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The Secretary
House of Representatives
PO Box 6021
Parliament House
CANBERRA ACT 2600

House Standing Committee on Education and Employment

Inquiry into workplace bullying

Dear Sir/Madam

Please find attached a submission to the House Standing Committee on Education and Employment, Inquiry into workplace bullying.

It is our view that this submission conforms to the Terms of Reference of this inquiry.

I have not requested confidentiality in respect of this submission but if you believe that any confidentiality is required then please advise me of same at your convenience.

National Whistleblowing Information Centre (NWIC) is a small voluntary organisation consisting of well qualified members who are committed to assisting people of conscience to disclose wrongdoing wherever it is found, but in particular, within public administration. Our objective is to ensure that whistleblowers suffer no harm in the course of exposing wrongdoing. We also aim to establish legislation which would standardise public interest disclosures nationally.

If NWIC can be of further assistance to this inquiry such as participating in public hearings, we would be pleased to send a representative.

Yours, sincerely

Peter Bennett

National Whistleblowing Information Centre Inc

to

House Standing Committee on Education and Employment

Inquiry into workplace bullying

This submission focuses primarily on 'workplace bullying' as it relates to 'whistleblowing' or public interest disclosures. Therefore it covers a narrow but unique and clear spectrum of bullying within the wider workplace.

Overview

Workplace bullying can generally be divided into two groups; the proactive and the reactive. Proactive bullying is the form broadly experienced across the workplace. Reactive bullying is the form usually associated with whistleblowing.

Both forms of bullying are significantly different in their foundation, structure and application. However the aim is common. It is to control and subjugate a targeted victim.

As stated, the aim of this submission is to highlight the form of bullying in the workplace as it relates to whistleblowing, and therefore the references to other forms of bullying is minimal and only used for the purpose of comparisons. Furthermore this submission is obliged to rely on generalisations as it is not possible to explicitly identify all the differences in legislation and practice.

The critical and important aspect of addressing whistleblower bullying in the workplace is that it deals with the two phases of real harm and damage being done within organisations.

1. In the first phase, there is the identification and disclosure of real harm and damage being caused to an organisation by people engaged in wrongdoing.
2. In the second phase there is the damage caused by the bullying of the whistleblower. This invariably leads to the whistleblower being harmed and it creates unnecessary additional organisational costs, disruptions and production losses to the organisation.

The unique nature of bullying related to workplace whistleblowing is already recognised and enshrined in legislation. Every government in Australia now has legislation specifically dealing with whistleblowers and whistleblowing. Each piece of legislation explicitly recognises the risk of workplace injury caused by bullying, intimidation and harassment of whistleblowers.

However running concurrent with the existing whistleblowing legislation is other nationally standardised workplace protection legislation dealing with Work Health and Safety (also known as Occupational Health and Safety (OH&S)). Also there is some complimentary legislation such as anti discrimination laws or common law practice, all of which are intended to protect employees from workplace bullying.

The strange anomaly is that once workplace bullying has been associated with whistleblowing, the usual standardised workplace protection legislation seems to be ignored as if it had no bearing or relationship to any bullying (harm or injury) being suffered by a whistleblower.

Terms defined

A reference to a whistleblower is a reference to a person who makes a disclosure or intends to make a disclosure based on a reasonable belief and knowledge that the disclosure is true.

Whistleblowing is the act of making a disclosure of information which will serve the public interest as it concerns conduct that is or appears to be contrary to law or required practice or standards.

A person who has knowledge of wrongdoing and does not disclose that wrongdoing is not a whistleblower.

A person who makes a disclosure which they know is false or untrue in belief or substance is not a whistleblower. Appropriate sanctions should apply.

Forms of Bullying

There seems to be 3 basic modes of bullying.

