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Committee Secretary
House of Representatives Standing Committee on
Education and Employment
PO Box 6021
Parliament House
CANBERRA ACT 2600
AUSTRALIA

13 July 2012

Dear Committee Secretary,

Submission – Workplace Bullying

The Australian Lawyers Alliance welcomes the opportunity to provide a Submission to the House Standing Committee on Education and Employment's Inquiry into Workplace Bullying.

We note that we were provided with an extension until 13 July to provide our Submission.

We would be happy to comment further on any issues we have raised within this Submission.

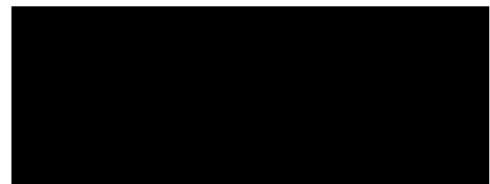
Yours sincerely,



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Legal and Policy Officer

WORKPLACE BULLYING

INTRODUCTION

The Australian Lawyers Alliance welcomes the opportunity to provide a submission to the Standing Committee on Education and Employment's Inquiry into Workplace Bullying.

The Australian Lawyers Alliance is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual. Further information is available on our website.¹

Many of our members have represented clients who have been sustained injury in the workplace, including psychological injury as a result of workplace bullying.

Workplace bullying has a profound impact on individuals, families, workplaces and communities all over Australia.

The passing of new model legislation in most states around Australia serves to harmonise understandings of the role of employers in ensuring work safety.

However, there is no specific mention of 'workplace bullying' in the new model legislation.

Employers have a 'primary duty' to ensure the health and safety of employees. We submit that for this duty of care to be fulfilled, more needs to be done by employers to develop, and enforce, anti-bullying procedures and policies in the workplace.

DEFINING BULLYING

Section 55A of the *Occupational Health, Safety and Welfare Act 1986* (SA) defines bullying as behaviour:

- (a) that is directed towards an employee or a group of employees, that is repeated and systematic, and that a reasonable person, having regard to all the circumstances, would expect to victimise, humiliate, undermine or threaten the employee or employees to whom the behaviour is directed; and*
- (b) that creates a risk to health or safety.*

We note that discrimination on the basis of age, race, gender or disability and sexual harassment, may also constitute bullying in the workplace.

THE NEW LAWS

The Australian Lawyers Alliance recommend that, given the lack of a specific definition of bullying in the new legislation, it is imperative that employers and employees be informed of the content of these new laws and how this links to workplace bullying.

New model legislation in relation to work health and safety came into force on 1 January 2012 enacted in the Commonwealth, ACT, the Northern Territory, New South Wales and Queensland.² Tasmania's legislation will come into force on 1 January 2013.³

¹ Australian Lawyers Alliance, www.lawyersalliance.com.au

In the legislation, persons engaged in business, including employers, are the subject of a primary duty of ensuring, as far as is reasonably practicable, the health and safety of workers who are engaged in their business, under section 19.

The offence gives rise to strict liability under s12A, but no civil right of action arises.

As Desmond Kennedy SC writes,

'Section 31 of the Act deals with a category one offence of reckless conduct in relation to a risk of death or serious illness, which provides penalties of up to \$300,000, and in the case of a company, up to \$3,000,000 which can be imposed and prison terms of up to five years in relation to individuals or officers of corporations conducting the business. These provisions ought to provide a powerful incentive to employers to prevent bullying in their workplaces.

'There does not appear to be any specific provision in the legislation defining and/or prohibiting specific bullying activity, although, such activity would fall within the primary duty.'⁴

ESTABLISHING PROCEDURES

The Australian Lawyers Alliance submit that one of the most significant issues in countering workplace bullying is structures in the workplace being sufficiently developed and neutral from the parties inflicting the bullying, and effectively implemented following incidences of bullying.

WorkCover NSW has recently released a Bullying Prevention Kit,⁵ which provides a checklist for employers to assess the quality of their anti-bullying procedures.

A lack of action from management following the reporting of bullying incidences perpetuates a cycle of harassment, and can cause distrust, fear, anxiety, panic attacks, depression and reduced productivity. In severe cases, it can lead to psychological injury, post traumatic stress disorder and even suicide.

Workplace bullying led to suicide in the cases of NSW apprentice chef Stuart McGregor, and young Victorian waitress, Brodie Panlock.⁶

² *Work Health and Safety Act 2011 (Cth) and Work Health and Safety Regulations 2011 (Cth); Work Health and Safety Act 2011 (ACT); Work Health and Safety (National Uniform Legislation) Act 2011 (NT); Work Health and Safety Act 2011 (NSW); Work Health and Safety Act 2011 (Qld).*

³ *Work Health and Safety Act 2012 (Tas)*

⁴ Desmond Kennedy SC, Paper presented at the Western Australian Summer Legal Conference (University of WA and Law Society of WA) February 2012.

