

**Faithfulness in Ministry 2020**  
**Churches: Preventing Bullying and Promoting Safe Workplaces- Legal issues**  
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## 1. The call to faithful pastoral ministry in the Bible

It is an honour to be asked to speak to brothers and sisters engaged in pastoral ministry in the Anglican context in Sydney. Many of you will know that I have been personally blessed by my time at Moore College and through my involvement in a number of churches pastored by Moore College graduates.

Today I have been asked to speak to you in the context of considering what “faithfulness in ministry” means in the context of legal obligations. But I would like to start by briefly touching on some of the Biblical injunctions to faithful ministry to set the scene.

“Ministry”, of course, can mean different things, but in today’s context I am speaking about those who are called to lead and shepherd local congregations of God’s people, those wonderful groups of people who reflect on earth the heavenly reality of “Mount Zion and the city of the living God, the heavenly Jerusalem”, surrounded by “innumerable angels in festal gathering”, the “assembly of the firstborn who are enrolled in heaven” (Heb 12:22-23). And of course, all of that work is carried out in the presence of “God, the judge of all” (Heb 12:23)!

It is these groups of people, sometimes small and apparently weak, who are, as Paul reminds us in Eph 3:10, “the church”, through whom “the manifold wisdom of God might now be made known to the rulers and authorities in the heavenly places”. No wonder Paul concludes Ephesians by reminding us that we are engaged in a “spiritual battle” with these forces. No wonder that the forces opposed to God’s work in the world would love to see the church divided and destroyed in different ways.

One way that churches can be attacked is by false teaching, of course. Paul is recorded in Acts 20 speaking to elders from Ephesus (some of whom may even have been the same ones who later received the letter to the Ephesians) and issuing his classic words of guidance for congregational leaders:

28 Pay careful attention to yourselves and to all the flock, in which the Holy Spirit has made you overseers, to **care for the church of God**, which he obtained with his own blood. 29 I know that after my departure fierce wolves will come in among you, not sparing the flock; 30 and from among your own selves will arise men speaking twisted things, to draw away the disciples after them. 31 Therefore be alert, remembering that for three years I did not cease night or day to admonish every one with tears. 32 And now I commend you to God and to the word of his grace, which is able to build you up and to give you the inheritance among all those who are sanctified.

It is perhaps easy not to notice how shocking it must have been for those elders to hear that some of the “fierce wolves” who would attack the blood-bought flock might even come from within their own number! But the dangers to the flock, over which the Holy Spirit has called congregational staff to be shepherds, can arise from both without and within.

So, the topic of bullying and caring for others in the course of ministry is a **gospel** topic, friends! Some of you may be viewing this presentation simply because it is a way of ticking the box on a checklist. I know what it is like to be asked by my employer to come to a seminar on a “worthy” subject. No doubt there are other ways you could be spending the time. But let me say from the heart- the matter of caring for God’s people, the matter of treating fellow workers and congregation members and members of the public with godly respect, the matter

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of behaving and being seen to behave with utmost honour in your relations with other persons- this matter is a gospel matter. The enemy of the gospel, as Peter reminds us in 1 Peter 5:8, is “prowling around like a roaring lion, seeking someone to devour”. If we harm and humiliate and bully others in our congregations, or allow that to happen when we could stop it, we not only damage those sheep for whom Christ shed his blood, we open the door for the enemy to sow discord and undermine the witness to the gospel of grace we may be presenting in our public meetings. These are important matters.

Peter tells us this in words that pick up Paul’s shepherd metaphor from Acts 20:

**5** So I exhort the elders among you, as a fellow elder and a witness of the sufferings of Christ, as well as a partaker in the glory that is going to be revealed: **2 shepherd the flock of God** that is among you, exercising oversight, not under compulsion, but willingly, as God would have you; not for shameful gain, but eagerly; **3 not domineering over those in your charge, but being examples to the flock.** **4** And when the chief Shepherd appears, you will receive the unfading crown of glory. **5** Likewise, you who are younger, be subject to the elders. Clothe yourselves, all of you, with humility toward one another, for “God opposes the proud but gives grace to the humble.”

