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Organisational Restructuring/Downsizing, OHS Regulation and Worker Health and Wellbeing

Michael Quinlan

School of Organisation and Management
University of New South Wales, Sydney
Australia

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- facilitate the integration of research into OHS regulation with research findings in other areas of regulation;
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- develop the research skills of young OHS researchers; and
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Address for correspondence:

National Research Centre for Occupational Health and Safety Regulation
Regulatory Institutions Network (RegNet)
Second Floor, Coombs Extension
The Australian National University
Canberra ACT 0200
Ph (02) 6125 1514 Fax (02) 6125 1507
Email nrcohsr@anu.edu.au
Web http://ohs.anu.edu.au

Abstract

A growing body of international evidence indicates that downsizing and related forms of organisational restructuring can have profound adverse effects on worker safety, health and wellbeing. In particular, evidence links downsizing to poorer mental health outcomes, bullying and other forms of occupational violence. In Australia federal, state and territory occupational health and safety (OHS) legislation imposes clear obligations on employers who initiate downsizing/restructuring in relation to risk assessment, consultation with employee representatives and the introduction of appropriate measures to manage any significant hazards that are identified, including psychosocial hazards. As yet Australian regulators, like their counterparts in other countries, have made only modest efforts to address the issue, producing some guidance material that refers to restructuring and workloads and launching a small number of prosecutions. At the same time, interviews indicate regulators are aware of the issue and that there is an increased willingness to address staffing levels and other impacts of downsizing (like working in isolation). Employer and union responses are also examined. The paper concludes by indicating a number of initiatives that would enable regulators, unions and employers to address the problems posed by downsizing more effectively.

Introduction

Over the past two decades there has been a significant refashioning of work arrangements in developed countries with a shift away from permanent full-time (direct hire employee) jobs (especially for males) and the growth of flexible work arrangements, including part-time, temporary (both direct hire and agency labour), remote/home-based work, multiple jobholding and own-account self-employment. Outsourcing and often repeated rounds of downsizing/restructuring by larger private and public sector employers have both facilitated the growth of more flexible/precarious employment arrangements and contributed to increased perceived job insecurity even amongst those workers who have 'survived' restructuring.

There is now an extensive body of international research indicating that job insecurity and contingent work arrangements (like temporary agency work, subcontracting and home-based work) are associated with significant adverse effects on worker safety, health and mental-wellbeing (see for example, Kalimo, Taris & Schaufeli, 2003; and Vahtera, Kivimaki, Pentti, Linna, Virtanen, Virtanen & Ferrie, 2004; Bourbonnais, Brisson, Vezina, Masse & Blanchette, 2005). An international review of published research on the health impact of job insecurity and downsizing/organisational restructuring (Bohle, Quinlan and Mayhew, 2001) concluded that 88% of the 68 studies identified found a measurable adverse effect in terms of least one of a range of indices (including an increased risk of work-related injury, occupational violence, cardiovascular disease and psychological distress/mental illness). Another meta-review reached similar conclusions (Sverke, Hellgren, & Naswall, 2002). More recent research has confirmed these findings as well as pointing to other effects such as a connection between job insecurity and common infections and health complaints (Mohren, Swaen, van Amelsvoort, Borm, & Galama, 2003).

A study of middle-aged managers and professionals (Strazdins, D'Souza, Lim, Broom & Rodgers, 2004) found that the combination of job strain (the imbalance between demands and control at work) and job insecurity – both characteristic effects of downsizing – resulted in markedly higher odds of mental and physical health problems (see also Kivimaki. Vahtera, Pentti, Thomson, Griffiths & Cox, 2001). Similarly, a study of downsizing and work-related stress due to effort/reward also identified a synergistic effect (Dragano, Verde & Siegrist, 2005). Further, studies comparing the health effects of job insecurity to the job insecurity effects of poor health have found the former to be by far the dominant effect (Hellgren & Sverke, 2003). Like others (see Kristensen, Borg & Hannerz, 2002; Bartley, Sacker & Clarke, 2004; and Bartley, 2005), Strazdins et al (2005) argued that the serious long-term consequences of job insecurity require significant policy interventions, including reconsidering the social benefit of increasingly flexible jobs and labour market structures.

Downsizing/restructuring has been found to pose a particularly serious risk to the mental health and wellbeing (Pepper, Messinger, Weinberg & Campbell, 2003; Kim, 2003 and Mauno, Kinnunen, Makikangas & Natti, 2005). For example, a recent longitudinal Australian study (Adam & Flatau, 2006) based on panel data from two surveys (each

containing responses from over 7,000 households and 13,000 individuals) found a significant relationship between job insecurity and mental health outcomes. The authors also found a significant relationship between over-employment and negative mental health outcomes – a finding that may be not unrelated (see discussion of presenteeism below). Some studies (such as Layton, 1987) have found the anxiety experienced by workers facing the prospect job loss is at the same level of those actually losing their jobs. Research has pointed to both gender and age differences in terms of the impact of downsizing (Ferrie, Shipley, Marmot, Stansfeld & Smith, 1998; Kivimaki, Vahtera, Koskenvuo, Uutela & Pentti, 1998; and Cheng, Chen, Chen & Chiang, 2005). A Swedish study (Isaksson, Hellgren and Pettersson, 2000) of repeated downsizing in the retailing industry found that older workers were more likely to experience negative and long-term symptoms of distress. Other studies suggest that highly committed workers faced with restructuring/job insecurity are more likely to report distress and negative attitudes (Probst, 2000; Niedhammer, Chastang, David, Barouhiel & Barrandon, 2006). Researchers have also begun to look more closely at whether there is an association between job insecurity and suicide (Chastang, Rioux, Dupont, Baranger, Kovess & Zarifian, 1998). Downsizing can also produce stress by affecting the level of collaboration and other relationships between different professions or groups in the workplace (Hertting, Nilsson, Theorell & Larsson, 2004).

Studies have found that downsizing and job insecurity can lead to more work/family conflict and burnout, including crossover burnout (Strechmiller & Yarandi, 1993; Burke & Greenglass, 1999; Westman, Etzion & Danon, 2001). Other studies (see for example Saksvik, 1996; Daykin, 1997; Simpson 2000; and Aronsson, Gustafsson & Dallner 2000) have found threats to job security and an over-riding climate of cost control encouraged presenteeism or excessive and often unpaid hours at work and failure to take recreation leave (with a consequent risk of premature burnout) and discouraged workers from taking sickness absence, joining health promotion, reporting OHS problems or taking part in OHS committees. It is not simply a question of long hours spent at work, taking tasks or work pressures home can also adversely affect work/non-work balance. A survey undertaken by the Australian Bureau of Statistics found that the proportion of persons taking at least some work home increased from 20 to 24% between 2000 and 2005 and over 36% stated they did this to catch up on tasks not completed at the office (*CCH OHS Alert* 29 May 2006). Findings about presenteeism, including working when ill, should be hardly surprising in the context of litigation where it has been claimed sickness or worker's compensation records have been used to target workers for retrenchment (see for example a claim by seven workers in *Smith and Others v Moore Paragon Australia Ltd*, [2001] and *Occupational Health News* Issue 503 14 November 2001: 4).

