



Master Builders Australia

Submission to House Standing Committee on Education and Employment Inquiry into Workplace Bullying

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1 Introduction

- 1.1 Master Builders Australia is the nation's peak building and construction industry association which was federated on a national basis in 1890. Master Builders Australia's members are the Master Builder state and territory Associations. Over 122 years the movement has grown to 33,000 businesses nationwide, including the top 100 construction companies. Master Builders is the only industry association that represents all three sectors, residential, commercial and engineering construction.
- 1.2 The building and construction industry is a major driver of the Australian economy and makes a major contribution to the generation of wealth and the welfare of the community, particularly through the provision of shelter. At the same time, the wellbeing of the building and construction industry is closely linked to the general state of the domestic economy.
- 1.3 The construction workforce currently represents over 9 per cent of the total Australian workforce with the number of jobs expected to increase by 300,000 to around 1.3 million employees by 2021.
- 1.4 At November 2011 the construction industry employed 1,039,900 people.

2 Purpose of submission

- 2.1 This submission sets out Master Builders' response to the inquiry into workplace bullying announced by the Minister for Employment and Workplace Relations on 26 May 2012.
- 2.2 Workplace bullying is of concern not only for the building and construction industry, but for all Australian workplaces. It can have serious health and psychological consequences for victims. Workplace bullying can also pose significant financial and legal implications for employers.
- 2.3 Master Builders does not condone bullying in the workplace. Master Builders therefore welcomes the inquiry into workplace bullying as well as the opportunity to provide a written submission to the inquiry. This submission addresses the following issues – what is the extent of workplace bullying; what is workplace bullying; whether the existing regulatory framework provides a sufficient deterrent against workplace bullying and the adequacy of

existing education and support services to prevent and respond to workplace bullying.

3 What is the extent of workplace bullying?

- 3.1 Available evidence suggests that workplace bullying is widespread although the estimates vary considerably. This issue was examined by the Productivity Commission in its 2010 report on performance benchmarking of occupational health and safety.¹ The Productivity Commission report cites research by Sheehan et al which applied a high and low rate of prevalence based on international surveys. In 2000 the estimate was that between 350,000 and 1.5 million workers were the victims of bullying with estimated costs to businesses of between \$6 billion and \$36 billion when “hidden” and lost opportunity costs are taken into account.² Some of the costs of workplace bullying borne by employers include absenteeism, labour turnover, loss of productivity and legal costs.
- 3.2 Using the results of international research, the Beyond Bullying Association in Australia estimates that between 2.5 and 5 million Australians will be exposed to workplace bullying in some form.³ A 2009 survey by an international recruitment company into workplace bullying in Australia surveyed 850 employee respondents and found that more than 50 per cent had witnessed bullying and over 25 per cent had been a target of bullying themselves.⁴
- 3.3 Master Builders recommends that the Committee takes an objective approach to this aspect of the inquiry. In particular, the inquiry needs to ensure that any assessment of the extent of workplace bullying is based on evidence from reliable sources rather than anecdotal evidence.
- 3.4 A number of recent incidents (see Appendix 1) indicate that bullying does occur in the construction industry. Master Builders is not aware of any quantitative data which would confirm the extent of bullying in the industry.

¹ *Performance benchmarking of Australian business regulation: occupational health and safety*, Productivity Commission, released 6 April 2010 – see <http://www.pc.gov.au/projects/study/regulationbenchmarking/ohs/report>