That passage alone of course could occupy the rest of our time- but my main job is to move on to the law, so let me just pause briefly to note that Peter clearly recognises that one occupational hazard for the shepherds of the flock is to be “domineering” (a word that seems pretty clearly to be identical to what we call today “bullying”).<sup>2</sup> And another hazard is to be “proud”, so proud that we pay no attention to our own “elders”, those whom the Lord has given spiritual leadership over us.<sup>3</sup>

## 2. Legal issues around congregational ministry- overview

### a. Compliance with the law as a matter of godliness

And can I add, then, as I move on to deal with the legal obligations in this area, there is yet another reason to pay careful attention to this area: that compliance with the law of the land is a matter of your own godliness.

Paul tells the Romans in ch 13:

**13** Let every person be subject to the governing authorities. For there is no authority except from God, and those that exist have been instituted by God. **2** Therefore whoever resists the authorities resists what God has appointed, and those who resist will incur judgment. **3** For rulers are not a terror to good conduct, but to bad. Would you have no fear of the one who is in authority? Then do what is good, and you will receive his approval, **4** for he is God’s servant for your good. But if you do wrong, be afraid, for he does not bear the sword in vain. For he is the servant of God, an avenger who carries out God’s wrath on the wrongdoer. **5** Therefore one must be in subjection, **not only to avoid God’s wrath but also for the sake of conscience.**

The last comment there is one I want to stress. Yes, we must obey the law because otherwise we may be punished in some way for disobedience. But obeying the law is also a mark of the godly person who wants a good conscience before the Lord, for those who make and enforce the law are (in general) God’s servants, carrying out his good purposes for the world by protecting and defending rights. I am not here today to speak about the circumstances where disobedience to the law might be justified, but can I say briefly that such circumstances are rare, and will usually involve a direct command from the state powers to either do

<sup>2</sup> The word is κατακυριεύω 'to master' (G2634), to lord it over, gain dominion over, master; it is used in a clearly negative way of “Gentile” leadership by the Lord Jesus in Matt 20:25 and Mark 10:42, and elsewhere it is used in Acts 19:16 to refer to the “mastery” of a demon-possessed man over other fake magicians.

<sup>3</sup> For a helpful overview of the passage see Sam Allberry “How Do Churches End Up with Domineering Bullies for Pastors?” (Jan 21, 2019) <https://www.thegospelcoalition.org/article/domineering-bullies-pastors/> .

something that the Lord says must not be done, or to not do something at all that the Lord says should be done. (Meeting together in large groups in person every Sunday, in my view, is not one of those areas where we should be disobeying the law, if the law allows us to meet in other ways.)<sup>4</sup> More to the point, it is very hard to see how disobeying laws preventing bullying and harm to others would in any sense accord with God's will! But being careful to obey the law will signal our respect for, and service of, the God who has given us the legal system for our good.

b. In general, legal standards around respect for others are consistent with, and reinforce, Biblical standards

I would also add that the legal standards that the law sets up for respect for others are generally perfectly consistent with, and reinforce, Biblical standards of conduct. This ought not to be too surprising, as we are part of a society where the Biblical views of humanity as made "in the image of God" and worthy of respect have shaped our values and laws. A key case in the law of civil wrongs (torts), as relatively "late" as 1932 but still part of the law of Australia, referred to Jesus' parable of the Good Samaritan in formulating the principle that as a general rule we owe a "duty of care" to those who are our "neighbours".<sup>5</sup>

Legal obligations in this area can be analysed in terms of "civil law"- which describes what people can sue others for; "criminal law"- behaviour which will be punished by prosecution by the State; and also the question as to whether a recently available remedy, "anti-bullying orders" are available in the congregational context.

I will be speaking in general about congregational life and issues that may arise. Much of what I will say relates to bullying, as that has been seen as one of the serious issues that needs to be dealt with. My expertise is in the area of law, so I will be addressing the law around these areas- but before we finish, I will try to summarise some practical guidance that can be gained from some of those who are experienced in dealing with these issues in the workplace.

Of course, there are often difficulties in personal relationships, situations where people don't get on or disagree, and where there needs to be forgiveness and repentance. But the sort of things I will be addressing today are where these problems escalate into a situation where serious and long-lasting harm has been caused in some way.