Following on from the last point, it should be acknowledged that the research on the adverse health effects of downsizing/restructuring discussed so far focuses on workers who retain their jobs (ie survivors or stayers) rather than those that are retrenched and become unemployed or find alternative employment. A Finnish study (Kivimaki, Vahtera, Eovainio, Pentti & Virtanen, 2003) that compared stayers and those who left found that amongst the latter older workers with pre-existing morbidity were less likely to find new jobs but that those workers finding jobs (generally younger) were at less risk

in terms of health effects than those that stayed (for another study of the effects of involuntary job loss on older workers see Gallo, Bradley, Falba, Dubin, Cramer, Bogardus & Kasl, 2004). An Australian study (Broom, D'Souza, Strazdins, Butterworth, Parslow & Rodgers, 2006) found that the adverse health effects of poor quality jobs, entailing high insecurity and job strain) could match those of unemployment. There is a substantial and longstanding literature on the adverse health, including mental health, effects of unemployment as well as a growing research literature on the effects of intermittent employment that is becoming a feature of the more 'flexible' labour markets, including the growth of temporary jobs, outsourcing and repeated rounds of downsizing by organisations (Isaksson, Hogstedt, Eriksson, Theorell, 2000; and Berth, Forster & Brahler, 2003). Even where displaced workers obtain another ongoing job they may experience adverse health effects because their replacement job generally entails inferior wages and conditions (including in the USA the absence of private health care cover) or the cumulative effects of cycles of layoff and re-engagement (Simon, 2001; Helwig, 2004; Moore, Grunberg & Greenberg, 2004; White-Means & Hersch, 2005). The health effects of unemployment and displacement are critically important but the central concern of this article is on regulatory issues surrounding those workers who retain their jobs after downsizing or restructuring.

The negative health effects of downsizing/restructuring appear to arise not only from the job insecurity felt by 'survivors' (especially in the context of often repeated episodes of restructuring) and overt changes to their task load/work intensity (NIOSH, 2002a). A Swedish study (Harenstam, Bejerot, Leijon, Scheele & Waldenstrom, 2004) pointed to the deleterious effects of organisational change itself, arguing it increased differentiation of working conditions and the perceived effects were greater in public sector. Account needs to be taken of more subtle or covert changes in work processes or the working environment, including changes to tasks/job descriptions (in terms of multi-tasking, supervisory or training responsibilities without matching OHS assessments and interventions); changes in management behaviour/expectations (including reduced emphasis on activities deemed non-essential); changes to client/customer behaviour and the effect of altered work practices on the balance of work/non work activities (Sheehan, McCarthy & Kearns, 1998). Downsizing and restructuring can also result in the loss of key technical expertise as well as experienced personnel that - quite apart from the safety risks well illustrated by ESSO's relocation of all plant engineers to Melbourne in 1992 prior to the Longford explosion in 1998 - can place remaining staff under additional pressure, to the detriment of their psychological wellbeing.

There is a burgeoning research literature on the extent of bullying/mobbing, abuse and other forms of occupational violence and its serious impact on psychological wellbeing (Bilgel, Aytac & Bayram, 2006). While much of this research fails to analyse causal factors, including changing organizational contexts or work practices, a growing number of studies have linked downsizing and work restructuring with more 'hard-nosed' human resource management practices, bullying and occupational violence emanating from supervisors, clients or other workers (Sheehan, McCarthy & Kearns, 1998; Lee, 1999). For example, the mixture of insecurity and reduced staffing levels may place hospital workers at greater risk of being bullied by supervisors or being abused or assaulted by disgruntled

or mentally ill patients or their families (Snyder, 1994; Viitasara, Sverke & Menckel, 2003). Another seldom anticipated effect of reduced staffing levels (and associated changes in the healthcare sector like de-institutionalisation and halfway houses) has been to increase the number of persons working in isolation – a change that requires a reconsideration of measures to address the risk of injury or, in some workplaces, occupational violence. For example, staff cuts and volatility may curb the capacity of homecare providers or those assisting informal carers to engage in discursive exchanges that are critical to assessing risks to all concerned (for a UK study of the construction of risk by community psychiatric nurses and family carers for people with dementia see Adams, 2001).

The health and safety effects of downsizing also extend to clients and the community, including problems associated with the early release into the community of patients from downsized inpatient psychiatric facilities (Citrome, 1997; Evans & McGee, 1998). In another study Jones and Arana (1996) argued the pessimism and negativity associated with downsizing led not only to more mistakes by healthcare workers but also a tendency to cover them up. The effects just discussed may also stem from changes to workloads and working hours associated with downsizing. As noted earlier, downsizing has been linked to presenteeism. The staff cuts that results from downsizing may also require longer hours of work as remaining staff struggle to complete workloads and this may adversely impact on both worker and client health. There has a renewed interest with the health and safety effects of extended working hours (Yang, Schnall, Jauregui, Su & Baker, 2006; and Ayas, Barger, Cade, Hashimoto, Rosner, Cronin, Speizer & Czeisler, 2006). Unfortunately relatively few of these studies have explored the connection between long hours and changes to work organisation and employment practices, including downsizing/staffing levels (for an exception see Trinkoff, Johantgen, Mutaner & Le, 2005).

In addition to direct health effects, there is also evidence that contingent work arrangements and downsizing/restructuring are associated with considerable problems in terms of compliance with occupational health and safety (OHS) legislation and workers' compensation/social security systems (Quinlan, 2004a&b, Johnstone, Quinlan & Walters, 2005). In Europe, Canada and Australia government agencies responsible for administering OHS and workers' compensation laws have begun to respond to these challenges. Initiatives include the production of guidance material (on agency labour, contractor management and home-based work, for instance), revising legislative provisions and codes of practice (including introducing supply chain regulations in especially problematic areas like transport), and changes to administrative/enforcement practices (such as establishing special workers' compensation premiums for agency labour and targeting areas of non-compliance) and inspection protocols.

As yet however regulatory initiatives have been patchy, both in terms of their coverage and effectiveness. One serious area of neglect has been the failure to focus on the legislative obligations of employers to safeguard the health and wellbeing of their workers when undergoing restructuring or downsizing. This paper will investigate the reasons for this gap, some efforts with the potential to bridge it and propose further

measures that agencies may take in this regard, drawing principally on evidence from Australia. It will also make reference to developments in other countries.

The remainder of the paper is divided into five sections. The first section will briefly identify the research methods used in this paper. The second section will examine the legislative framework to identify the provisions that could apply to situations where downsizing or restructuring occurs. The third section will examine the response of government agencies to problems arising from restructuring/downsizing or related issues (such as understaffing) with particular attention being given to mental health issues. The fourth section will identify employer and union awareness and responses to the OHS implications of downsizing/restructuring. The fifth and final section will draw the findings together while also suggesting how downsizing/restructuring can be more effectively addressed by regulatory agencies.

Research Methods

Research data in this paper are drawn from two sources. First, a research project undertaken in 2001-2 for WorkCover New South Wales (the state government OHS agency) on the prevention and workers' compensation challenges posed by changing work arrangements in Australia (Quinlan, 2003). The WorkCover NSW project covered state, territory and federal OHS jurisdictions and entailed meetings with tripartite industry reference groups (IRG's) together with focus group and individual interviews (using a semi-structured interview schedule) with 63 OHS regulatory staff and 40 senior employer/industry and union representatives. Interview material was augmented by an examination of OHS statutes and government agency documents (codes, guidance material, information bulletins, internal and public reports) as well as a review of international research and government agency material.

