboriginal people, the act says that any measure to achieve equality is not unlawful. So it is quite lawful for the directors general of each agency to target, and then for them to say, "I want you to select people with this particular characteristic." Some agencies are already doing that to some extent. We are getting more Aboriginal people as police officers in regard to what you said in this provision. That provision is not widely known. The Equal Opportunity Commission has been trying to publicise that provision more widely. I would say, yes, there is a problem. Yes, we need to set targets. But the important thing is we need a clearly endorsed mechanism for directors general to achieve those targets that really require the government, perhaps, to tell the CEOs, "This is your performance agreement and here is how you can achieve it."

The CHAIR: That is a very good answer.

Ms MacTIERNAN: We have been working with the Public Sector Commission to develop those guidelines to use and actively use those measures to achieve equality, because the Public Sector Commission has put in place a few strategies for people with disabilities and for Aboriginal people, but it does not come to anything unless you actively use those provisions. It is not just employing

people. It is also retention mechanisms. You might have seen that decline in those numbers because there have not been good retention practices either. That is something we are hoping that is going to get released. Allan and I are meeting with our colleagues in the Public Sector Commission next week to further that.

Mr MacDONALD: It really needs to be a sector-wide endorsement. This is quite a significant development because it is the first time that the Public Sector Commission will have produced guidelines for implementing measures to achieve equality across the whole sector, and that is how it needs to be applied. If you leave it up to individual decision-makers in government, through no fault of their own, sometimes they think that if they implement a measure that targets recruitment and retention of a particular cohort with an attribute, they think that that is favouritism. It is not, because it is designed to overcome entrenched barriers that are already there. If you can change the mindset of that recruitment practice, the people involved, then you will start to see those figures reverse, I would expect—but it will not happen overnight.

Ms MacTIERNAN: Also, John is very strong on that issue. There is a perception about what constitutes merit and that really needs to be rethought in terms of using these provisions and not using it in the sort of static way that we have.

Mr MacDONALD: Merit was the first fight that was fought under discrimination law to overcome obvious direct discrimination against women and people of colour and so on, but now it has almost become a constraint because you have to get around merit to be able to implement measures to achieve equality. That is where people think that if they do not use the merit-based system, they are favouring someone unfairly. It is actually not the case. The Equal Opportunity Act has had the special measures provisions in there since it was enacted in 1984. It has hardly ever been used.

Dr BYRNE: In my view, the merit process, as I would see it, is selecting the best clones of the selection panel, and the selection panel is not really diverse enough. They is very rarely a person with a disability or an Aboriginal person on the selection panel.

The CHAIR: Fair point.

Dr BYRNE: Generally, you select the best clones and that is not merit. I suppose, they have to put it. But it is my view that when selecting people, put diversity first and merit second. Select the best person that meets the diversity criteria. That is how we should operate.

The CHAIR: It is also important for us not to assume that if you put diversity first, you are putting merit second. It assumes the people from the diverse areas do not have the merit. Usually they do, but the merit in them is overlooked. It is hidden by the disability or whatever.

Dr BYRNE: Merit is not working very well. I am not saying merit is not good. Where did merit first come from? I will tell you where it first came from. It came from the military. After the Crimean War, 150 years ago, you had the Charge of the Light Brigade. The person who led the Charge of the Light Brigade was a very distinguished lord. He was not there in any form of merit, was he? So, they said, "Well, we're not going to have these stuff-ups on the battlefield anymore. We're going to have the best soldier doing that." All the soldiers all had identical diversity characteristics. They were all white males, Englishmen and so forth. So the issue of diversity did not come into it. They simply selected the best soldier, because diversity did not come into it. But they basically locked in a situation where we do not consider diversity and the need for organisations to be diverse. The diversity of the government's customers is much greater than the diversity of CEOs or the diversity of its employees. Surely, you are not coping with customers very well unless you match their diversity. Diversity is a very important thing.

The CHAIR: One of the other frustrations I had in reading the "State of the Sectors" report is while there had been very small incremental improvements in the number of women employed in the SES in the public service, under the machinery-of-government changes, we have found that that has now decreased. In fact, the number of women holding tier 1 SES positions has been reduced by more than half. It has dropped from 13 to six. Again, I am a bit surprised that in this day and age people were not keeping an eye to that during the process to ensure that that was not the outcome given it has taken so long to make some small incremental changes and actually get some more women into the SES. I suppose my question is: what is your role in all this? How do you make sure that you play a role and you are there in the decision-making that actually sets up the process to make sure that the process does not forget about these important issues?