One type of case I will not be considering in any detail is sexual activity with children. I have decided not to discuss this area, simply because I don't think there is any doubt at all that this is wrong and should be the subject of legal penalty. We have had a Royal Commission examining abuse of children in institutions like churches, and we are seeing criminal prosecutions and civil claims flowing from those findings, as we should. Child protection is a huge area where the principles and processes are reasonably clear.

The cases I want to discuss are those involving adults. Let's take some fictional examples where these principles may need to be applied.

- **Example A:** bullying of *a congregation member by a pastor*. The pastor regularly criticises and attacks one of the congregation members, both in private to others and face to face. The member suffers a breakdown and has to take time off work.
- **Example B:** bullying of *a staff member by the senior pastor*. The senior pastor is highly critical in staff meetings of an assistant minister. He often yells at the

<sup>4</sup> You can find a more reasoned explanation of these views on my blog- see for example this post: "Church meetings and COVID-19 in Australia" (April 18, 2020) <https://lawandreligionaustralia.blog/2020/04/18/church-meetings-and-covid-19-in-australia/> .

<sup>5</sup> See *Donoghue v Stevenson* [1932] AC 562; for some academic comment see R Castle, "Lord Atkin and the Neighbour Test: Origins of the Principles of Negligence in *Donoghue v Stevenson*" (2003) 7 *Ecclesiastical Law Jnl* 210, <https://sites.google.com/site/richardcastlelawyer/articles/lordatkinandtheneighbourtest> .

assistant, and regularly gives him an impossibly heavy workload which the minister cannot meet. He makes appointments to meet and does not keep them. Finally, he calls in the assistant at short notice without saying what the meeting is about and tells him he is to leave in 3 weeks. The assistant has a psychological breakdown.

- **Example C:** bullying of a *pastor by a committee of management*, such as a Parish Council. The pastor is regularly subjected to harsh criticism from members of the management committee. After a particularly difficult meeting he suffers a breakdown.

In the following discussion I will refer back to these examples as different legal regimes are considered.

### c. Civil Law- what people can sue for

The area of civil law covers situations where an individual claims that they have suffered harm from another individual, and takes legal action to recover compensation or some other remedy. Two well-known areas of civil liability include an action for breach of contract, and an action based on a “tort” (a civil wrong), often the tort of negligence. In more recent years other civil remedies that may arise would be those under discrimination law, and actions for statutory workers’ compensation payments. It would take us a bit out of our way to deal with discrimination today, but there is an appendix to the main paper which touches on some of the issues that may arise there, and also in the area of possible defamation claims.

#### (i) Breach of contract- unfair dismissal

A contract is an agreement between parties which is enforceable by legal remedies. Most employment arrangements (where someone is paid to do work) will be governed by a contract between the parties.

In the area of congregational life examples B and C (harm suffered by an assistant minister or the senior pastor) will usually involve consideration of a contract. A contract may be fully written out, or (not uncommonly) it may be unwritten. An unwritten contract is just as enforceable as a written contract in the area of paid work- the downside of the unwritten contract is that it may be harder to work out the precise terms (which is a good reason for pastoral staff to have written contracts, so that both sides understand what is expected!) However, once the terms of a contract have been identified (some may be “implied” by the obvious expectations of the parties, others may be implied by rules of law), then an unwritten contract is just as binding and enforceable as a written contract.

In this area there has been a longstanding debate as to whether contracts for work in Christian ministry are intended to be legally binding, and if they are, whether they make a clerical worker an “employee” or an “independent contractor”. This is an area where reasonable minds may differ, and my views on the topic may not always coincide with the view taken by Diocesan officials! But I will give you my views for what they are worth.

You can see a more detailed comment on the issue of the employment status of clergy in a blog post I wrote in 2015.<sup>6</sup> In brief, the conclusion I come to is that under current Australian law, it is most likely that paid clerical workers do have an enforceable contract, and that most “senior pastors” who are in charge of a congregation will be “independent contractors” rather than “employees”. However, there is a helpful review of the status of assistant ministers in a paper available online which draws on my blog post but suggests that the position of an

<sup>6</sup> “Employment status of clergy”, May 3 2015; at <https://lawandreligionaustralia.blog/2015/05/03/employment-status-of-clergy/>.

