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Abstract

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WorkChoices and Workplace Bullying

More disadvantage for women workers under the new legislation

Diana Kelly

Abstract

Considerable evidence points to an increase in workplace bullying, in large part as a consequence of competitive pressures, the predominance of business values, and concomitantly, the declining legitimacy ascribed to fairness and social justice. This paper examines workplace bullying in the context of the recent employment relations legislation in Australia (WorkChoices). It is shown that the legislation will enhance and extend women's labour market disadvantage by shifting the employment relationship to the private sphere, together with informalisation of workplace relations, reduced access to formal procedures and reduced accountability and transparency. Moreover, overt government support of business wishes will enable managers and employers to condone or encourage bullying. In exploring these issues, the paper will draw on a 'Swiss Cheese' model, which highlights the factors that might enhance or prevent workplace bullying.

Bullying behaviour involving grossly improper conduct, including racist and sexist vilification, is notoriously under-reported even in the workplace, and the undoubted fact that many victims seem unable or unwilling to take action, at least for a considerable period of time, shows that such responses are well within the range of ordinary human conduct, and we should not be altogether surprised when it occurs (Adams 2005).

Introduction

In Australia, there have been some institutional efforts to identify, penalise, and reduce the incidence of bullying through Occupational Health and Safety legislation in some states, but recent employment relations legislation (WorkChoices) will have the effect of countering such measures. In particular the new legislation has the capacity to enhance and extend labour market disadvantage. This paper will examine workplace bullying in the context of the 2006 WorkChoices legislation, taking particular account of the potential effects on women employees. It will show that the shift of the employment relationship to the private sphere, together with reduced access to formal procedures, less accountability and transparency and overt government support of business wishes, will enable unscrupulous managers and employers to condone or encourage bullying. In so doing, the paper will draw on a model which highlights the contextual factors which can enable, prevent and de-legitimate bullying.

The first section will include a brief discussion of the nature, extent and varieties of bullying, as well as factors which can determine the incidence of bullying, drawing on the 'Swiss Cheese' model. Originally the 'Swiss Cheese' model was developed to evaluate factors which led to plane crashes, insofar as an adverse event was perceived to have been caused by a variety of weaknesses or omissions in proper practice, all of which, when 'lined up', led to major failures (Reason 1990). We can observe workplace bullying as being the outcome of a bully being able to perpetrate behaviours because of the lack of cultural and systemic protections. Thus, incidents of bullying can be viewed as adverse phenomena caused by serious flaws and omissions in the workplace and its environment, which when 'lined up' will enable bullying. Having identified the kinds of factors which determine the incidence of bullying, the next section considers women's labour market disadvantage. In large part, this is because it appears that the majority of bullying is 'top-down', so that an environment which enhances workplace disadvantage can also be seen to increase incidence of bullying. In the last section, the impact of WorkChoices on women employees will be assessed in light of the 'Swiss Cheese' model of enabling/preventative factors.

Workplace Bullying

While there are many definitions of bullying, they all centre around the notions of repeated and unreasonable destructive behaviours of one person towards another (Rayner & Hoel 1997;

Einarson et al. 2003; Kelly 2005). While some people think of bullying as confined to aggressive shouting and verbal or physical abuse, the nature of bullying is rather wider than that, and indeed can be even more damaging. What makes workplace bullying notable is that work is core necessity for most of us, and yet workplace bullies can destroy their targets' working lives. For example, Salin (2003) asserts that bullying is

repeated and persistent negative acts, including social isolation, silent treatment, rumours, attacking a victim's private life or attitudes, excessive criticism or monitoring, withholding information, depriving responsibility, verbal aggression.

The nature of bullying ranges over a spectrum of behaviours which are directed at targets, are rarely 'one-off' events, and are unreasonable. Bullies may be 'accidental', that is persons taken up with pressures and demands from others who then overtly or covertly bully others to meet pressures or demands. It is often evident in highly motivated or talented individuals, and is characterised by 'destructive, self-absorbed attitudes and behaviours, a lack of empathy, blaming, nitpicking, devaluing others, lies, boasting and taking credit for others' work' (Egan 2005b). The most destructive behaviour is that of the psychopathic bully who deliberately seeks to destroy others through fear, whisper campaigns, marginalisation and destabilisation. Egan notes that psychopathic bullies have considerable capacity to engender widespread confidence in their abilities and are highly effective at managing upwards. This means that their destructive behaviours do not become apparent for some time. This very complexity is one reason why understanding, awareness and analysis of bullying are not as broad as it might be, given the extent and impact of workplace bullying.

