

Redfern Legal Centre



15 April 2013

Committee Secretary
Senate Education
Employment and Workplace Relations Committees
PO Box 6100
Parliament House
Canberra ACT 2600

By email: ewer.sen@aph.gov.au

Please find attached our policy submission in response to the Fair Work Amendment Bill 2013 (Cth).

We would welcome the opportunity to meet with you to further discuss our submission.

Yours faithfully,

Redfern Legal Centre

Joanna Shulman
Chief Executive Officer

Redfern Legal Centre



SUBMISSION IN RESPONSE TO
THE FAIR WORK AMENDMENT BILL 2013 (CTH)

AUTHORS:
Jacqui Swinburne, Employment Solicitor
Kritika Naidu, PLT Law Student

DATE: 15 APRIL 2013

1. Introduction: Redfern Legal Centre

Redfern Legal Centre (RLC) is an independent, non-profit, community-based legal organisation with a prominent profile in the Redfern area.

RLC has a particular focus on human rights and social justice. Our specialist areas of work are domestic violence, tenancy, credit and debt, employment, discrimination and complaints about police and other governmental agencies. By working collaboratively with key partners, RLC specialist lawyers and advocates provide free advice, conduct case work, deliver community legal education and write publications and submissions. RLC works towards reforming our legal system for the benefit of the community.

2. RLC's work in employment law

This submission is based on Redfern Legal Centre's experience in providing free legal services to applicants in the Fair Work system. This is provided in three ways:

- a. The provision of advice to clients by volunteer solicitors, supervised by solicitors employed by Redfern Legal Centre;
- b. Casework undertaken by solicitors employed by Redfern Legal Centre. Such casework is usually provided to particularly disadvantaged clients; and
- c. Representation at unfair dismissal conciliations under the Unfair Dismissal Representation Scheme, which is a partnership between Clayton Utz and Redfern Legal Centre. Under that scheme, solicitors are seconded by Clayton Utz to Redfern Legal Centre, and those seconded solicitors provide advice and representation to applicants in unfair dismissal matters, under the supervision of a solicitor employed by Redfern Legal Centre.

Redfern Legal Centre also advises and represents clients in discrimination complaints against employers and other respondents.

3. RLC's view in summary

Redfern Legal Centre supports the Fair Work Amendment Bill 2013 and makes the following comments in relation to aspects which are relevant to the experience of our clients. These are:

- a. Right to request flexible working arrangement.
- b. Bullying in the workplace.

It is our position that:

a. Right to request flexible working arrangement

Redfern Legal Centre supports the broadening of reasons for requesting flexible working hours, especially where the employee has a disability or is experiencing family violence.

RLC supports the clarification that a worker can request to return to work part-time after the birth or adoption of a child. RLC also supports the clarification of reasonable business grounds for refusal of the request.

However, we recommend the bill be strengthened to give a positive obligation on the employer to enable flexible working arrangements or returning to work part-time. The Fair Work Commission should be given powers to make orders that involve flexible working arrangements and returning to work part-time and the onus should be on the employer to prove a reasonable business ground for refusing a request.

Case study:

Mary called Redfern Legal Centre for advice when she was returning to work after unpaid maternity leave. She was finding it difficult to deal with her employer who was refusing to discuss her return to work date and arrangements. Her manager had told her they wanted her back but they really wanted her to work full time. When she suggested different ways her job could be structured or shared so that she could work part time he stopped returning her emails or calls. Later he said she didn't need to worry about returning just yet but to come back full time in a few months. Mary felt like she was not able to do anything about this. She wanted to keep her job and continue her career but was not able to move straight into full time work.

Although the Fair Work Act gave Mary the right to ask for a change in working arrangements the employer could refuse on reasonable business grounds. The Act did not set out any details on what was reasonable and Mary felt it was difficult to negotiate with her employer when there was no clear right for her to return part-time. Mary has not yet decided whether to pursue returning to work part-time.

b. Workplace bullying

Redfern Legal Centre recognises bullying as a key workplace health and safety issue that is experienced by many employees and requires national attention. The International Labour Organisation describes workplace bullying as a form of psychological violence through vindictive, cruel, malicious or humiliating attempts to undermine an individual or groups of employees. According to Davidson Trahaire Corpsych, a leading organisational

psychological firm, the most common form of workplace bullying is verbal abuse.¹

In the experience of Redfern Legal Centre, such behaviour, especially when continued over extended periods of time, is destructive to the victim's sense of self, dignity, morale, and confidence. The impact of this extends to the victims day to day activities, family life, and social engagement. These can have significant flow-on effects to bystanders, co-workers, family and friends. The detrimental effects of this behaviour is heightened due to the workplace forming a large part of each individuals life and in most cases, their primary means to gaining a livelihood. In most cases, employees continue to tolerate such behaviours due to fear of not being able to pay day to day living expenses if they leave their job, not finding another job, being unable to support their family or other commitments.

The Australian Workplace Barometer, a commonly accepted estimate of the prevalence of workplace bullying in Australia, found that 6.8% of Australia workers in 2009-11 had experienced workplace bullying in the six months prior to their survey in 2011². The Personality and Total Health through Life project managed by the Australian National University support this figure³.