“assistant minister” is much more likely to be that of an employee.<sup>7</sup> I am not entirely persuaded that this is correct- I concede that assistant ministers are more usually obliged to take directions as to their work from a senior pastor, but I still tend to think that the range of “independent” spiritual decision-making required might point away from employee status. But it is certainly possible.

In **Example B**, where an assistant minister is bullied by a senior pastor and both loses his job and suffers a breakdown, there may be legal liability based on breach of an express or implied term of a contract.

An employment contract will contain an implied term that the employer will take reasonable care for the safety of the employee.<sup>8</sup> While this principle was developed in the days when most workplace injuries were physical bodily harms, it has been applied in more recent times to psychological harm. Since cases of this sort can be run in either contract or tort, we will leave the details here to discuss under the next heading.

If the assistant minister is not an “employee” there may be some debate about whether the contract contains such an implied term. But it seems fairly clear that there will be a tort obligation in any event.

In terms of the loss of work, there are remedies which are available to “employees” who are dismissed. There may be a term of a contract that a certain amount of notice must be given. There is also a remedy for an employee for what is called “**unfair dismissal**” under the *Fair Work Act* 2009 (Cth). A claim may be made where a dismissal has occurred without proper “performance management” processes being followed. A dismissal may be “unfair” under s 394 of the FWA for other reasons.

An example of an unfair dismissal claim made against a church-related body (though it was not a congregational position) is *Alison Bleyerveen v Uniting Mission and Education* [2019] FWC 4818 (9 Aug 2019). Ms Bleyerveen had been removed from a policy position with a Uniting Church body, in part because a new position had been created which involved liaison with “conservative” bodies such as Tongan churches which did not support same sex marriage. She was thought to be “progressive” on such matters and unsuitable for the work. But the FWC ruled that while this was a reason for the decision not to redeploy her, it was not directly put to her by the interview committee and so she had no chance to make a case that she would be able to do the job. Her loss of position was hence “unfair” and she had to be offered either reinstatement or damages. The case illustrates the principle that factors that have motivated an adverse employment decision should be directly put to the person who will be affected, however uncomfortable that conversation may be.

An unfair dismissal action under the FWA, however, will only be available where a person is an “employee”, so there is still some doubt as to whether this would be available to an assistant minister. On my view it would clearly not be available to a senior pastor.

#### (ii) Tort law- harm caused outside contractual obligations

Under the principles of tort law, an action can be taken where a civil wrong has been committed, whether or not a contract is in place. The most common civil action in this area would be an action based on the tort of negligence. Establishing a claim in negligence means showing that the defendant owed a “duty of care” to take reasonable care to avoid causing the relevant harm, that such duty has been breached, and that resulting harm has been caused.

<sup>7</sup> See “Legal Advice” Terceiro Legal Consulting, 24 April 2019 <https://gospelworkersadvocacy.org/wp-content/uploads/2020/02/Gospel-Workers-Advocacy-Group-GWAG-Legal-Advice-re-employment-status-Assistant-Ministers-dated-24-April-2019.pdf> .

<sup>8</sup> See *Wilsons and Clyde Coal Co v English* [1938] AC 57 at [78]; *Wright v TNT Management Pty Ltd* (1989) 85 ALR 442 per McHugh JA at 450.

It is clear that the law recognises that psychological harm caused by bullying is a reality and may be the basis of a civil claim for damages. Bullying of workers by a boss or senior colleague leading to diagnosed psychological harm was established in cases such as *Swan v Monash Law Book Co-op* (2013) 235 IR 63 and *Trolan v WD Gelle Insurance and Finance Brokers Pty Ltd* [2014] NSWDC 185 and led to damages awards of over \$500,000.<sup>9</sup> See also cases such as *Keegan v Sussan Corporation (Aust) Pty Ltd ACN 005 489 725* [2014] QSC 64 and *Wearne v State of Victoria* [2017] VSC 25; (2017) 268 IR 401. This last case contains a very helpful analysis of a possible “bullying” claim and also an analysis of psychological harm caused by other workplace arrangements.