1. Most bullying in the workplace is usually motivated by proactive discrimination and prejudice and a desire to impose a form of control over passively guiltless victims. The bully sees some difference between themselves and their victim and seeks to impose some control or subjugation in various forms over their victim(s). The control and subjugation is generally the primary goal and the bully seldom acquires any other benefit from bullying.
2. The second proactive form of workplace bullying is carried out to protect the interests of the bully. The bully considers that another employee is a threat to their interests and to reduce or eliminate any risk to their interests they engage in bullying tactics.
3. Workplace bullying in relation to whistleblowing matters, tends to be a bullying reaction to a whistleblower who has made or who may make a disclosure about suspected wrongdoing or misconduct in the organisation.

The primary goal of the bully is to instil fear and to intimidate the whistleblower into silence and inaction so that their wrongdoing or misconduct remains undisclosed thus enabling their misconduct to continue unabated.

There can be a mixture of all forms of bullying in circumstances particularly where proactive bullying is under threat of exposure by a whistleblower. That threat of exposure then compounds the existing proactive bullying with the additional reactive form of bullying in an attempt to force the whistleblower into silence.

Basis of Bullying

Though this inquiry on bullying is limited to the workplace it is a sensible place to start looking for answers about bullying. Most members of society are a part of the workplace at some stage. Therefore an anti-bullying workplace scheme incorporating an education programme which is accompanied by relevant legislation and regulatory agencies may then be used as a basis on which to pursue the issue within the general population.

Obviously bullying is not restricted to the workplace as it occurs within and across all facets of society; instances of bullying are found in clubs, associations, unions, and political parties and right through to institutions and organisations such as schools, universities, voluntary organisations and religious bodies.

Most workplace bullying is fundamentally a personal conflict that falls within the purview of the industrial relations and occupational health and safety framework. In the employment situation, bullying also raises the 'duty of care' responsibility of employers and the culture of the organisation.

However in whistleblower bullying cases the treatment of the injured whistleblower, the bully and those who condone or promote the bullying seem to be dealt with in a way that is disconnected from the industrial relations or OH&S framework and very separately from an organisation's culture or 'duty of care' responsibilities.

The aim of most bullying is to give some advantage or benefit to the bully. The goal may be to obtain some material advantage or benefit or may be a self serving device to protect the bully's interests. In other cases the bullying may be of a kind that gives the bully the benefit of some satisfaction or gratification that is not tangible. Of course the aim of some bullying may be any combination of gaining a material benefit or self serving device or some gratification at the discomfort caused to the victim.

In those cases where the aim of bullying is simply the satisfaction and gratification gained from inflicting harm on a victim, it seems likely that such conduct is an anti social pathological condition.

In most whistleblowing cases the primary aim of the bully is to protect their self-interest and the collateral damage to the whistleblower is just a self-serving form of bullying gratification. There may also be a cumulative advantage to the bully if (s)he is able to i. successfully protect their interests, ii. materially and personally harm the whistleblower and thus iii. instil within the culture of the organisation an expectation that future whistleblowers will be unsuccessful and will suffer similar material and personal harm.

Where the aim of workplace bullying is simply to gain a material advantage, it is probable that the victim has something that the bully does not have and is seeking. This form of proactive bullying is generally straightforward and the least complex to resolve.

Any investigation could reasonably obtain prima facie motivational evidence of this type of bullying based on the explicit material facts.

However, where bullying is proactively based on the bully's opinions or prejudices, identifying motivational evidence is considerably more difficult.

Workplace bullying can be an employer having a prejudicial attitude to an employee and harassing them on the basis of that prejudice. A person of one status within an organisation can hold a prejudice against a person within their own status or another status and will act against them because of that prejudice. The prejudice can be based on anything including income, job title, work function, sex, race, religion, political views, personal jealousies, disability, sexual preference, clothing, sport or anything else the bully perceives as grounds to discriminate and victimise. In some cases there are no tangible grounds to discriminate other than a desire on the part of the bully to successfully control and dominate the victim.

Most workplace bullying is of a proactive kind. It is initiated or instigated by the bully's prejudicial perception of the victim or to gain an advantage or benefit or both.

The bully usually tests their chances of success by subtle acts of discrimination and harassment until they are convinced that the victim does not have the will or capacity to fight off the impending bullying attack.