⁵ <http://www.workcover.nsw.gov.au/newlegislation2012/health-and-safety-topics/human-behaviour/Pages/Bullying-prevention-kit.aspx>

⁶ See Helen Westerman, 'In harms way', *Sydney Morning Herald*, March 10 2010
<http://www.smh.com.au/small-business/in-harms-way-20100309-pvxxm.html>

As a result of Brodie Panlock's suicide, the Victorian Government introduced the *Crimes Amendment (Bullying) Bill 2011* (Vic) on 6 April 2011, and assented to on 7 June 2011.

This legislation sought to amend s21A of the *Crimes Act 1958* (Vic), which covers the range of conduct attributed to stalking. The amended legislation thus also incorporated:

- (da) making threats to the victim;*
- (db) using abusive or offensive words to or in the presence of the victim;*
- (dc) performing abusive or offensive acts in the presence of the victim;*
- (dd) directing abusive or offensive acts towards the victim.*

This was expanded to also include:

- 'acting in a way that could reasonably be expected to:*
- (i) cause physical or mental harm to the victim including self harm; or*
 - (ii) to arouse apprehension or fear in the victim for his or her own safety or that of any other person (self harm is defined to include psychological harm and suicidal thoughts).*

Ultimately, procedures must be established that provide systems to encourage reporting of workplace bullying; clear steps for management to isolate the bully from the victim; and to protect the victim's safety and physical and mental health.

However, it is not enough for such procedures to be developed.

Procedures must be followed and implemented. It is not enough for a company to have in place a bullying policy – this policy must be actioned.

The common law also has a part to play in regulating behaviour, combined with the various pieces of legislation.

WORKPLACE CULTURES

In especially high stress workplace situations, or in junior positions, there can be a workplace culture that conduct constituting workplace bullying must be 'tolerated' to ensure that career progression is not harmed, and that this is conduct that is acceptable and must just be 'put up with'.

CASE STUDY

I worked for my employer, a government department, for 16 years. During my last six years, my supervisor, a woman, victimized staff. Although I reported the abuse, as did others, through reporting policy mechanisms which were set up, the bullying and harassment of me and others continued.

I couldn't believe what was happening to me as the supervisor kept up the surreptitious and overt victimization of me. I sought help from the union with professional counselling and asked to be moved.

I put in a formal request for transfer but the bullying and harassment continued while I waited. I took a week's stress leave and sought an interview with the senior executive. I was told it was not their area of responsibility.

I was interviewed and applied for different positions within the department to no avail. I took three years leave without pay and finally was advised not to come back. I rang a representative of Equal Employment Opportunity but they advised they couldn't do anything.

At all times my supervisor devised a framework for the abuse by saying it was a personality conflict and solicited support for that idea.

The loss of work which I valued so highly, the socializing aspects and friendships but most importantly the ability to support myself financially has led me to believe that bullying in the workplace should be identified more closely with its criminal element. My mental health is severely affected as I have begun to realize the huge financial/ health costs involved.

Workplaces, and managers within workplaces, must take both minor and major concerns and reports of workplace bullying seriously. Failure to take all complaints seriously thus encourages a culture of acceptance and toleration of bullying that indicates to employees that they are not adequately valued and that the bullying will continue.

Addressing workplace bullying requires strong leadership. In addition, employees need to be aware of the steps that are available to them to report workplace bullying, and have confidence in their employers' commitment to adhere to such procedures.

HARASSMENT AND VICTIMISATION IN MAKING COMPLAINTS

Victims of workplace bullying often can be reticent to complain about incidents of bullying, as they fear the impact of making a complaint, whether it is on their career progression; their relationship with management; or the repercussions from the person who is bullying them, once it is known that the incidents have been reported.

As workplaces develop procedures to counteract workplace bullying, a core element must be that employees will not be subject to victimisation as a result of making a complaint.

WORKPLACE BULLYING AND DISCRIMINATION

In some instances, employees may be subject to bullying at work due to an injury sustained at work, or due to race, sex or disability.

In these instances, a complaint of discrimination can be brought to either the relevant State based anti-discrimination board, or to the Australian Human Rights Commission.

However, these processes largely depend on the conciliation between parties, and in practice, the process relies implicitly on the wrongdoer to admit their wrong. Failure to do so means that victims can enter the process and receive nothing.

This is especially the case within the Australian Human Rights Commission, where failure of the parties to conciliate can mean that the only option available to an individual is to take the complaint to the Federal Court following its termination.

This is often not viable on a number of grounds, including the gathering of evidence, but in addition, the emotional strain of court proceedings, especially for those who suffer post-traumatic stress disorder as a result of the bullying and discrimination; and the financial strain, with the threat of the costs jurisdiction of the Federal Court – this option is generally not pursued by claimants.

Workplace bullying does indeed have a profound effect on all aspects of a person's health as well as their work and family life.

CONCLUSION

Workplace bullying should not be acceptable in any employment in Australia. More needs to be done to ensure that persons who are subjected to bullying feel confident and secure in their rights to report incidents, and that their concerns are met with remedy and redress.