In these cases, there can be liability attached directly to the person who was carrying out the bullying, but also liability where an employer is made aware of bullying but does not act to stop it happening. So, in **Example A**, where a pastor was engaging in repeated criticism and attacks on a congregation member, if that had been observed by other church leaders it is possible that not only might the pastor be sued, but also the church as an entity for failing to stop foreseeable harm. There may liability in **Example C**, where church leaders join in bullying the pastor, either separately for the leaders, or for the church as an entity.

(iii) Worker’s compensation claims for harm caused by bullying

In discussing possible civil actions in relation to harm caused by bullying, I should just mention that, as well as a possible common law claim in sufficiently serious circumstances, employees can claim statutory workers’ compensation payments under the *Workers Compensation Act 1987* if they are harmed while at work, and such harm can include psychological harm.

For the purposes of compensation claims, most clergy are deemed to be “workers”, even if they are not common law employees.<sup>10</sup> So in **Example B** and **Example C** the assistant minister and the pastor may potentially be able to claim statutory compensation.

However, s 11A of the 1987 Act contains an important caveat: that such a claim cannot be made if the psychological condition was caused by “reasonable action taken or proposed to be taken by or on behalf of the employer with respect to transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of workers or provision of employment benefits to workers”. So, in our **Example C**, it will depend on whether what the management committee did was “reasonable” action in relation to appraisal of the minister’s performance.

(iv) Who can be sued? (Brief comments)

One of the things I have not been examining in great detail is the question, where there is liability, who can be sued? The reason is, sadly, that this is a complicated issue. The starting point is that those who are guilty of fault can usually be personally sued. But often they are not themselves very well off. So, in most cases, if compensation is to be obtained for a wrong, it would be good to have access to an insurance policy held by a larger organisation. In many cases this will be applicable, but there are some situations where it might not. Insurance policies may exclude liability, for example, for intentional misconduct. So for the purposes of the presentation today I have skipped over the fine details. There may be some other occasion when those issues can be unpacked.

<sup>9</sup> See comment in A Stewart, *Stewart’s Guide to Employment Law* (6th ed; Federation Press, 2018) at [15.22], p 357.

<sup>10</sup> See the *Workplace Injury Management and Workers Compensation Act 1998* - Schedule 1, cl 18.

#### d. Criminal law- what people can be prosecuted for

As well as civil liability where wrongs have been committed, the law may also impose punishment through the criminal law system. A crime, as opposed to a civil wrong, is prosecuted by a public official, not the victim of harm themselves. Any financial penalty is not paid to the victim, but to the State. And, of course, in a serious enough case there may be a sentence of imprisonment.

##### (i) General criminal law- sexual assault (esp of minors), other bodily harm

Of course, intentional sexual assault or other cases of serious bodily harm are crimes and must be reported to the authorities. This is especially the case if the abuse occurs in relation to a child.

##### (ii) Specific Work Health and Safety law matters- fail to take reasonable care to see to safety of others

There are, however, a range of penalties under other legislation for behaviour which does not amount to an intent to harm, but where there has been a failure to take reasonable care for the safety of others. In particular, the *Work Health and Safety Act 2011* (NSW), part of a (mostly) uniform system in force around the country, sets out the following primary obligations of a “person conducting a business or undertaking” (“PCBU”):

#### **19 PRIMARY DUTY OF CARE**

(1) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of--

- (a) workers engaged, or caused to be engaged by the person, and
- (b) workers whose activities in carrying out work are influenced or directed by the person, while the workers are at work in the business or undertaking.

(2) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking.

It seems fairly clear that a pastor would fall into the category of a “PCBU”, as indeed would the church as a whole. Under s 5 of the WHSA, a PCBU may be a “not for profit” undertaking and may also be an “unincorporated association”. The fact that the pastor may be a PBCU and owe obligations to others, does not prevent him from also being a “worker” who is himself protected under s 19 from a breach of obligations owed by the church.<sup>11</sup>

The obligations under s 19 extend not only to “workers” (a term that includes anyone, whether an employee or not, who works for the organisation- see s 7), but also any “others” who are affected by the undertaking, which would of course include congregation members.

The definition of “health” in s 4 specifically refers to “physical and psychological health”, so a risk to someone’s psychological health by bullying or other behaviour will be targeted by the law.

Of course, action under these provisions can only be taken by Safe Work NSW inspectors, but it is becomingly increasingly clear that risks to mental health are being taken into account by inspectors.