Second, in 2004-6 a search and analysis of industrial tribunal and court proceedings was undertaken to identify cases where organizational restructuring/downsizing (or related issues of staffing levels) was involved. The earlier search of government agency codes and guidance material was updated and a number of relevant incidents involving union/employer negotiations were also investigated. Finally, information was drawn from detailed interviews and workplace visits with over 40 government OHS inspectors undertaken in three state jurisdictions in 2004-2006.

The Application of OHS Legislation to Downsizing/Organisational Restructuring

In Australia, like Canada, the enactment and enforcement of OHS laws is largely a provincial/state responsibility (although federal OHS laws exist and there have been recent proposals for a single national set of OHS legislation). While this means there are separate pieces of OHS legislation covering each of the six states and two territories, the principal OHS Acts have adopted the Robens model, and notwithstanding some

differences, the laws are broadly similar in the structure, provisions and implementation processes. As in a number of other countries (and in keeping with the Robens model), OHS legislation in Australia contains wide-ranging general duty provisions and participation/consultation requirements. A number of these provisions, in particular, would seem to impose obligations on employers undertaking downsizing/restructuring where these decisions entail changes to staffing levels/workloads, task structures and work processes (as is often if not invariably the case).

For example s8(1) of the New South Wales *Occupational Health and Safety Act 2000* (hereafter referred to as NSW OHSA 2000) imposes a duty on employers to ensure the health, safety and welfare at work of all the employees of the employer. This includes ensuring that premises, plant and substances, systems of work and the working environment are safe and without risks to health; providing information, instruction, training and supervision as may be necessary to ensure the employees' health and safety at work: and providing adequate facilities for the welfare of the employees at work. Sections 13, 14 and 15 of the Act require the employer to consult with employees (sharing relevant information, providing employees with a timely opportunity to express their views and contribute to remedies, and taking account/placing value on the views expressed) in a wide array of circumstances including (most pertinently to this study) when risks to health and safety arising from work are assessed/reviewed or when changes that may affect health, safety or welfare are proposed to the premises where persons work, to the systems or methods of work or to the plant or substances used for work (s17 requires employers with 20 or more employees to establish an OHS committee). Under s18 the functions of OHS committees and OHS representatives are to review the measures taken to ensure the health, safety and welfare of persons at the place of work, investigate any matter that may be a risk to health and safety at the place of work, and attempt to resolve the matter but, if unable to do so, to request an investigation by an inspector for that purpose.

Employers have similar duties under the other Australian OHS statutes. For example, in the Tasmanian *Workplace Health and Safety Act 1995* (hereafter referred to as WHSA 1995), under s9(1)(a)(i)&(ii) the employer has a duty to ensure as far as is reasonably practicable that the employee is, while at work, safe from injury and risks to health and must provide and maintain so far as is reasonably practical a safe working environment and safe systems of work. Under Section 9(1) of the Workplace Health and Safety Act 1995 the employer has a duties to ensure as far as is reasonably practicable that the employee is, while at work, safe from injury and risks to health, including providing and maintaining, so far as is reasonably practicable a safe working environment, safe systems of work and plant and substances in a safe condition. Other relevant duties under Section 9 relate to the keeping of records relating to injuries and illnesses (s9(2)(b); provision of information to employees in relation to health, safety and welfare (including the names of persons to whom employees may make inquiries or complaints about OHS, s9(2)(c)); ensure employee performing hazardous work receives proper information, instruction and training before commencing that work (s9(2)(d)); ensure any employee who is inexperienced receives such supervision as is necessary to ensure that employee's health and safety (s9(2)(e); ensure any employee who could be put at risk by a change in the workplace, in any work or work practice…,is given proper information, instruction and

training before the change occurs and receives such supervision as is necessary (s9(2)(f); ensure any responsible officer, manager or supervisor is provided with any information, instruction and training reasonable to ensure the health and safety of each employee under their supervision (s9(2)(g); monitor working conditions at each workplace under their control (s9(2)(h)). Section 9 (3) and s9(4) extend the employers duty of care to persons at the workplace other than an employee or a contractor or any person engaged by a contractor.

In all jurisdictions except Victoria and the ACT, the relevant OHS regulations also require employers to identify hazards, assess and control risks. In Queensland the *Workplace Health and Safety Act* invokes these risk management principles as a means of complying with the statutory duties of employers (and others conducting a business or undertaking), and an approved code or practice explains the risk management approach. In at least Queensland, NSW, WA and Tasmania the risk management principles potentially extend to psychosocial and physical risks arising from any work-related source, including restructuring and downsizing. In the SA and Commonwealth regulations the risk management provisions are more circumscribed as they relate to the implementation of the regulations. As such they would only apply to restructuring or downsizing to the extent these give rise to risks addressed in the regulations (for example isolated work is covered). The NSW *OHS Regulation* 2001 (clause 9) most clearly embraces work practices and work systems (and changes to these), as well as shift working arrangements, hazardous processes, psychological hazards, fatigue related hazards and the potential for workplace violence as matters to be identified and assessed.

The 2001 Regulation also specifies more detailed requirements in relation to workplace consultation. For example, Clause 23(2) requires that workgroups represented by OHS committees or representatives should take into account the diversity of employees and their work including hours of work of employees (including shift work), pattern of works (including the representation of part-time, seasonal or short term employees), geographic location (including the representation of employees in dispersed locations), different types of work performed, the attributes of employees (including gender, ethnicity, age and special needs), the nature of hazards at the place of work, and the interaction of the employees with the employees of other employers. Finally, the Code of Practice on OHS Consultation (WorkCover NSW 2001a: 14) also makes explicit the employers obligation to consult where changes are made to premises, work systems, plant and substances that may affect safety and health.

Taken as a whole, it is clear that the duties in relation to changes in work processes apply to many if not almost all downsizing/restructuring situations. Downsizing and organisational restructuring commonly entail significant changes to work processes due to the reallocation of task loads to a smaller pool of staff, changes to job descriptions, multi-skilling/multi-tasking, changes to training/supervision arrangements and the like. Restructuring can also lead to a degree of disorganisation as the new system is ‘bedded down’, fears of further changes are alleviated and new informal patterns of communication between workers develop to fill gaps resulting from the changes. To comply with the legislation an employer anticipating a major change to work processes

that may affect OHS should undertake a risk assessment of the OHS consequences of the change, consult with workers and their representatives, and (implicitly) take steps to manage any risks identified so as not to compromise existing OHS standards. It is important to note that for a breach of the employer's duties to their employees (or others like subcontractors on their premises) to occur does not require that a worker be injured. Further, this duty (like other employer duties) is non-delegable and owed to each worker individually. The latter means that changes to work processes that improve the safety, health and wellbeing of some workers but place others at greater risk are not acceptable (even if the changes achieves a net improvement in overall OHS).

While legislation establishes a number of obligations that would cover downsizing or restructuring a critical issue is the extent to which government inspectorates have implemented these, the level of compliance by employers and union responses. The next two sections will consider these issues.