Dr BYRNE: I share the concerns there. The number of males in tier 1 also dropped, but not proportionately the same as females. Also, the freeze on any new additions to the SES was an unfortunate decision. There are some agencies that had women acting long term and who were about to step up to the SES, but were not already members of the SES. They were then displaced by a male from somewhere else being pushed into the position. There were several situations like that. There are two roles we can have. People lodge a complaint of discrimination and try to get it resolved and we can talk to people. I made that point to Mal Wauchope quite publicly at a meeting when Susan Hunt—if I can mention people's names; Susan Hunt who is now at the Lotteries Commission but was previously at the zoo. At that meeting she raised a point that the people who are being groomed to move up have now been stopped and a man put in front of them. I made that point to Mal. We should allow people who were long-term acting also to compete for those vacant positions. I think that is now going to happen. I have a bit of moral authority to tell people what I think they should do. I use that discreetly, rather than publicly, generally, because you get better results if you do it discreetly. I do that, but, in addition, of course people can lodge complaints. There is a very effective avenue for this particular situation.

The CHAIR: I understand now from my discussion with those people involved in the machinery of government that they do acknowledge that and they are seeking to address that issue in terms of future measures, but it just surprised me that it happened in the first place in this day and age.

Ms MacTIERNAN: Under the act, the other statutory position beside the Commissioner for Equal Opportunity is the Director of Equal Opportunity in Public Employment. That is who the equal opportunity management plans go to. We do not actually see those. I suppose that is the role that has that more statutory oversight of that cohort. But in saying that, that sort of has been subsumed by the Public Sector Commission. That might make it more difficult for that position to exert that.

The CHAIR: Further questions?

Hon DARREN WEST: Can I just make a comment in regard to your assessment of merit. It is a very subjective thing, merit. We have had similar discussions within our own organisation. Often it depends who you ask, who is the most meritorious. I think that will always be the case, but I do fully support your comments about how we arrived at this position of merit 150 years ago and we are still using it today. It is time to move on. You are quite right, sir.

Dr BYRNE: Thank you.

The CHAIR: I have one last question. Do you think that there is a benefit in a complainant receiving an apology? Is this a common outcome of conciliation and would this be a major benefit in having bullying included under the equal opportunities jurisdiction?

Dr BYRNE: I think it is a great benefit to the complainant to get an apology and that sometimes happens, quite often in conciliation, sometimes in the form of a conciliation agreement. Apologies

are really great value in getting closure and resolving the issue. But I feel that a compulsory apology, an apology where it is required "you must apologise", does not really give closure. There has to be a sincere apology, a genuine apology, for that to work and, therefore, it should not be a legislative requirement. That is my view. Others?

The CHAIR: Fair point.

Ms MacTIERNAN: We did actually have research done back in about 2009, 2010 by UWA on that very issue and there was a report, and it was found that, yes, as John said, when it is a genuine apology given in person, that is often a matter that is more readily resolved. But when it is the "I am sorry you feel that way" type of response, that does not really cut it. We have had ones and I have had conferences where it has been very genuine and that has resolved the issue for the person.

Hon KYLE McGINN: Were there any circumstances in that study where even though it was not sincere, there was a positive effect for the victim?

Ms MacTIERNAN: I cannot recall that. Generally, it was seen that that did not really assist the process or resolution. We could consider whether we are able to provide you a copy of that.

The CHAIR: I was going to ask that question. You have read my mind. If you are able to provide us with a copy of that report, that would be great. That is question on notice 3. Thank you. If there are no further questions, I think I might just wrap up. I just ask, John, if you wanted to make any concluding comments.

Dr BYRNE: No concluding comments, but I would like to thank the committee for the accommodations made for my disability. That is appreciated.

The CHAIR: Thank you. In terms of the formalities, thank you for attending today. It has been really helpful to the committee to hear your evidence, and I am sure it will help us enormously with our inquiry into WorkSafe. You will be provided with a copy of the uncorrected transcript of evidence from today's hearing. You will be provided with an opportunity to make any corrections to that transcript that you feel are necessary. If you could provide the answers to the questions on notice when you return the transcript, that would be appreciated. If you require additional time to provide those answers, just let us know and I am sure that can be accommodated. If there is any additional information you want to provide or any points you want to elaborate on, or provide supplementary evidence once you have gone through the transcript, feel free to do so. If you could just do that again when you return the uncorrected transcript of evidence with your corrections on it. With that, on behalf of the committee, thank you very much. I conclude the hearing today.

Hearing concluded at 11.28 am

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