The Extent of Bullying

The bullying literature is large and eclectic, reflecting the complexity of the definitions and the range of behaviours which can be identified as bullying. It is not surprising therefore that it is difficult to measure the extent of bullying in a workplace or organisation because it depends to a reasonable extent on self-reporting, and the definitions or attributes of bullying used in employee surveys. For example, Salin (2001) found that different perceptions of the levels of bullying depended on the criteria or definitions applied by the researcher. Professional employees who were given a general definition of bullying and

then asked if they had been bullied, indicated much lower levels of bullying (8.8%) than those who were provided a list of pre-defined, negative acts and then asked which they had experienced (24%). It has been the same with other surveys, that respondents' perceptions of bullying change after definitions are offered or bullying activities are named.

Moreover, as noted in the opening quote, Adams (2005) in his decision in the NSW Supreme Court, concurs with researchers that bullying is greatly under-reported, with perhaps only 10% of instances being reported. As Lewis (2006) has noted, women may have different perceptions of bullying, in part related to self-doubt and different perceptions of power. Different perceptions of bullying can lead to different responses, so that as Egan (2005) and others (Lipsett 2005a; Lutgen-Sandvik 2003) have noted, targets will often desist from, or withdraw any complaints, perceiving that they are at fault or that there is no possible redress (Wornham 2003). Rayner (1998) found that bullying will continue where there is an organisational tolerance of such behaviour. From her survey of union members in Britain, Rayner noted that 95% believed that bullying was caused by the fact that 'bullies can get away with it', so there was little point in reporting it.

Lewis and Orford (2005) have shown bullying in large part is an organisational problem, so rather than considering it a difficulty residing with the victims, researchers should give heed to the organisation and its context. Moreover, recourse to reporting procedures can be weak. Following a major newspaper survey of bullying in higher education in the United Kingdom, Lipsett (2005b) noted that a major finding was that respondents saw, for example, university HR departments as 'protecting institutions and helping bullies rather than victims'. In these respects, many approaches to bullying may be likened to approaches to other forms of relationship deviance, such as domestic violence and racial or sexual harassment. Then as now the lack of wider recognition of the destructiveness, nature and extent of the phenomenon of bullying limited early recognition or acceptance, and so prevented effective structures, cultures, responses and remedies. Furthermore, if unrecognised, ignored or accepted, bullying can become embedded in a workplace culture, as spiralling fear and copycat behaviours develop, so that under-reporting occurs simply because employees accept bullying as the norm (Shallcross 2003; Lutgen-Sandvik 2003; Kelly 2006).

In a recent UK survey of nurses (Sweet 2005), 17% reported having been bullied in the previous year. However, this

is lower than other surveys such as that by Cusack (2004) whose results showed that not only had 38% experienced bullying but a higher percentage (42%) had observed co-workers being bullied. These latter results are similar to those found in New South Wales nursing where Rutherford and Rissel (2004) reported that, taking a broad definition of bullying, 50% had experienced one or more forms of bullying in the previous 12 months. Bullying is not confined to the health sector. A recent survey of bank workers in New Zealand found that 43% of employees had experienced bullying, while in the UK a survey of personnel/human resource managers found 87% had experienced bullying (Anon 2004). It follows that bullying, in general, is rather more widespread than has been formally acknowledged, despite its high cost to individuals, organisations, and society. Research has shown that bullying reflects power structures, with bullies being reported to managers or supervisors in 70–80% of cases. (Rayner et al. 2002; Rayner 1998).

Factors Which Affect Incidence of Bullying: The Macro and the Micro

Given the ambiguity of bullying, it is not surprising that there are multiple models of investigating bullying. The studies noted above principally included surveys and interviews regarding the incidence and impacts of bullying, and coping strategies of targets. From these studies, it becomes clear that several factors which limit or encourage bullying are apparent. At the level of the workplace and establishment, these factors will include (Salin 2003; McAvoy & Murtagh 2003; Rayner 1998):

- Structures and processes which increase likelihood of bullying (power balances/imbbalances, satisfaction/dissatisfaction, perceived costs of bullying, internal competition, nature and extent of workplace changes)
- Culture of tough/inclusive management
- Absence/presence of management ownership, especially by CEOs
- Transparency and openness
- Effectiveness of policies and procedures to deal with bullying
- Level of access to external forms of support and grievance processes