Implementing OHS Legislative Obligations in relation to Downsizing and Restructuring

Interviews with Australian regulators undertaken in 2001/2 indicated they were aware of that downsizing/restructuring could compromise OHS. A number cited specific instances where they believed this had occurred based on deteriorating workers' compensation claim records or other evidence (such as serious assaults on healthcare workers placed in situations of imminent risk due to staffing cut backs). They also expressed the view that the majority of even large employers, including government agencies, failed to recognise the work process changes associated with restructuring, failed to undertake risk assessment or consultation to meet their general duty obligations, and that even those employers who did undertake risk assessment or consultation did so in very cursory manner. At the same time, no agency had prosecuted an employer for failing to comply with these duties, in part because they believed it would be too difficult to establish a clear connection between a downsizing incident and a subsequent injury or more general deterioration in OHS. Resourcing constraints appeared to be another deterrent, especially in a context where agencies need to respond to a wide array of new challenges (including occupational violence and other aspects of workplace change as well as the consequences of weakened protection under revised industrial relations laws)

Agencies have failed to produce guidance material on downsizing/restructuring to emphasise or explain the obligations of employers. Nor have agencies established protocols for inspectors to check on employer compliance with risk assessment/consultation requirements, reinforcing the message and enabling the issuing of notices or other remedies on the basis of failure to comply with procedures established under legislation (something that would not require evidence this failure to comply led to injury to a worker/s). On the other hand, several recent initiatives in relation psychosocial risks (guidance material and inspector training/specialization) have the potential to be adapted to address downsizing/restructuring situations.

There is virtually no generic information provision on downsizing/restructuring by government OHS agencies in Australia. Aspects of the issue, such as staffing levels and working in isolation, has been picked up in generic or industry-specific guidance material dealing with psychological risks at work and occupational violence, especially that dealing with community and healthcare services. For example, WorkCover NSW's (1996a: 2,4) guide to *Preventing violence in the accommodation services of the social and community service industry* notes that a integrated approach requires attention to adequate staffing (other issues mentioned are service to clients, design of premises, security equipment, staff training, shift structures, emergency procedures and post-incident procedures). In other words, staffing levels and other aspects of work organisation (such as shift arrangements) are identified as central and a number of these, as well aspects of workplace design, could be affected by downsizing/restructuring of operations as highlighted by a recent prosecution (see below). These aspects are elaborated on in terms of managing the risk, with sections on staff rosters, training, callout protocols, communication (including emergency communication) and recognising warning signs. A number of issues of work organisation are also developed in WorkCover NSW's (no date) guide on *Violence in the workplace*. Similarly, a WorkCover NSW (2001b:13) guide/case studies on managing workplace aggression in health makes direct reference to "the current cost-cutting focus and widespread downsizing within the health care industry" in its discussion of risk factors.

In addition to covering occupational violence, a WorkCover NSW (2004: 56) guide to managing OHS in community services includes a section on managing psychological injury that directly refers to the need for employers to consider workloads and changes in task content, hours, location and supervision (all things that may be associated with restructuring). An even more recent guide to managing OHS in community services produced by WorkSafe Victoria (2005: 28, 31-32) includes specific reference to organisational restructuring as a risk factor in the section on bullying and a reference to staffing, rosters and working in isolation in the following section on occupational violence. Similarly, the WorkSafe Western Australia (2006: 20) *Code of Practice: Violence, Aggression and Bullying at Work,* identifies changes in the workplace and workloads as one of a number of reasons for bullying.

It should also be noted that in addition to codes and formal guidance material government agencies have also included information on the risks associated with downsizing in other outlets, including the magazines a number produce for distribution to employers and other interested parties. For example, an article on bullying in the Tasmanian Workplace Standards monthly magazine *Workplace Issues* (No.13 July 2000: 10) warned employers that:

> *they are not entitled to use the excuse of 'downsizing' or restructuring' to introduce or support coercive and abusive tactics in order to get rid of workers or to force them to accommodate to unsafe and unhealthy industrial conditions.*

While guidance material and other advisory publications are useful, and a significant improvement on earlier material that entirely ignored the issue, a more explicit reference to the need for management to consider the consequences of changes to staffing levels/reorganisation prior to these actions being implemented and taking appropriate remedial measures would seem essential to change actual practices. By and large, the references to organisational change and staffing levels are fleeting (being one of list of eight or more identified risk factors) and, almost without exception, no mention is made to changes to staffing levels/workloads in the sections of these guides dealing with suggested remedies (including case studies). Further, the trend to give more attention to workloads/staffing in relation in psychological injury is patchy both between and within particular jurisdictions. For example, the WorkCover NSW (2003: 23) *Health and Safety Guidelines for Call Centres in NSW* identifies work organisation, including workload, as a risk factor in relation to manual handling problems but makes no mention to this same factor when referring to the managing psychological wellbeing of workers on the same page.

Government agencies in other countries and international bodies have also produced guidance material that addresses issues of staffing load and work organisation in relation to occupational violence. For example, in the USA NIOSH (2002b) produced a guide to managing occupational violence in hospitals that explicitly raises staffing levels and related issues in relation to both the risk factors leading to violence and remedial measures. Indeed, they are accorded significant emphasis. In relation to risk factors the second issue raised is 'working when understaffed – especially during meal times and visiting hours' followed closely by references to long waits for service, overcrowded and uncomfortable waiting rooms, working alone, inadequate security and lack of staff training and policies. In essence, half of the 12 risk factors identified relate to staffing levels/allocation and other aspects of work organisation (some of which are directly affected by staffing arrangements). (NIOSH, 2002b:4). Consistent with this, recommended prevention strategies include providing security escorts, providing all workers with adequate training and designing staffing patterns to prevent personnel from working alone and to minimise patient waiting time (NIOSH: 2002b:5-6). In the European Union there is evidence of similar developments. In Ireland, for example, a report (based on a substantial survey) prepared for the Health and Safety Authority (2001: 34) concluded that organisational change, including downsizing, had a substantial impact on the risk of being bullied. Interestingly, a short report on *Preventing violence and harassment in the workplace* produced by the Dublin-based European Foundation for the Improvement of Living and Working Conditions (2003: 2) makes only a brief and rather generalized reference to organisational change (no reference to staffing levels or workloads) in its discussion of contributory factors. A draft code of practice on violence and stress at work produced by the International Labour Organisation (2003: 45) identified understaffing, downsizing and working in isolation as risk factors.

Of course, the production of guidance material, however well-designed, is only a first step. Implementation requires an adequately trained and resourced inspectorate. In recent years more attention has been given to training inspectors in psychosocial factors such as work organisation and bullying in a number of states and territories, with Queensland

appointing several inspectors with specialized expertise in the area to facilitate change and mentor other inspectors. At the same time, interviews with inspectors across four jurisdictions undertaken as part of a research project on changing OHS standards in 2004-6 revealed some problems. A number of inspectors expressed frustration at the time consuming nature of exploring often complex bullying and harassment claims (and counter claims), the reluctance of workers to lodge formal as opposed to anonymous complaints (the former is necessary for agencies to launch an investigation) for fear of jeopardizing their employment, and the unsatisfactory remedy advocated by agencies even where a breach was detected (such as simply requiring the offending employer to revise their documentation). While training has affected some change the impact has been limited in the context of already over-stretched inspectorates. As yet there have been few prosecutions for bullying and these have tended to occur in the most extreme circumstances, such as long term workplace, sexual and racial harassment of a security officer – though the impact of this case was reinforced by the awarding of substantial damages in a subsequent common law claim by the victim (*WorkCover Authority (NSW) (Inspector Maddaford) v Coleman* [2004] NSWIRComm 317 and *Naidu v Group 4 Securitas Pty Ltd & Anor*, [2005] NSWSC 618).