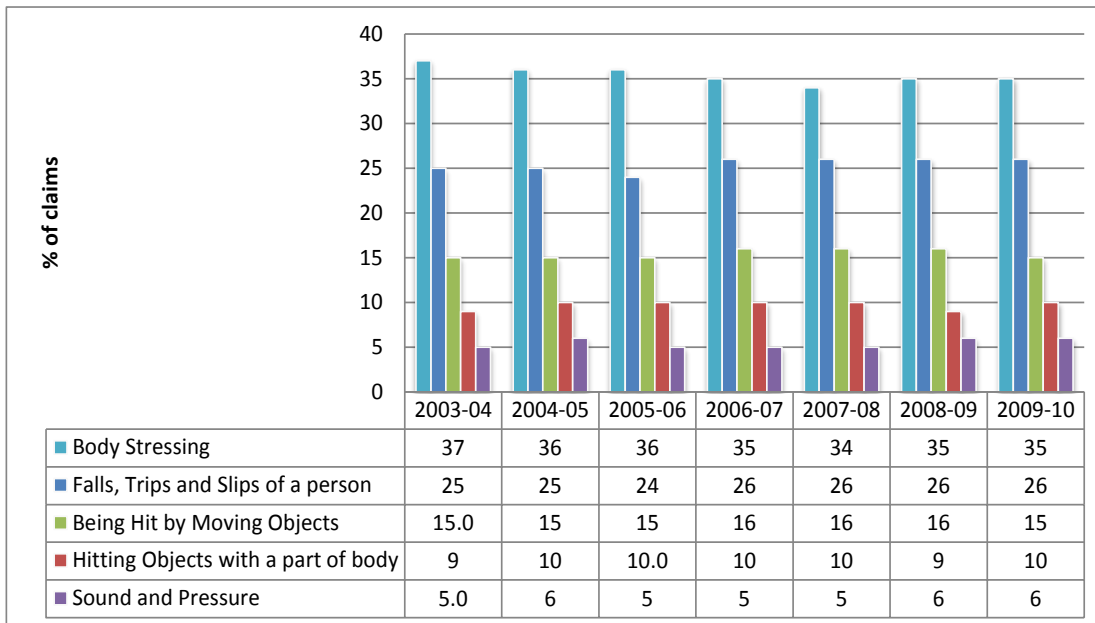
² Ibid, page 287. These figures are also quoted by the Australia Human Rights Commission in their fact sheet for employers – see http://www.hreoc.gov.au/info_for_employers/fact/workplace.html, accessed 5 June 2012.

³ APC Report, above n 1, page 287.

⁴ *Bullying research report*, Drake Australia Pty Ltd, 2009.

3.5 Master Builders is committed to improving the work health and safety performance of the building and construction industry. The vast majority (92 per cent) of injuries in the building and construction industry are attributable to five mechanisms (see Table 1).⁵ It is important that the focus continues to be on addressing these major causes of injury and death in order to continue to improve the work health and safety performance of the industry. Nonetheless, all risks to health and safety, including bullying, need to be addressed.

Table 1 – Percentage of serious claims⁶ by mechanism of injury or disease



4 What is workplace bullying?

4.1 Workplace bullying has been the subject of academic research both locally and internationally. That research has attempted to provide a definition of what constitutes bullying. Although there is no single universally accepted definition, it can at least be agreed that bullying is systematic and interpersonal behaviour which may cause severe social and psychological problems in the target.⁷ The term 'bullying' is sometimes utilised to describe a pattern of repeated harassing or abusive behaviour by an individual or a group that is designed to intimidate, offend, degrade or humiliate an individual

⁵ Data supplied by Safe Work Australia from the National Data Set for Compensation based statistics; data extracted 13 September 2011

⁶ Serious claims include all fatalities, all permanent incapacity claims (as defined by the jurisdictions) and temporary claims for which one or more weeks of time lost from work has been recorded

⁷ Einarsen S, Hoel H, Zapf D and Cooper CL (eds) *Bullying and emotional abuse in the workplace: international perspectives in research and practice* (2003).

or group.⁸ These descriptions of bullying point to two key components – the behaviour is systematic and there is an imbalance of power between the perpetrator and victim. This imbalance is more often psychological and physical as opposed to hierarchically-based. In other words, workers can bully other workers; subordinates can bully supervisors, and the other way around.⁹

4.2 Workplace bullying usually occurs between individuals who work together in the same organisation but in the building and construction industry bullying behaviour is also exhibited by third parties such as union officials. The perpetrator displays behaviour described above, i.e. that person acts towards the other person in such a way as to cause the target harm or disadvantage through actual behaviour or the perceived threat of harm.¹⁰ This harmful behaviour would be workplace bullying if it occurs on a regular and sustained basis and is not limited to a single or isolated act.

4.3 Workplace bullying can be both overt and covert in its nature. Some examples of overt bullying are verbal abuse, including swearing and shouting, intimidation through insults and public humiliation.¹¹ Covert forms of workplace bullying include malicious gossip, undermining someone's performance or purposefully excluding them from career opportunities,¹² or in the building industry the threat or actual exclusion of obtaining other contract work.