These kinds of risk factors are readily apparent in the negative, especially in a climate where business values prevail and at the same time singular pressures are on organisations,

whether private or public sector or not-for-profit, to deliver results. Organisations, large and small, are under pressure to meet bottom line demands and, at least until managers and CEOs can understand the evident and sometimes significant moral and financial costs of workplace bullying, many of these organisational risk factors will remain. However, there are two other sets of factors beyond the workplace which can limit or enhance the likelihood of bullying. First, there are laws which specify employers' duty of care in terms of harm or injury to employees, and for which there are important agencies which can monitor and enforce elements of such laws. In particular, Anti-discrimination and Occupational Health and Safety (OHS) laws are extant in every state in Australia. There are evident limits. To make claims under anti-discrimination law, individuals have to demonstrate that it is their membership of a specified category (race, religion, gender, marital status, etc.) which led to their being targeted and the object of psychological injury. Nevertheless, anti-discrimination agencies provide considerable detail of ways in which psychological injury can be remedied or ameliorated.

OHS laws are seen to have considerable potential in the prevention and de-legitimation of workplace bullying. At their foundation, OHS laws emphasise employers' duty of care to make a workplace wholly safe for employees, including safe from psychological injury caused by bullying and harassment. Moreover, Catanzariti (2004) asserts that such a duty of care may now extend to individual directors 'where the employer has failed to take all reasonable steps to prevent it from occurring'. Furthermore, he emphasises that under OHS laws, it is unnecessary to prove an employee has sustained psychological or physical injuries; only that employees were at risk and employers failed to take reasonable steps to prevent that risk. These laws have most effect through the regulations and agencies, such as WorkCover. In South Australia, the Office of the Employee Ombudsman (OEO) supports state legislation by handling and liaising complaints with the objective of ensuring that 'every employee is treated with dignity, irrespective of their sex, race or religion, or the type of work they undertake' (Office of the Employee Ombudsman, n.d.). In this respect, in 2004-5 for example, about 8% of the 2,944 complaints handled by the OEO dealt with issues clearly related to bullying (OEO 2005). In other words, there are remedies and recourse through OHS and anti-discrimination laws which can penalise employers. Such penalties have the potential to prevent and reduce the risks of bullying, by increasing employers' awareness

of the high transaction costs in failing to meet 'duty of care' responsibilities.

As well as those laws relating specifically to preventing harm to employees such as OHS and anti-discrimination, the additional set of factors which could influence the risks of bullying has been the industrial relations legislation itself. As can be seen from the South Australian example, agencies set up to implement laws and support the parties in meeting their legal requirements, such as Victorian WorkCover and Office of the Employee Ombudsman, could work together to enable not only the laws directed at OHS or anti-discrimination but also the state and federal workplace relations legislation itself. Moreover, in Australia, the employment relations laws have traditionally provided for formal employee-centred processes which have been delineated in awards and enterprise agreements, to ensure clarity and a degree of transparency. For many employees, this has been further bolstered through access to their unions, which has ameliorated power imbalances and given employees a fairer chance of addressing issues.

'Swiss Cheese' Model

To this point, we have seen that research into workplace bullying explores the incidence and impact of bullying, in order to identify and evaluate ways of preventing or lessening bullying and its effects. For a more comprehensive overview, see Kelly (2005) and Kelly (2006). While 'macro' phenomena such as legal aspects are evident and important, much of the research and professional practice is at the level of the organisation. For example, practitioner-scholars such as Cotton and Hart (Cotton 2004; Cotton 2005) focus wholly on the workplace and establishment in their organisational health programmes, which work with groups to generate an organisational climate which seeks to eliminate bullying. A different approach and wider net is cast in the highly respected 'Dignity at Work' project in the UK, initiated by the Department of Trade and Industry (DTI), and funded by the DTI and the Amicus (Amicus n.d.). This model of tripartism is a £1.8 million scheme to provide support, advice, training and good practice benchmarks in bullying prevention, as well as a collaborative, voluntary Dignity at Work Charter, and a rigorous research and evaluation programme. The project highlights business benefits, as well as a clear role for trade unions, with the strong research and professional team systematically checking effectiveness. As with the Cotton and Hart project, the values of monitoring and evaluating

effectiveness have intrinsic gains for participant firms, as well as providing exemplars for others to follow.