Agencies have prosecuted employers (including government agencies) where the downsizing led to an unambiguous breach of OHS legislation (such as serious injuries to mental health workers left alone in half-way houses or community affairs workers being placed in direct contact with aggrieved families outside courtrooms). For example, the NSW Department of Community Services was convicted and fined $95,000 after an incident where the female manager of a state home for persons with developmental disabilities was assaulted by a patient (suffering from schizophrenia not developmental disabilities and with a history of sexual assaults on staff and others at the home) while working alone (*Gordon Tuckley v NSW Department of Community Services* [1999] NSWIR Comm 402). In 2002 WorkCover NSW brought four charges against the Central Sydney Area Health Service following an incident in 1997 at Rozelle Hospital where a disturbed patient assaulted a number of staff trying to subdue him. The original summonses covered staffing levels and training, physical environment, duress response and the basis on which patients were assessed. At the hearing (2002) WorkCover withdrew the summonses apart from that relating to the failure to use safety glass in the ward and the duress response. It secured a conviction and fine of $180,000 against the Health Service. In this case WorkCover did not proceed on the staffing level aspect of the case (*WorkCover Authority of New South Wales [Inspector Pompili] v Central Sydney Area Health Service* [2002] NSWIR Comm 44). However, in 2005 WorkCover NSW successfully prosecuted another regional government health service after a psychiatric nurse, working in isolation and without the benefit of a formal shift changeover briefing, was assaulted by a schizophrenic and drug using patient (*Inspector Buggy v Hunter Area Health Service (now known as Hunter New England Area Health Service)* [2005] NSWIR Comm 317.Deacons, 2006). Staffing levels were not a peripheral issue in this decision, such that an annual review of cases by a leading law firm described the case as “an example of the encroachment of OHS into manning/staffing level issues, something that has historically been a matter of managerial prerogative” (Deacons, 2006).

Downsizing has also resulted in organisations making increased use of contingent workers (such as contractors and directly hired or agency-based temporary workers) or less-qualified workers (such as nursing aides) to meet exigencies or even undertake tasks on a regular basis. In some circumstances, such as healthcare workplaces, this has undermined OHS management systems and thereby exacerbated the risk of occupational violence. Government inspectorates have prosecuted employers for breaching the OHS duties where this has resulted in serious incidents. For example, WorkCover NSW prosecuted a Sydney clinic after an agency-supplied nurse suffered serious injuries and developed a serious post-traumatic stress disorder following an assault by a psychiatric patient. The nurse had received no induction, including training in the clinic's duress alarm system (which was ineffective at the time in any case) or in the management of potentially violent patients (*Inspector Bogue v Ramsay Health Care Australia Pty Ltd* [2004] NSWIR Comm 390, 15 December 2004).

Another aspect that several state government workers' compensation agencies had given attention to was the impact of organisational changes on the already costly area of work-related stress/psychological injury claims for workers' compensation (Peterson, 2003; WorkCover Tasmania, 2004; Guthrie and Jansz, 2006) but even here analysis was limited and has not permeated through to the prevention arm of government OHS agencies. Even where government agencies have produced guidance material it has at best only made passing reference to organisational restructuring and makes no substantive recommendations in this regard. An exception is Tasmania, where the Workplace Standards Tasmania (2004: 7-8, 15, 19-20) guide on *Hidden Hazards* commences with an examination of workplace stress that makes prominent reference to restructuring, job losses, uncertainty, work overload, inadequate staffing levels and poor morale in identifying workers at risk (the role of job insecurity is similarly highlighted in the succeeding section on workplace bullying). The guide stresses the need for worker involvement in the implementation of remedies. It is worth noting that the production of this document caused some degree of angst amongst employers. This helps to explain the circumspect approach government agencies have taken to incorporating work organisation and staffing issues that employers have traditionally seen as outside of the scope of OHS and their own prerogative, notwithstanding that such matters would seem to clearly fall within the notion of safe systems of work in the general duty provisions of OHS legislation.

Workers' compensation agencies have produced detailed reports on stress-claim data, examining an array of factors including, gender, age, occupation, industry but ignoring the issue of organisational change (see WorkCover Western Australia 2000). One workers' compensation agency stated that its tracking of claims revealed a clear correlation between downsizing by organisations and an increase in stress-related claims (based on a retrospective examination of claims experience for particular firms) while another indicated restructuring was examined as part of an array of factors contributing to occupational stress. There is evidence of some prosecutorial activity in relation to staffing levels and stress. For example, in 2002 the Victorian WorkCover Authority launched a prosecution against John Myers, the state chief manager of Australian Correctional Management, for 'failing to take reasonable care of the health and safety' of Wayne

Rowe, a former prison officer at the Melbourne Custody Centre. The prosecution alleged Myers threatened to 'personally discipline' Rowe when the latter complained about staffing levels and 'put Mr Rowe under stress where it was foreseeable that the stress would affect Mr Rowe's health, which it did' (*CCH Australia Latest OHS Headlines* 28 May 2002). The charge was withdrawn pending legal advice when evidence indicated an employer-employee relationship rather than an employee-employee relationship (*CCH Australia Latest OHS Headlines* 29 May 2002).

It is arguable that limited agency activity (either in terms of guidance material or publicized prosecutions) has helped to perpetuate a view amongst employers that, notwithstanding the incidents just cited, they are under no legal or other obligation to assess and manage the OHS effects of changes in work processes arising from organizational restructuring. Indeed, it seems clear most employers don't even recognise a connection between organizational restructuring and work processes. Even amongst those employers most likely to recognise their obligations here, such as large public sector bodies, the extent of risk assessment and worker consultation has, according to a number of agencies spoken to, often been cursory, had not addressed all the critical issues or had failed to deal with 'after effects.' Similarly, even where risks were identified and control measures put in place those few regulators with an intimate knowledge of restructuring indicated that there was frequently a failure to follow this up with an assessment of the effectiveness of the measures. A number of regulators expressed the view that planning for the effects of downsizing/restructuring was often poor with unanticipated effects, such as the extra tasks, only becoming apparent after the event. It is worth noting this is a view that accords closely with the bulk of international research into downsizing/restructuring (and not simply in terms of OHS but also quality, productivity, creativity, gender-equity and other effects. See for example, Cascio et al, 1997).