4.4 Master Builders recommends that the definition which best meets the agreed elements of bullying is the definition in the *Occupational Health, Safety and Welfare Act 1986* (SA). Section 55A(1) of the South Australian Act is as follows:

Workplace bullying means any behaviour that is repeated, systematic and directed towards an employee or a group of employees that a reasonable person, having regard to the circumstances, would expect to victimise, humiliate, undermine or threaten and which creates a risk to health and safety.

⁸ Loggins A, English J and Ballard A *Workplace bullies: how employers can detect and prevent workplace bullying before it escalates into violence* (2012) ACC Docket, at 100.

⁹ Einarsen et al *Bullying and emotional abuse*, above n 5.

¹⁰ Hutchinson J *Restructuring and workplace bullying in the Australian public sector*, paper presented at 25th AIRAAZ (Association of Industrial Relations Academics of Australia and New Zealand) Conference, February 2011, at 2.

¹¹ Ibid.

¹² Ibid.

- 4.5 The key components of this definition are that the behaviour must be repeated (not a single occurrence), systematic and that behaviour must be judged against an objective, and not subjective, standard. Because bullying behaviour can comprise a very wide spectrum of conduct it is essential that it is defined in a way that does not capture behaviour which could subjectively be bullying, but is not when judged against an objective standard. We note that this definition is, however, confined to the relevant behaviour being exhibited towards employees and therefore that the more generalised concept of a worker in the harmonised work health and safety legislation is not captured.
- 4.6 One example of the distinction between the application of an objective rather than a subjective standard is disciplinary management practices which a disgruntled employee might perceive as bullying behaviour but when examined against an objective standard, does not constitute bullying because the employer is seeking the employee to act in a prescribed manner that is determined as normative behaviour within that organisation. Performance management, including management of workers who are not performing at the standard expected by the workplace is not bullying. It is important to differentiate between a person's legitimate authority at work, and bullying. All employers have a legal right to direct and control how work is done, and managers have a responsibility to monitor workflow, give feedback and manage performance.
- 4.7 Master Builders therefore submits that workplace bullying must be distinguished from legitimate feedback on the work performance of an employee by his or her supervisor or manager. Strong management and the exercise of legitimate managerial responsibilities is not workplace bullying. Managers have the right to performance manage and discipline employees who are exhibiting shortcomings in their performance or who have breached company rules and policy or where behaviour falls short of required standards. Although workers may feel uncomfortable or upset as a result of receiving feedback about poor performance, it needs to be made clear that this is a legitimate management practice, not bullying. As noted in paragraph 4.5 above, bullying is behaviour which a reasonable person would expect to victimise, humiliate, undermine or threaten a person.

4.8 In distinguishing legitimate managerial conduct an example can be borrowed from workers' compensation laws which contain exclusionary provisions often referred to as industrial relations exclusions or management exclusions. For example, in Western Australia a compensable injury does not include a disease caused by stress arising from a worker's dismissal, retrenchment, demotion, discipline, transfer, redeployment, or from the worker not being promoted, transferred or granted a leave of absence, or any other benefit in relation to the employment unless the employer's actions in relation to those matters are unreasonable and harsh.¹³

4.9 This is broadly mirrored in all other jurisdictions across Australia. However, the statutes in some jurisdictions contain exclusions that are broader and include staff performance appraisals as exclusionary provisions. In addition, some jurisdictions refer to reasonable management action as grounds for a defence against a stress related claim. The South Australian occupational health and safety legislation draws on these management exclusions as a way of differentiating between bullying and reasonable management actions. Section 55A(2) of the *Occupational Health, Safety and Welfare Act 1986* (SA) expressly states that bullying behaviour does not involve:

Reasonable action taken in a reasonable manner by an employer to transfer, demote, discipline, counsel, retrench, or dismiss an employee; a decision by an employer, based on reasonable grounds, not to award or provide a promotion, transfer, or benefit in connection with an employee's employment; reasonable administrative action taken in a reasonable manner by an employer in connection with an employee's employment; or, reasonable action taken in a reasonable manner under an Act affecting an employee.

4.10 The comparison with workers' compensation laws serves as a useful illustration about how legitimate and reasonable managerial conduct can, and should, be distinguished from workplace bullying per se. In addition, reasonable managerial conduct, judged in the circumstances of a particular case, must be able to be used as a defence against a claim of workplace bullying. The end focus needs to be on targeting the perpetrators of workplace bullying (inclusive of managers) in order to change a dysfunctional culture, not the employer who exercises legitimate managerial prerogative in attempting to improve staff performance.