It should also be noted that, under s 27 WHSA, those who are “officers” of the PCBU can also be prosecuted for failing to exercise “due diligence” to see that the PCBU carries out

<sup>11</sup> Indeed, a note to this effect appears at the end of s 5: “A person may be both a “person conducting a business or undertaking” , within the meaning of this section, and a “worker” within the meaning of section 7.”

its duties. It seems likely that members of a management committee of a congregation (however described) would satisfy the definition of “officer” in the legislation.<sup>12</sup>

So, in our **Example C**, where the senior minister is bullied by the committee, such as the Parish Council, all might be liable. So also, in **Example A** if it became known that the minister was bullying and denigrating a congregation member, and nothing was done by the committee. In fact, the principle would apply to all the examples.

e. *Anti-bullying orders? Fair Work Act 2009 (Cth), Part 6-4B*

A new initiative that has been introduced recently are “anti-bullying” orders. I consider here whether they could formally be used in this context, and then also whether other things could be learned from the legislation.

(i) *Are they available in a congregational context?*

Australian law has changed over the last few years to allow a formal approach to the Commonwealth Fair Work Commission to seek an order preventing bullying, under Part 6-4B of the *Fair Work Act 2009* (Cth). However, I should note at the outset here that it seems to me to be **unlikely** that such an order is available in a congregational context. The relevant provision of the Act, s 789FD, provides that such an order is only available to a worker in a “constitutionally covered corporation”. That term is defined in s 789FD(3) to mainly include financial and trading corporations and Commonwealth or Territory government bodies, or “a body corporate incorporated in a Territory”. I think that this would not include a congregation, and even if the congregation were an “incorporated association” under State law (which I don’t think would apply to most Anglican congregations) it would probably not be applicable.

The only application of this law to the Anglican church would be in the context of a specific corporate entity which was incorporated under Commonwealth law. But that is not really the sort of case I am dealing with today.

(ii) *Does the definition of bullying help?*

While it seems likely that the regime will not apply to churches, principles that are provided in these provisions may provide some guidance to how courts will view “bullying” as a topic. In particular, it is worth knowing the definition of “workplace bullying” provided by the *Fair Work Act* s 789FD:

When is a worker **bullied at work**?

(1) A worker is bullied at work if:

(a) while the worker is at work in a constitutionally-covered business:

(i) an individual; or

(ii) a group of individuals;

repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member; and

(b) that behaviour creates a risk to health and safety.

(2) To avoid doubt, subsection (1) does not apply to reasonable management action carried out in a reasonable manner.

The definition brings out the important factor that “bullying” must be a “repeated” behaviour (not just a one-off interaction); that it is “unreasonable”; and that it creates a “risk to health and safety”. In other words, it must lead to reasonably serious consequences, and not just be something that annoys someone occasionally.

<sup>12</sup> The definition of “officer” in s 4 of the Act refers to the definition of the term in the *Corporations Act 2001* (Cth) s 9, which would include most significant decision makers.



These are likely to be things that a court would take into account in an allegation of bullying in the workplace, even where this specific jurisdiction was not available.

It is also worth noting the sort of behaviour that has been identified as possibly amounting to bullying. The following behaviour has been identified in a helpful Safe Work Australia document:

Examples of behaviour, whether intentional or unintentional, that may be workplace bullying if they are repeated, unreasonable and create a risk to health and safety include but are not limited to:

- abusive, insulting or offensive language or comments
- aggressive and intimidating conduct
- belittling or humiliating comments
- victimisation
- practical jokes or initiation
- unjustified criticism or complaints
- deliberately excluding someone from work-related activities
- withholding information that is vital for effective work performance
- setting unreasonable timelines or constantly changing deadlines
- setting tasks that are unreasonably below or beyond a person's skill level
- denying access to information, supervision, consultation or resources to the detriment of the worker
- spreading misinformation or malicious rumours, and
- changing work arrangements such as rosters and leave to deliberately inconvenience a particular worker or workers.<sup>13</sup>

### 3. Conclusion

I am all too conscious that this information simply sets the legal scene for the hard work to be done of making sure that all involved in congregational ministry are properly cared for. But I hope it may assist in making sure that everyone realises that these are serious issues.