Another issue in relation to the accuracy of workers' compensation claims data is the impact of changes to legislation in a number of jurisdictions that make some types of claim (such as those in relation to occupational stress) more difficult to lodge or which require the employer to pick up costs for the first days of a claim (five days in the case of Tasmania). These changes have potentially significant effects, especially in the context of changing work relationships (for example, where tasks are outsourced and employees are transferred to a new employer or converted to self-employment, or simply the increased volatility in the labour market and climate of job insecurity). These changes may make it harder to demonstrate a connection between stress and downsizing/organizational restructuring for both compensation and preventative purposes. Faced with job insecurity workers may also be less willing to lodge such claims except in the most serious circumstances where they are effectively unable to work and face the prospect of long-term unemployment. Responding to a question about organisational restructuring and its effects on occupational violence, family/work balances and the like, a representative from one agency was explicit about the role of claims in driving prevention policies:

> *Looking at it more strategically from our point of view, they're issues that are starting to raise their head. We're still trying to fight the issues that have been sitting on our claims database, particularly manual handling, which have been*

there for a long time and now we're getting really serious about addressing them…I would suggest in a lot of cases, while we recognise that those things are starting to come up the organisation hasn't done anything about it yet… (name's agency) is very much industry focused at the moment…They're not the sort of things that we're really looking at organisationally at the moment.

Staff in this agency went on to say that as worker's compensation claims data on bullying and stress got better this would help them to launch more activity in areas like the consequences of organizational change. Yet this would amount to a 'catch 22' situation if the decisions and policies pursued by workers' compensation agencies made it more difficult for such claims to succeed, especially with regard to women (Guthrie & Jansz, 2006 and for a recent Administrative Appeals Tribunal decision highlighting the difficulties of securing a claim see *Jan Montesinos v ComCare, AATA 706*, No. A2004/382 Decision 17 August 2006).

Having said this, there is still some prospect that pursuit of workers' compensation claims or common law damages claims (the Australian system permits both options but with constraints on the latter and no 'double-dipping') for stress due to work overload or other factors (like working in isolation) commonly associated with downsizing. Similar claims are identifiable in other countries. For example, in 1995 a local government social worker in the UK won a 'landmark victory in the High Court by suing his employer in respect of a stress-related illness brought about by work overload' (Earnshaw & Morrison: 2001: 304). Nonetheless, a study (Earnshaw & Morrison, 2001: 304) indicated that while employers needed to be aware of the potential for claims related to workplace stress, these claims faced a number of barriers and the decision had not led to a flood of similar successful claims. A later assessment of cases pertaining to work-related stress (Barrett, 2004) also pointed to the difficulties in mounting such claims, including demonstrating foreseeability and the difficulty of differentiating work and non-work origins of stress – the latter a potentially catch 22 situation given the capacity of downsizing to adversely impact on family and personal matters already referred to. Barrett (2004: 349) noted that the publication of guidance material on stress (and covering circumstances such as workload) by the Health and Safety Executive (HSE) established standards that employers would need to take account of in meeting their risk assessment requirements under OHS legislation. In a similar vein, a review of tort actions based on bullying and harassment in the UK, USA and Canada (Quill, 2005) found these cases proved difficult to mount and outcomes were unpredictable, limiting the potential for tort law to supplement protectionist legislation. The same situation applies in Australia where claims for work-related stress at common law have encountered similar difficulties. For example, the High Court of Australia dismissed the appeal of a sales representative who suffered a psychiatric illness after she was made redundant and then offered a three day job with a workload she claim was excessive. The court deemed the risk of psychiatric illness from the tasks was unforeseeable (*Koehler v Cerebos (Australia) Ltd* [2005] HCA 15 6 April 2005). Similarly, the Supreme Court of Western Australia rejected claims of a librarian that her chronic depression and an disabling anxiety disorder were due to overwork, finding her stress was more likely to be due to family and intrinsic personality factors (*Wylie v South Metropolitan College of TAFE*, Court of Appeal, Supreme Court of Western Australia 54-109 [2003]). There have been successful claims. For example,

the manager of a factory located in a government correctional facility successfully sued Australian Correctional Management Pty Ltd and NSW Department of Correctional Services for a psychological injury he suffered as a result of security concerns at the facility, including the failure to provide additional security staff and other measures. The decision was upheld on appeal (*State of NSW & Anor v Napier*, Court of Appeals of Supreme Court of NSW 53-992 2003). Overall, however, the small number and limited success of claims have not created a tide of litigation sufficient to prompt interventions by government agencies and policy-makers.

Management and Union Responses

Interviews with employer representatives for the WorkCover NSW project suggested that there was less recognition of the OHS problems and regulatory obligations associated with downsizing/restructuring than other changes in work arrangements, such as the increasing use of contractors and temporary workers. This confirmed the views of regulators. For example, senior regulatory officers for the federal OHS agency (Comcare) stated that even large government agencies often only appeared to pay lip-service to their obligations when undergoing restructuring, consulting with employees but undertaking no systematic risk assessment of the OHS implications of the change. As highlighted by a case discussed below, even where risk assessment was undertaken it could be restricted in scope. Like OHS inspectorates, public sector employer interventions have focused on particular problem areas, notably bullying and stress, rather than investigating and addressing the organisational context in which these and other problems are occurring. A recent review of occupational violence/bullying in public service organisations (state, federal and territory) in Australia (Mayhew and McCarthy, 2005) found these problems were widespread and had generated a growing set of countervailing interventions by management (technological, behavioural and organisational). However, responses tended to focus on technological/physical (alarms, barriers etc), behavioural (training and discipline) and organisational culture while attention to staffing levels and workloads appeared as lower order option or even as a last resort despite the fact that downsizing and work intensification had been clearly recognised as a significant causal factor (Viitasara, Sverke & Menckel, 2003; and Mayhew and McCarthy, 2005: 35-39)

With regard to private employers interviews for the WorkCover Project indicated that there appeared even less likelihood that the OHS implications of downsizing or resutructuring would be considered. There were exceptions. One OHS manager in mining referred to his direct involvement in a business process reorganisation where he had the role of advising of the implications of changes to tasks, work procedures etc prior to its introduction and he believed this had meant the exercise had actually been of benefit in terms of safety outcomes. At the same time, other mining managers indicated there were (as in other industries) many occasions where this evaluation and management process didn't happen. Another manager said that in his experience there was a clear connection between such restructuring and an increase in workers' compensation claims because the uncertainty caused people to lose their focus on OHS. Where companies were suffering financial difficulties the departure of key management was seen to cause both disruption

and the loss of 'corporate' memory. In short, there was a diversity of views as to how well such changes were being managed.

At peak council level employers have been more openly hostile of government initiatives in relation to bullying, stress and other psychosocial aspects of work – viewing this as opening up a Pandora's Box of potential litigation against employers by disaffected workers and infringing on conventional areas of managerial prerogative. Responding to the development of a bullying guide by WorkCover NSW, Garry Brack CEO of Employers First (*Thomson Inside OHS* No.46 August 2006: 1) stated:

> *It's the legal system going berserk and constraining human relations so businesses can't function. Many aspects of human interaction will drop into the net of bullying.*

Interviews with union officers undertaken for the WorkCover NSW project revealed concerns about the OHS implications of downsizing/restructuring but, with some conspicuous exceptions (most notably with regard to service sector unions), the challenges posed by contracting and agency labour were seen to be more pressing and there was little awareness of how OHS legislation might apply to these situations, individual unions or the national peak body (Australian Council of Trade Unions or ACTU) do not appear to have produced guidance material or member alerts focusing on the OHS effects of downsizing/restructuring. However, like government agencies the risks associated with understaffing/workloads, long hours, burnout, bullying and the like have been included other documents, such as the ACTU (2002) guide to stopping stress at work that is part of a strategic campaign on this issue and makes the link between these problems to changing work practices (for similar activity by individual unions and in the European Union see NSW Nurses Association, 2006 and *TUTB Newsletter* 2002).