Such initiatives are important, but at present they are piecemeal and relatively isolated. Given the apparent prevalence of bullying, greater understanding may be achieved by seeking to identify and understand the risk factors which may enable or prevent bullying by addressing the 'macro' and 'micro' levels together. Such a perspective could therefore assist with ways of developing responses which do not depend on the goodwill of a few firms, and which take account of broader contextual phenomena. Combining these factors, it is clear that a 'Swiss Cheese' model of bullying could be developed to show possible barriers/opportunities for bullying. From the factors discussed above, there are four kinds of 'barriers' which can constrain or allow workplace bullying:

- the internal culture as exemplified and led by senior managers
- the processes and structures in place to prevent or deal with bullying (grievance procedures)
- the legal requirements relating to employers' duty of care, particularly OHS laws, but also EEO, and
- the extant employment relations legislation and regulations

Figure 1 represents these four factors as part of a 'Swiss Cheese' model, which shows that if negative factors prevail, the bully will be able to perpetrate bullying on his/her target with little fear of redress.

The importance of having all barriers in place is of particular relevance for employees who are already at evident labour market disadvantage, and who may experience further disadvantage as a consequence of wider changes.

Women and Labour Market Disadvantage

It is evident that women employees are disadvantaged in the labour market (Pocock 1999; Chapman 2004). In terms of pay, women earn less than men, whether comparing all part-timers or all full-timers. The finance sector in Australia, for example, has roughly equal numbers of males and females, however non-managerial women employees earn 76% of their male colleagues, while women managers' earnings in the same sector are only 70% of earnings of male employees. In the health and community sector where 71% of the workforce is women, managerial women earn 72% and non-managerial

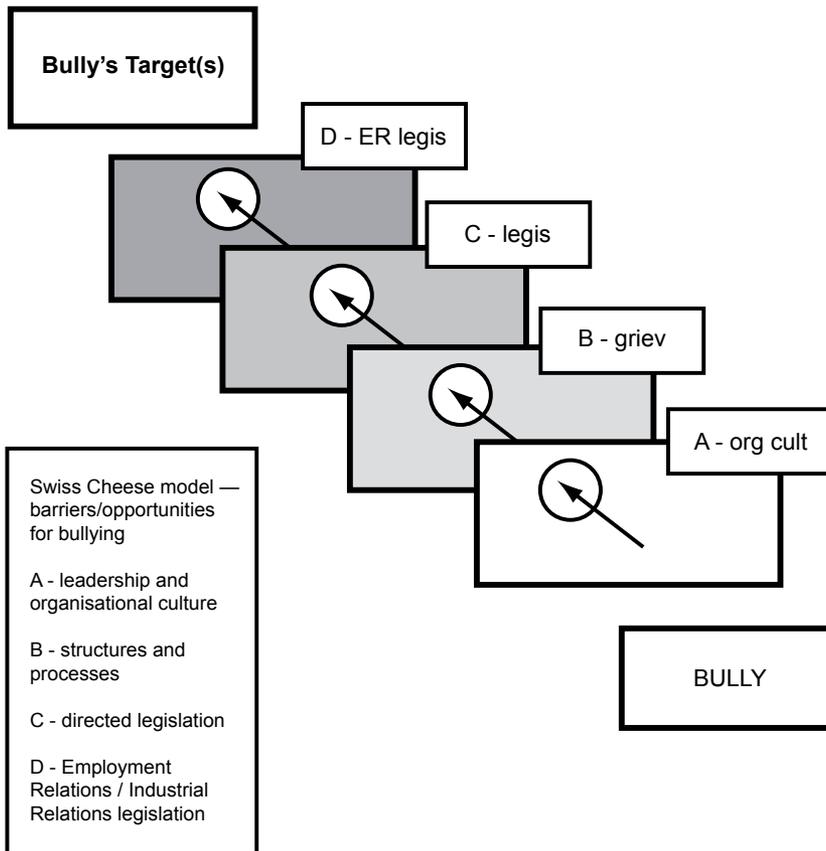


Figure 1
The Swiss Cheese model for enabling/preventing bullying

women earn 82% of their male counterparts. In the personal and other service sectors where women are also in the majority, non-managerial women employees are paid 76% of the male earnings. In part, lower rates of pay reflect lower status, with only 25% of managers being women.