¹³ S5(4) *Workers Compensation and Injury Management Act, 1981* (WA)

- 4.11 Master Builders also recommends that the inquiry into workplace bullying carefully consider and distinguish between workplace bullying and managerial styles that may be strict or directive. As noted above, employers have a legal right to direct and control how work is done. 'Tough' managerial styles may not suit some workers but this does not automatically equate strict managerial styles with bullying.

5 Current legal framework for workplace bullying

- 5.1 A number of areas of the law currently deal with bullying including workplace health and safety, workers' compensation, anti-discrimination laws and industrial relations. The only state to introduce bullying behaviour into the criminal code is Victoria.¹⁴ Recent superior court judgments have also given recognition that failure to prevent bullying in the workplace is actionable under common law.¹⁵
- 5.2 Master Builders' view is that current work health and safety legislation has adequate scope to deal effectively with workplace bullying. Under section 19 of the Model Work Health and Safety Act¹⁶, a person conducting a business or undertaking has a duty to ensure, so far as is reasonably practicable, the health and safety of workers engaged, or caused to be engaged by the person and workers whose activities in carrying out work are influenced or directed by the person. Under section 28 of the Work Health and Safety Act, workers have a duty to take reasonable care of their own health and safety and the health and safety of others in the workplace.
- 5.3 The Model Work Health and Safety Act also has sufficient scope for regulators to adopt appropriate interventions to curtail bullying. These interventions range from improvement notices (which outline the nature of the breach and can include directions as to the measures that the duty holder needs to take in order to rectify the breach) to criminal prosecutions with high

¹⁴ *Crimes Amendment (Bullying) Act 2011* (Vic)

¹⁵ For example, tort of negligence.

¹⁶ Legislation to give effect to work health and harmonisation is currently in place in NSW, Qld, the Commonwealth, ACT and NT. In Tasmania, the harmonised legislation will come into effect on 1 January 2013. Although Victoria, South Australia and Western Australia have not yet passed legislation to give effect to harmonisation, the duties of care in the existing OHS legislation in those jurisdictions also adequately covers workplace bullying and successful prosecutions have been made under that legislation.

monetary penalties and jail terms for individuals where the duty holder is reckless as to the risk to an individual of death or serious injury.

5.4 Regulators need to use the full range of interventions available to them to achieve the culture change needed in workplaces to address bullying. In most cases, Master Builders recommends that the focus of interventions by the regulator needs to be on facilitating resolution of the matter (for example through issuing an improvement notice). However, in the most egregious cases, where there is physical injury of the worker, regulators need to seek penalties at the top end of the hierarchy (i.e. reckless endangerment).

5.5 While Master Builders considers that there is sufficient scope within the Work Health and Safety Act to deal appropriately with bullying in the workplace, guidance for duty holders needs to be developed. Safe Work Australia has developed a draft *Code of Practice: Preventing and Responding to Workplace Bullying*. The draft Code was released for public comment in September 2011. Master Builders is of the view that that Code is flawed and needs to be thoroughly reviewed; work that is currently being undertaken by Safe Work Australia. Master Builders' concerns about the Code were made in a submission to Safe Work Australia, a copy of which is available on the Safe Work Australia web site. In summary, Master Builders concerns about the Code were as follows:

5.5.1 The Code is drafted for larger, static workplaces and does not provide practical guidance for smaller workplaces.

5.5.2 The definition of bullying used in the Code is inappropriate because it does not include that the behaviour must be systematic. The *Preventing Workplace Bullying: A Practicable Guide for Employers* states that systematic refers to having, showing or involving a method or plan. Inclusion of this factor in the definition would, for example, better distinguish between poor management (for example due to lack of experience or skills) and management practices which a reasonable person would expect to victimise, humiliate, undermine or threaten.

5.5.3 The Code includes examples of behaviour which are not necessarily bullying and which could be due to legitimate organisational factors. For example, the Code includes setting timelines that are difficult to

achieve or constantly changing deadlines as an example of bullying. These could be due to operational factors which are often outside the control of the organisation.

- 5.5.4 The Code states that a manager or supervisor in a position of power may have a management style that seems to be strict or disciplinary when in fact it is bullying. Having a strict or directive style of management does not, in Master Builders' view, automatically constitute unreasonable behaviour. A strict or directive style of management may well not suit some workers and other styles of management may be more effective. However, to equate styles of management automatically with bullying is, in Master Builders' view, inappropriate.
- 5.5.5 The Code does not focus sufficiently on positive courses of action.
- 5.5.6 The case studies are inappropriately vague and could lead a person to conclude that particular behaviour is bullying when it does not meet the key elements of bullying.