Individual unions have surveyed members as part of their campaign over staffing levels. For example, in 2002 the Media, Entertainment and Arts Alliance surveyed its News Limited members following a three-year staff freeze, with 46% of the 250 respondents stating workloads were damaging their health and wellbeing (*Workers Online*, Issue 167, 2002). The willingness to raise concerns or take industrial action in support of claims about inadequate staffing appears most apparent when it has been seen to involve an increased risk of occupational violence. Recent examples include the Western Australian (WA) Prison Officers Union complaining that issuing officer with duress alarms was not an adequate response to under-staffing and overcrowding in prisons (two years earlier guards at a privately run Acacia prison in WA had struck over 'dangerously low' staffing levels and in Tasmania additional staffing was provided after a riot at the Risdon jail) and a protest by the National Tertiary Education Union at cuts to security staff at the Parramatta/Westmead campus of the University of Western Sydney – again in the context of proposals to enhance electronic security (*Occupational Health & Safety Daily News* 7 April 2004; and *Thomson Occupational Health News* Issue 684 26 April 2006, Issue 694 5 July 2006 & Issue 695 13 July 2006).

In 2002 community-service workers in the NSW Department of Community Services refused to work at the Campbelltown Court House near Sydney after a caseworker was assaulted. This followed the introduction of a requirement that case workers remain in the general waiting area, often placing them near families of children they have taken into care (*Workers Online* Issue No.133 2002). This incident was part of a broader union campaign about increased caseloads, over-worked staff and inadequate services (*Workers Online* Issue No.136 2002). Over the past five years the Australian Nursing Federation coordinated national campaign to secure staffing levels in hospitals that were 'safe' for patients and did not expose nurses to unacceptable risk of burnout or occupational violence. This campaign including strikes, claims before industrial tribunals and direct pressure on governments has achieved a number of successes and has garnered some international recognition for its strategic acumen and melding of public and occupational health concerns (*CCH OHS Alerts* 9 December 2002; 29 March 2004; 5, 27, 28 April 2004; 23 November 2004; 5, 7 April 2005 and *Occupational Health & Safety Daily News* 19 April 2004; 5, 11 May 2004; 3 June 2004).

That unions representing public sector workers should be prominent in the actions just described is hardly coincidental given that the public sector – especially that providing community services - has experienced labour shedding and cost containment pressures in Australia and elsewhere as a result of the imposition of neo-liberal macroeconomic policies and the 'new' public sector management.

Another proactive initiative referred to by one union in the WorkCover NSW project was its efforts to train HSRs and encourage them to get involved in downsizing/restructuring exercises in order that they might exert some influence on the process, including trying to ensure that some risk assessment was done in relation to the changes. At the same time, it was acknowledged that this was a difficult task given the degree of uncertainty (affecting workers and HSRs) such processes generated. In terms of collective negotiations the focus of union attention itself was also often drawn to those targeted for redundancy rather than mounting cases on behalf of the health and wellbeing of insecure 'survivors'. Another difficulty was the belief that OHS agencies had done little to assist the process because they had failed to produce any guidance material on workplace restructuring that would indicate employer obligations and also strengthen the 'hand' of HSRs in terms of raising such issues. In this jurisdiction (not NSW) at least the union believed the OHS agency was more comfortable dealing with the 'physical plant' aspects of changes to work processes (as identified in general duty provisions) rather than changes to work organisation. On the other hand, another union representative from the same jurisdiction expressed skepticism about the production of more guidance material, which HSRs (if not employers) might find difficult to comprehend. She believed that the money would be much better spent (ie more cost effective) on re-educating inspectors to better understand the link between forms of work organisation and OHS.

Other options available to unions can have flow on effects to the inspectorate. For example, unions can call in OHS inspectors. For example, in February 2004 the Community and Public Sector Union called in WorkCover Victoria inspectors, alleging understaffing at the Melbourne Juvenile Justice Centre had led to assaults on officers and

a recent escape by detainees (*CCH OHS Alert* 18 February 2004). Similarly, in 2002 the NSW Nurses Association alerted WorkCover NSW regarding issues in connection to workloads and the pressure that emergency departments were under (*CCH Latest OHS Headlines* 16 July 2002)

Further, in New South Wales unions have the capacity to initiate a prosecution under the OHS Act. Although the option is only used on a relatively infrequent basis because of the expense, time and other resources needed to mount cases it has been used on occasion to good effect. In one case the Nurses Union successfully prosecuted a government regional health service for placing a nurse with an existing back injury in a situation where she could be required to do an emergency lift unaided. In a second case the Maritime Union successfully prosecuted a stevedoring company in relation to workload related OHS risks following the implementation of a new work system (implemented after a major industrial dispute). Both cases highlight the potential for prosecutions to be launched following restructuring but as yet there have been no prosecutions based on the impact of such changes on the mental health and wellbeing of workers.

Finally, another option which may both reinforce regulatory changes and activity and provide an alternative solution in its own right are attempts by unions to negotiate the terms and conditions of downsizing and restructuring in order to better protect the health and wellbeing of workers. In Australia negotiation can be pursued either directly with the employer or through the intervention of a state or federal industrial relations tribunal. Although unions have often contested downsizing/restructuring in an effort to maintain jobs/minimize job losses attempts to reshape the process to avoid adverse OHS outcomes are much less common. There have been a number of exceptions.

For example, in 2004 the Communications, Electrical and Plumbing Union (CEPU) challenged a proposal by the Australian Postal Corporation to alter work practices so postal delivery officers (PDOs) would undertake eight hour shifts delivering mail on motor bikes (prior to this their tasks had been divided equally between delivery and exchange work such as sorting mail). For Australia Post the proposals sought to exploit changes in mail sorting technology and also reduce overall staff numbers required to deliver mail (for other disputes over work restructuring at Australia Post where OHS has been an issue see *Australian Postal Corporation and Communication, Electrical and Plumbing Union*, AIRC [2001] C2001/1721; [2003] C2003/675; and [2005] C2005/4098). Unlike many other employers Australia Post had undertaken a risk assessment process involving employees (although the quality of this had questioned by the union) and including a proposed trial of the new method in southern Sydney that was to be assessed by a panel of expert consultants. The union took the dispute to the federal industrial tribunal (Australian Industrial Relations Commission) and focused on the OHS (both physiological and psychological) implications of the change (when it became clear conventional industrial relations grounds for objection would fail), employing its own set of OHS experts (including a prominent OHS lawyer). The union's OHS experts produced reports querying the scope and methods of risk assessment process (including the failure to consider issues like toilet breaks and the validity of a trial based on a single region) and arguing that under the general duty provisions in federal OHS legislation the change

could not be implemented if it resulted in any diminution of OHS standards (as the existing arrangements were clearly practical and the general duty required employers to secure the healthiest workplace that were practicable). It was also argued that the obligation not to diminish existing OHS standards applied to both the workforce as a whole as well as to any individual employee given that the duty is owed to each individual worker. The latter meant that a change of work arrangements that secured a net improvement in OHS standards for the workforce but where some individuals would be placed at greater risk would not be acceptable. This was not an unlikely scenario as one of the arguments mounted in favour of the change was there would be fewer PDOs needed, thus reducing the number of Australia Post employees exposed to what was generally viewed as a higher risk activity than other tasks (like mail sorting). On the other hand, those doing these tasks would have longer periods of exposure. These contentions had potentially wide implications for employers engaging in downsizing or restructuring but they were never tested because Australia Post withdrew the proposal after one of its own consultants (an ergonomist) recommended that PDOs should not spend a maximum of more than five hours on the bike on any given day.