What is curious about these levels is that they have scarcely shifted in a decade. It is not just in Australia that women have lower pay and status than men. In Canada, for example, full-time working women earn 71% of males, while

the Australian average percentage of 85% appears in a positive light. Part of the explanation for these differing ratios in two countries of similar size and production structure, is reflected in the lower minimum wage in Canada where the influence of US employment patterns is greater. Thus, in Canada, Glaszo (2004) notes, 'of all adult workers earning less than \$8 an hour in 2000, 69% were women'. Moreover, the experience in other unregulated labour markets demonstrates that ratios in Australia look set to decline, as individualised arrangements for pay-setting increase.

More significantly for this paper, the lower pay and status for women highlights their vulnerability to workplace bullying. It is significant for example that, as noted above, at least 70% of bullying is perpetrated by managers, and most women workers are not managers. Moreover, Mayhew (2005) has highlighted areas such as precarious employment and casualisation, both increasing phenomena at present, as risk-bearing areas for workplace bullying. In particular, these elements of labour market disadvantage are exacerbated in the absence of formal rules and procedures which enable transparency and accountability. Additionally, a major attribute of the recent WorkChoices legislation is the informalisation of the control and administration of the employment relationship.

Women, Workplace Bullying and WorkChoices (WC)

The WorkChoices legislation continues the shift begun in the late 1990s from external regulation of employment relations to internal regulation (Ellem et al. 2005). It has two major effects which, in turn, can affect the likelihood of workplace bullying. These are informalisation – the reduction of formal and transparent processes of workplace relations – and a concomitant shift of the processes of employment relations to the private sphere, where there is little or no public scrutiny of issues, agreements or an 'independent umpire' to support those with fewer power resources. Employment relations legislation such as the WorkChoices (WC) Act informalises workplace relations and reduces considerably individual employees' recourse to remedies and genuine bargaining. Despite the mammoth proportions of the legislation (around 2000 pages), the objective of the WC Act is to remove 'rigidities' which hamper employers' capacity to align their employee needs with those of the markets in which they operate. The new Act includes inter alia:

- a strong redirection towards enabling Australian Workplace Agreements (AWAs)
- a reduction of issues which awards and agreements can cover
- increased capacity to dismiss employees
- a strengthening of the potential towards precarious employment through extended probationary periods
- union access to workplaces severely reduced, and
- improving capacity of firms to use labour hire and other forms of precarious employment

These kinds of initiative will have profound long-term effects on Australian wage and salary earners, as have been shown in studies of work and employment under similar systems such as New Zealand's more-than-stringent Employment Contracts Act (Harbridge & Hammond 1997; Kelsey 1997). In this respect, it is worth noting that some researchers argue that initiatives in the WC Act are more stringent than the Employment Contracts Act or British initiatives during the years of the Thatcher government.

As in the New Zealand case, not all employees will lose in the short term. As a director for the human resources firm of Chandler Macleod noted recently, tradespersons who are likely to have scarce skills and could therefore bargain with their employers, would gain from the new legislation. However, given that women constitute less than 6% of tradespersons, it is also useful to note Cartwright's acknowledgement that other workers '...may well suffer some loss of bargaining power and could be forced to accept changes in their working conditions' (Anon 2006). In the few months since ratification of the WC Act, Cartwright's latter prediction has proven accurate. What is happening under the WC Act is that much of the control and administration of the employment relationship can be moved from the public sphere, open to public scrutiny, to the private sphere where employment arrangements lie outside the purview of open scrutiny, and thus are less transparent. Where awards and agreements are readily accessible and subject to public scrutiny, processes under the WC Act enable secrecy and hidden agenda and clauses. As feminist theory has discussed (Goodman 2004) much of the inequality of women in earlier eras drew from the acceptance that women's place was primarily in the private sphere, the home and family. Unlike males who were seen to be inhabiting the public sphere, the private sphere allowed no opportunity for equality or autonomy, but even more importantly for our argument here, it was not subject to public

scrutiny. In other words, as political theory shows, if the sites of struggle are in the private sphere, transparency is reduced and fancy and caprice form the basis for decision, rather than formal processes open to public scrutiny.