Redfern Legal Centre recognises that the costs of workplace bullying are significant. Work plays a significant role in the constitution of society. The negative effect of workplace bullying costs the government, employers, industry and community as a whole. The Productivity Commission⁴ estimates that workplace bullying costs the Australian economy between \$6 billion and \$36 billion every year. Other costs to the economy include public sector costs such as the health and medical services, and income support and other government benefits provided to individuals who prematurely depart the workforce based on their bullying experience and injuries suffered⁵. Workplace bullying costs employers an average of \$17,000 to \$24,000 per case⁶.

In the experience of Redfern Legal Centre, victims of workplace bullying face significant hurdles to stop workplace bullying. This is primarily due to existing modes of redress for victims being reactive and ineffective in the control of the risks of bullying behavior. We support reforms to the *Fair Work Act 2009* to implement mechanism for victims to gain access to order which stop this type of behavior before it escalates and causes significant harm to the victims health and safety.

¹ Ms Michele Grow, Chief Executive Director, Davidson Trahaire Corpsych (DTC), *Committee Hansard*, Canberra, 13 September 2012, p. 1.

² Referenced in Safe Work Australia, *Submission to the House Standing Committee on Education and Employment, Inquiry into workplace bullying*, (Submission 74), 29 June 2012, p. 14.

³ Referenced in Safe Work Australia, *Submission to the House Standing Committee on Education and Employment, Inquiry into workplace bullying*, (Submission 74), 29 June 2012, p. 14; Mr Rex Hoy, Chief Executive Officer, Safe Work Australia, *Committee Hansard*, Canberra, 17 August 2012, p. 12.

⁴ Productivity Commission, *Benchmarking Business Regulation: Occupational Health and Safety*, March 2010.

⁵ Diversity Council of Australia (DCA), *Submission 185*, p. 8.

⁶ Ms Holmes, PC, *Committee Hansard*, Canberra, 17 August 2012, p. 17.

Case Study:

Jenny came to see Redfern Legal Centre after resigning from her job due to ongoing and persistent bullying. She had worked at the company for 7 years but had recently had a change of managers. The new manager didn't like Jenny and spoke to her in condescending and derogatory language. She felt constantly hounded and treated differently to other employees.

Soon after that the company wanted to change Jenny's employment contract to include lower duties such as cleaning and data entry. When Jenny did not agree to the changes in her position she was told by her manager to 'take it or leave it'. The tension with having to face her manager every day made her feel ill. She complained to the HR department but was offered no assistance.

Jenny resigned as a result of the bullying. At the same time she lodged a formal complaint to the company. There was an internal investigation but she had not been informed of any outcome.

Jenny then lodged an application for unfair dismissal as she felt forced to resign. Unfortunately for Jenny, there were no other remedies for her unless she had a psychological injury, the bullying gave rise to a discrimination complaint, or she could argue breach of contract (a difficult and expensive process). It was not until she took the step of resigning that she could apply to the Fair Work Commission to have her complaint heard.

Any remedies under anti-discrimination laws can only be taken when the bullying focuses on a protected ground, (age, sex, disability, race, homosexuality, marital status) or involves sexual harassment or racial vilification.

Under current Workplace, Health and Safety (WHS) legislations there is only a general duty of care to manage psychosocial hazards in the workplace. There is unfortunately no express requirement for employers to control the risks to psychological health of employees, nor does it give individuals a right to seek remedies when they are adversely affected because their co-worker or employer has breached their duties of care. It is often the case that victims have to look around in an attempt to try to find a legislative or regulatory framework that provides them with the right to seek individual recourse. Furthermore, these remedies are available only after harm to an individual's health and safety has occurred.

The nature of WHS legislation precludes workers from commencing proceedings for breach of WHS Laws and must rely on their jurisdictional regulator taking action. This can take years to complete and often when irreparable damage has been done to victims of bullying behavior. Even if a regulator does take action, a successful prosecution does not benefit workers, as the penalty imposed on an employer is a fine for breach of duty, which does not include a compensation component. Consequently a bullied worker will find it difficult to access a satisfactory legal remedy unless a compensable injury is sustained. This can be extremely difficult. The Australian Council of Trade Unions found that

enforcement of the law in response to non-physical workplace bullying is particular low due to the difficulty faced by inspectors to detect and protect against that area⁷. JobWatch stated that the burden on the regulators to prove beyond reasonable doubt that workplace bullying occurred was discouraging regulators from bringing about more prosecutions⁸.

The protection provided to victims of workplace bullying under the current modes of redress fail to prevent and deter serious psychological injury to an employee. The burden placed on employees to prove such behaviors occurred and their psychological harm is work related is too high a onus and has the potential to act as a deterrent to victims seeking redress. In the experience of Redfern Legal Centre, victims have chosen to resign from their work and then had to bring action for adverse action or constructive dismissal under unfair dismissal, which can be more difficult to prove.

4. RLC's recommendations

a. Right to request flexible working arrangement

Recommendation 1

Enact Schedule 1 of the *Fair Work Amendment Bill 2013*

Recommendation 2

Give the Fair Work Commission authority to make any order it considers appropriate to ensure employers allow flexible working hours or return to work part time except when a reasonable business ground is proved.

b. Bullying in the workplace

Recommendation 3

Enact Schedule 3 of the *Fair Work Amendment Bill 2013*

⁷ Mr Michael Harmer, Harmer's Workplace Lawyers, *Committee Hansard*, Brisbane, 18 July 2012, p. 3.

⁸ Referenced in JobWatch, *Submission to the House Standing Committee on Education and Employment, Inquiry into workplace bullying*, (Submission 103), p. 18.