A number of other unions, such as those dealing with staff reductions/restructuring in manufacturing, nursing homes or the education sector, have raised OHS as part of the negotiating process – in some instances achieving favourable outcomes without having to go before industrial tribunals while in other cases meeting a barrier of denial even from large government departments. In some cases, the relevant state government OHS agency has been brought in to provide expert input into the OHS implications of altered staffing levels (see for example, *Qenos Pty Ltd v Australian Workers Union*, AIRC [2004], C2004/6672). Further, in 2004 the Labor Council of New South Wales (the NSW branch of the ACTU) lodged a test case claim on employment security before the NSW Industrial Relations Commission, using OHS evidence on downsizing and contingent work to secure (in the decision handed down in 2006) new award provisions on the OHS of temporary workers – something that could be extended in the future. Nor is such union activity confined to Australia. For example, in 2002 health sector unions in British Columbia utilized OHS evidence on the adverse effects of downsizing/restructuring and contingent work arrangements as part of Charter Challenge to the *Health and Social Services Delivery Improvement Act* (Bill 29-2002) which voided collective agreement provisions on seniority in relation to job security (bumping regimes) and consultation over outsourcing and prohibited future collective negotiation on contracting out (*The Health Services and Support – Facilities Subsector – Bargaining Association and Others v Province of British Columbia*, Supreme Court of British Columbia [2002], L020810).

This Charter Challenge, which was unsuccessful, raises some important limitations on the capacity of unions to use the industrial relations sphere to safeguard the health and wellbeing of members experiencing restructuring. Effective access to this option depends on the entitlements to negotiate in industrial relations laws and obligations placed on employers by OHS laws. Just as the British Columbia healthcare case saw a significant diminution of union rights to bargain so similar developments can be identified in countries like Australia. In 2006 the Australian federal government introduced its *Work Choices* industrial relations legislation which sought to supplant state industrial relations

laws and further diminished the role of the Australian Industrial Relations Commission, collective determinations (awards), and union rights to collectively negotiate (including a prohibition on negotiating over agency work or contracting out) as well as dramatically increasing the scope for employers to dismiss workers without the latter having recourse to an unfair dismissal claim. The new federal industrial relations laws place a premium on employer rights to alter working arrangements and ignore mounting evidence on the long term adverse health effects of job insecurity. The federal government has mooted a takeover of OHS legislation and workers' compensation, responding in part to complaints that existing OHS laws are too onerous. Following an unsuccessful High Court appeal against the federal *Work Choices* legislation, the federal government is now able to use the corporations power in the Constitution to assume jurisdiction over OHS and workers' compensation, and unions are likely find the promising option of negotiating on the health and safety effects of restructuring/downsizing is removed or severely circumscribed. Having said this, it needs to be noted that as yet unions have only made limited use of this option.

Conclusion: Resolving the Impasse

Substantial if not compelling evidence that downsizing and organisational restructuring pose a serious risk the physical and mental health and wellbeing of workers has thus far generated a limited response from regulators, employers and unions. In Australia, and most probably other countries too (especially those with post-Robens style laws), the general duty, risk assessment and consultation provisions in OHS legislation impose a number of obligations on employers undertaking restructuring that changes work processes and tasks in a way that may affect OHS. However, while Australian regulators are aware of the problem, like their counterparts in other countries, they have made only modest efforts to address it. No government agency in Australia has produced a guidance note on downsizing or restructuring to better inform employers of their obligations and how they can meet them. Agencies have produced some guidance material (on matters like bullying) and other types of information that refers to restructuring and workloads. They have also launched a small number of prosecutions in relation to bullying, violence and stress where workloads were a factor. At present prosecutions appear to be confined to the most extreme cases and arguably address symptoms rather than root causes, namely the changes associated with downsizing/restructuring. Stretched for resources, and confronting a number of challenges associated with changing labour market and industrial relations regimes, government prevention agencies have found it easier to focus their energies on areas where it easier to identify a causal link between work arrangements and adverse OHS outcomes (notably the higher injury risks associated with outsourcing/subcontracting and temporary agency work). Further, it is no small irony that most if not all these agencies have themselves undergone significant organisational restructuring (often repeated) over the past decade, exposing the inspectorate itself to 'change fatigue.' The same applies to workers' compensation authorities (Quinlan, 2003) and there have been too few successful common law claims for work-related stress, bullying and the like by aggrieved workers to impact on employer behaviour. Nonetheless interviews with and recent actions by regulators indicate there is an

increased willingness to address staffing levels and other changes to work organisation associated with downsizing (like working in isolation).

To provide context employer and union responses were also examined. By and large employers remain unaware of their legal obligations. Although some employers undertook risk assessment and consultation as part of their restructuring this appears exceptional, even in the public sector where consultation was viewed by regulators as often cursory. For their part, while unions have raised OHS problems associated with downsizing for some time, even peak bodies like the ACTU have not produced guidance material on the matter. In the last four years both peak bodies and individual unions have sought to use OHS issues and evidence in negotiations with employers over changes in work practices and in test case decisions before industrial tribunals (notably the NSW secure employment test case). Despite recent federal government changes to industrial relations laws (weakening union bargaining rights and the role of industrial tribunals) and other initiatives (to wrest OHS and workers' compensation from the states), this trend is likely to continue. Having said this, more unions need to grasp this option and, in so doing, reinforce regulatory activity and the responsiveness of employers.

Finally, a number of recommendations can be made to assist regulators meet the challenge of downsizing/restructuring. First, the present general duty provisions in OHS legislation should amended to more explicitly enunciate employer responsibilities regarding contingent work arrangements and major workplace restructuring such as downsizing and to keep a record of their compliance with these provisions. Second, government OHS agencies should develop a guidance note on downsizing/organisational restructuring to elaborate these obligations (including risk assessment, consultation and interventions including changes to induction, training, supervision and staffing levels/workloads) how they can be met as well as revising other guides, advisory notes and industry codes where appropriate to make reference to restructuring. Third, protocols should be developed for inspectors to monitor compliance by employers with their duties when undertaking restructuring. Failure to comply or keep records attesting to compliance could then form the basis for enforcement action (issuing of a notice or prosecution) obviating the need to demonstrate a link between the restructuring decision and an illness or injury to a worker or workers. Fourth and finally, workers' compensation agencies should devote more attention to analysing the effect of downsizing/restructuring on claims statistics and the information used to modify interventions by both compensation and prevention authorities.

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