The 2006 WorkChoices legislation aims to shift the control and administration to the private sphere and in so doing, ensure ‘... that, as far as possible, the primary responsibility for determining matters affecting the employment relationship rests with the employer and employees at the workplace or enterprise level; and enabling employers and employees to choose the most appropriate form of agreement for their particular circumstances’ (WC Act 2005, Part 3—Principal Object (f)–(g)). By explicitly emphasising the individual aspects of the employment contract, and, as a corollary, raising explicit barriers to union access, the new legislation places those already disadvantaged in the labour market at further disadvantage. Such disadvantage includes vulnerability to bullying, which has great potential to increase in incidence and impact because under 2006 WorkChoices legislation employees no longer have access to forms of redress, remedy, and representation previously available.

Reprise: Bullying Risk Factors

A brief examination of the recently enacted WorkChoices legislation indicates major shifts in the transparency and formal processes of employment relations at the level of the establishment and workplace. Such informalisation, as well as a shift of the locus of employment relations to the private sphere, has reduced the potential for equitable arrangements. Furthermore, the new legislation is underpinned by giving primacy to business values, ahead of moral and ethical values. The emphasis on market conditions as a major criterion throughout the WC Act will further have the effect of reducing the transaction costs of bullying by managers.

Returning to the ‘Swiss Cheese’ model, it can be argued that CEOs, and other designers and leaders of workplace cultures, will have less impetus to develop and uphold organisational cultures which stigmatise and penalise bullying. Moreover, structures and processes such as fair grievance procedures which are equitable for all parties, appear to be on the decline. The informalisation of rulemaking can now have a deleterious effect on structures and processes. Previously, formal structures, processes and access to remedies have been available to employees who have been subject to psychological injury. Thus, where a workplace developed a bullying culture,

organisational processes and access to unions offered the potential for remedy and redress. As one union official (O'Malley 2006) has noted of the dangers of physical risk:

The sad reality is that companies cut corners on worker safety because they can get away with it, and the new laws assist them by restricting unions from being safety watchdogs.

The highly restricted access of trade unions to the workplace emphasises the shift of workplace regulation to the private sphere, together with the lack of transparency and informalisation of arrangements. In the meantime, OHS laws and anti-discrimination law are still permissible remedies within the WorkChoices legislation, and may provide some barrier in our 'Swiss Cheese' model. However, in a curious irony, there is already media rhetoric which may delegitimize access to OHS legislation in cases of bullying and other psychological injury. For example, following the recent major case of bullying in front of Adams J in the NSW Supreme Court, employment relations journalist, Brad Norington, noted that insulting comments such as 'coconut head' and 'monkey face' led to \$1.9 million compensation for the target from News Limited and Group 4 Security, whereas '... [b]y comparison, the maximum payment under the workers' compensation scheme for the loss of both eyes is \$250,000'. Norington appears to misunderstand or trivialise the Naidu case which, as the decision of Adams J notes, involved major bullying over several years. He cites business lawyer Jane Seymour's argument that 'bullying and sexual harassment are grey areas. As unfair dismissal dries up, they will be fertile ground for employees looking for new ways to gain compensation' (Norington 2006).

The final barrier or opportunity regarding bullying in the 'Swiss Cheese' model is that of employment relations legislation. It appears from the foregoing that the recent WorkChoices legislation evidently enables, rather than prevents, workplace bullying through assumptions of power equality, insistence on informalisation of employment relations, in order to maximise employer flexibility, shifting arrangements to the 'private sphere', and minimising access to voice, particularly in terms of union access to the workplace. Because the new WC Act also demonstrably exacerbates labour market disadvantage, there is a singular likelihood that women employees will be subject to workplace bullying, harassment and psychological injury.

Conclusion

Given the evident growth of workplace bullying on the one hand, and the dynamic economic, legislative and social environment on the other, this paper has sought to identify and understand the major contextual attributes that can constrain or enhance the incidence and effects of workplace bullying. In particular, given that women are recognised as being at a labour market disadvantage, the paper sought to understand contextual factors which affect women employees.

This paper has used the ‘Swiss Cheese’ framework to understand how the environment for women workers, particularly with respect to workplace bullying, is changing as a consequence of the effects on organisations and employees of the new employment relations legislation. Organisational culture and leadership, organisation structures and processes, supporting legislation and the recent WorkChoices legislation itself, all appear to build on women’s labour market disadvantage, and therefore compound employee vulnerability to bullying. As the regulation of the employment relationship shifts to private sphere, the protections of legislative openness, transparency, or access to representation and remedies diminish, further exacerbating labour market disadvantage. Future research should investigate how CEOs and managers could be encouraged to take greater responsibility for prevention of psychological injury at the workplace, if public regulation is to diminish as a basis for equity and protection.

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