6 Education

- 6.1 Master Builders considers that there is a clear need for better education about bullying in the workplace. A key component of the education must be to establish a better understanding of what sort of behaviour constitutes bullying. In particular, workers need to be clear that performance management does not constitute bullying, other than in exceptional cases where it is a component of behaviour which is repeated, systematic and directed towards an employee or contractor that a reasonable person, having regard to the circumstances, would expect to victimise, humiliate, undermine or threaten.
- 6.2 Education is also an invaluable tool as it will inform employers and those in control of workplaces about the extent and the nature of workplace bullying, as well as how to better recognise workplace bullying and to respond. This will ensure that employers are better informed and aware about how to protect their employees and how to avoid the unnecessary organisational costs such as loss in productivity and litigation costs.
- 6.3 Education will train employers and employees about workplace bullying and how to deal with incidents of workplace bullying and how to eliminate bullying

from the workplace culture. Better informed employers and employees can then work towards creating a workplace culture and environment in which bullying and harassment will not be tolerated. Workplace culture that tolerates or encourages practical jokes aimed at taunting and harassing workers should not be seen as acceptable because it can lead to bullying.

- 6.4 Better informed employers will also be better placed to develop sound policies dedicated to preventing and responding to workplace bullying incidents. These policies will ensure that everyone in the workplace knows what is expected of them when it comes to workplace bullying. Increased workplace awareness will minimise occurrences where the target of workplace bullying fear is that if he or she reports bullying, it will be either ignored or avoided. Prevention is better than cure, and better prevention will happen through better education and information about workplace bullying.
- 6.5 Master Builders Australian Capital Territory Group Training currently offers a short industry-based course on workplace bullying and we submit that more courses, spread across all industries, need to be developed and delivered, with funding assistance from the government.

7 Conclusion

Master Builders does not condone bullying in the workplace. While Master Builders welcomes the inquiry, as noted in the body of this submission Master Builders does not consider that further law is required to address workplace bullying. The harmonised work health and safety legislation establishes obligations on duty holders to prevent workplace bullying and provides sufficient scope for regulators to take appropriate action. What is needed is good guidance for duty holders which establishes a definition of bullying which provides for bullying to be measured against an objective standard and which also properly distinguishes between bullying and legitimate management practices. This guidance needs to be supported by education of employers and workers.

Case Studies of Bullying in the Construction Industry

Case 1

In 2004, a New South Wales company was fined when a 16 year old labourer was bullied by his co-workers.¹⁷ This was the first case of workplace bullying to come before New South Wales Courts. The victim was subjected to physical and psychological abuse that was aimed at demeaning and humiliating him. In one particularly serious incident, his co-workers wrapped him in plastic from his neck to his feet using a manual plastic wrapping machine, stuffed his mouth with sawdust and glue and whirled him around on a trolley. The on-going bullying exacerbated his existing health problems and he abandoned his employment shortly after the incident. The employer was fined \$24,000 and the two directors, one of whom was in the factory at the time of the incident, were fined nominal sums of \$1,000 which was later raised to \$9,000 and \$12,000. The co-workers who carried out the bullying were also prosecuted and were placed on good behaviour bonds, with one worker receiving a fine of \$500.

Case 2

While the following case appears to have been a one-off incident, it is relevant to a discussion on bullying because single incidents such as this can be indicative of a workplace culture where bullying could occur.

This case In this recent case,¹⁸ four workers grabbed a fellow worker as he got out of his truck at work, hit him in the groin and tied him to a piece of steel mesh. His clothes were cut off with a knife and eggs were thrown at him. The chief perpetrator then grabbed a jerry can and poured fuel on the ground near the victim, who was still bound, and lit the fuel. The flames were about knee-high. The victim then fell to the ground and sustained partial thickness burns to his legs, which required debridement and skin grafts. He also suffered psychological injuries. Two of the four workers were fined \$2,000 and \$1,800 respectively, with the other two being placed on a 12-month good-behaviour bond.

¹⁷ *Maddaford v Coleman (NSW) Pty Ltd & Ors* [2004] NSWIRComm 317.

¹⁸ *Inspector Estreich v Zaccardelli & Ors* [2012] NSWIRComm 47.