I highly recommend, on the issue of “workplace bullying”, the guide mentioned already produced by Safe Work Australia. It contains a lot of useful tips on how to make sure that legal obligations in relation to possible bullying are being managed.

Here are some general comments summarising their approach:

The risk of workplace bullying can be minimised by taking a pro-active approach that involves:

- early identification of unreasonable behaviour and situations likely to increase the risk of workplace bullying occurring
- implementing control measures to manage the risks, and
- monitoring and reviewing the effectiveness of the control measures. (at p 9)

The first step will often be to have an honest chat with other staff or senior lay leaders, to check in on the possibility of a problem. Do we have an issue of bullying? Are there complaints of this sort? What do we need to put in place to deal with this, or to keep an eye on the danger of this occurring in the future?

The Guide describes circumstances where bullying may arise. How many of these sound like your church?

Research indicates that there are a number of factors which may increase the risk of workplace bullying occurring. The following characteristics could help alert to potential WHS risks in the workplace:

- presence of work stressors –
  - high job demands

<sup>13</sup> See Safe Work Australia, *Guide For Preventing And Responding To Workplace Bullying* (March 2016) at 5-6. The whole document is strongly recommended. See <https://www.safeworkaustralia.gov.au/system/files/documents/1702/guide-preventing-responding-workplace-bullying.pdf> .

- limited job control
- organisational change, such as restructuring or significant technological change
- role conflict and ambiguity
- job insecurity
- an acceptance of unreasonable workplace behaviours or lack of behavioural standards, and
- unreasonable expectations of clients or customers.
- leadership styles –
  - autocratic behaviour that is strict and directive and does not allow workers to be involved in decision making
  - behaviour where little or no guidance is provided to workers or responsibilities are inappropriately and informally delegated to subordinates... (p 11)

Other factors are listed. It is well worth considering whether these issues may create pressures which might lead to bullying. They go on to say:

The risk of workplace bullying can be minimised so far as is reasonably practicable by creating and promoting a positive work environment where everyone is treated fairly and with respect. (p 12)

But one of the tips that struck me very strongly was this:

Demonstrated senior management commitment in identifying, preventing and responding to workplace bullying is one of the key factors for preventing unreasonable behaviour and managing psychological risks. Effective leaders **model their organisation's values** and standards for workplace behaviour through their own conduct. This can send a clear message to workers that the organisation is serious about preventing workplace bullying and contribute to a positive workplace culture where unreasonable behaviour is not tolerated. Managers can demonstrate commitment in various ways including by:

- **modelling respectful behaviours at all times ...**

Does that advice sound familiar? 1 Peter 1:3 tells us: “not domineering over those in your charge, but being **examples** to the flock”. As we seek to follow the servant leadership model set for us by our Lord Jesus, and we display that model to others in the congregation and elsewhere, we will “adorn the doctrine of God our Saviour” (Titus 2:10) and commend the gospel message to all around us.

As you are no doubt aware, under the *Faithfulness in Service* code applying to ministers of the Anglican church in Sydney,<sup>14</sup> “bullying” is a form of “abuse” which amounts to misconduct, and there is a specific prohibition on “bullying” in cl 6.5. Complaints of bullying can be dealt with by the Professional Standards Unit under the *Ministry Standards Ordinance* 2017.<sup>15</sup> People who are available in the Diocese to assist with advising on / seeking to resolve bullying and related matters, particularly in the early stages, are Elenne Ford, Dispute Resolution Consultant for the PSU and Vikki Napier, Parish HR Partner with SDS.

Those are important matters for you to be aware of. But of course, the best situation is for there not to be any complaints about bullying, because your congregation and its leadership have a culture of servant leadership, of putting others’ interests above their own (Philippians 2:3-4), and of transparency in that problems can be discussed at an early stage and resolved in love.

## Further Reading

- J Catanzariti & K Egan, *Workplace Bullying* (LexisNexis Butterworths Australia, 2015)

<sup>14</sup> [https://safeministry.org.au/wp-content/uploads/2017/11/FaithfulnessInService\\_May-2018.pdf](https://safeministry.org.au/wp-content/uploads/2017/11/FaithfulnessInService_May-2018.pdf) .

<sup>15</sup> <https://safeministry.org.au/wp-content/uploads/pdf/Ministry-Standards-Ordinance-2017.pdf> .

- N Foster, *Workplace Health and Safety Law in Australia* (2<sup>nd</sup> ed; Sydney, LexisNexis Butterworths, 2016)
- Safe Work Australia, *Guide For Preventing And Responding To Workplace Bullying* (March 2016)

## Appendix- other legal issues that may arise in congregations

These are some other areas where legal issues may arise, which were not central to our main topic of bullying.

### (1) Defamation

One legal action that might be available in some circumstances is an action for defamation. I just mention it briefly because there are some circumstances where someone in a church may wish to say something which will have an impact on another person's reputation. The law here is complex but there are a couple of general principles that pastors and church leaders should be aware of.

- Something can be “published” for the purposes of the law of defamation even if only communicated to a small group of people in an informal forum. An allegation that is shared with one person other than the subject of the allegation, even if only conveyed verbally, can be the subject of a defamation claim. It goes without saying, of course, that social media is not a “defamation-free zone”, and there are an increasing number of court cases being brought related to comments on social media.
- If something is true, and can be clearly proven to be true, it is not defamatory to say it.<sup>16</sup>
- Where a church leader has to share a suspicion (if it is reasonably grounded) about a congregation member's moral conduct, with other leaders, for the purposes of protecting the congregation at large, then this will usually be protected against a defamation claim by a defence known as “qualified privilege”. There is an example of precisely this situation in a case involving a Sydney Anglican church which many of you will already know about, and the case is very helpful in laying this principle down clearly- see *Haddon v Forsyth* [2011] NSWSC 123 (8 March 2011). Of course, this does not mean that mere “gossip” can be circulated where there is no reason for others to know; there needs to be a real “need to know” policy for information that will have an impact on a person's reputation.

So, to take **Example A** (bullying by a pastor of a congregation member), saying derogatory things about a person to others might lead to a defamation action if those things were not true or not shared for a legitimate pastoral reason.

### (2) Discrimination and vilification law

There are a range of discrimination laws that might need to be taken into account these days in pastoral ministry. This is a complex area and I have commented on a number of relevant cases on my blog. But I give some brief examples.

In the area of “discrimination proper”, we are dealing with a situation where someone has been subjected to a detriment, or denied a benefit, based on one of the “protected grounds” under discrimination law. Some such decisions made in obedience to Biblical teaching will be justified by “balancing clauses” in the laws. For example, a decision not to appoint a woman to the preaching roster, because she is a woman, might seem at first to be an unlawful act of sex discrimination, and part of a pattern of “bullying”. But under s 37(1)(c) of the *Sex Discrimination Act* 1984 (Cth), such a decision might be justified (if made genuinely on the basis of a view about the Bible's view on women preaching) on the basis that it was “the

<sup>16</sup> This is the defence of “truth” or “justification”- see s 25 *Defamation Act* 2005 (NSW).

selection or appointment of persons to perform duties or functions for the purposes of or in connection with, or otherwise to participate in, any religious observance or practice”. It could also be said under s 37(1)(d) to be an “act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion”.<sup>17</sup>

On the other hand, it would still be possible to unlawfully discriminate by denying someone a job on the basis of a disability, say, where the Bible says nothing about this area and the person was able to carry out the essential requirements of the position.<sup>18</sup>

Another area of law which might be relevant would be the “vilification” provisions of the NSW *Anti-Discrimination Act 1977*. There is a prohibition under s 49ZT(1) of the Act of any “public act” (which of course would include a sermon) which “incite[d] hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the homosexuality of the person or members of the group”. But again, preaching from Romans 1 about the fact that homosexual activity is sinful would not fall within this prohibition, first, because such preaching should not incite the relevant emotions, but second, because s 49ZT(2)(c) exempts from this provision anything “done reasonably and in good faith, for ... religious instruction”.

<sup>17</sup> Similar provisions apply under the NSW *Anti-Discrimination Act 1977*, s 56(c) and (d).

<sup>18</sup> See the *Disability Discrimination Act 1992* (Cth). There are no religious “balancing clauses” in this Act.