The bully also weighs up their chances of being caught if they inflict harm on their targeted victim. They also assess whether there are any meaningful repercussions if they get caught bullying the victim. And in some cases the bully would assess the extent to which bullying is either tolerated or condoned within an organisation.

However it must be stressed that most organisations do not tolerate or condone proactive bullying. Such bullying can create enormous problems within an organisation which detracts from profit and stable production. The likely repercussions in costs to an organisation simply make proactive bullying a costly, time wasting distraction that can undermine the effectiveness and efficiency of an organisation.

Nonetheless there are some organisations which expect all employees to resolve workplace disputes without the intervention or involvement of management. Therefore in some cases it is often easier to dispense with the services of a bullied and victimised employee than it is to break up and punish a clique of employees who get enjoyment from bullying weaker and less resourceful individuals.

There is a cultural issue in Australia, particularly in workplaces with a predominantly male workforce involved in heavy physical work to allow employees to sort out their own pecking order. Part of that process often involves certain competitiveness that may be described as proactive bullying to various degrees. The process is often tolerated within a peer group as it helps establish authority relationships, competencies and responsibilities. In fact in some circumstances knowing the personal attributes or limits of members in a group only tends to strengthen that group. However there is a fine line between a competitive workplace pecking order and causing harm to an individual by what could be seen as bullying. It is possible that even the slightest hint of competitiveness may have to be considered a form of bullying – though that seems to be crossing the line too far in the wrong direction.

The bottom line is that bullying would not exist in any organisation if the chances of being caught were high, if the repercussions were significant and if every employee and manager in an organisation condemned and acted against bullying.

Basis of bullying Whistleblowers

There are clear and important differences between the proactive form of workplace bullying and that associated with the reactive bullying of whistleblowers.

Until a whistleblower does or says something about their perception that another person is engaged in wrongdoing they are usually safe from bullying. However that whistleblower is in fact not a whistleblower until they disclose the perceived wrongdoing.

The person who has knowledge of wrongdoing and does not report or disclose it is not a whistleblower. Remaining silent and permitting corruption or other wrongdoing to continue unabated is the best way to protect oneself against possible reactive bullying. If you are not seen as a risk it is unlikely you will be bullied.

Unfortunately remaining silent is the standard response of most people in the workplace who suspect or identify wrongdoing by other people. They do nothing and tell no one.

The cost of unreported wrongdoing such as theft, corruption, fraud, misreporting, misappropriation, graft, abuse of office, maladministration, waste of public moneys and other wrongdoing is enormous. But it occurs because witnesses to such

conduct are too frightened of bullying reprisals if they come forward and disclose such matters.

It is likely that many instances of wrongdoing are reported and are satisfactorily dealt with by competent and proficient managers in organisations which have a strong culture against bullying. Usually such organisations would also have high ethical standards and an open approach to accountability.

But the critical issues affecting how whistleblowers are treated are whether;

1. the whistleblower reports the suspected wrongdoing within the organisation or,
2. the whistleblower makes a disclosure about the suspected wrongdoing outside the organisation and,
3. the way the relevant organisational employees/managers react to;
 - a. being told by a whistleblower about suspected organisational wrongdoing and
 - b. which organisational employees will be held to account for the existence of any wrongdoing.

Nonetheless both historical and current exposure of whistleblowing events shows that people who come forward to disclose wrongdoing are persistently and repeatedly harmed despite all anti-bullying ethical organisations and all the anti-bullying and public interest disclosure legislation.

Most employees have an instinctive self-preservation mode of operation; if the organisation in which one works does not have a well promoted, strongly supported, anti-bullying and open accountability framework, then most employees think it best to remain silent if they suspect wrongdoing particularly at a level above one's own status.

Most employees have a perception that whistleblowers are seldom if ever properly protected against bullying and intimidation and that they subsequently suffer after making a public interest disclosure. Furthermore it is perceived that those who have come forward and suffer bullying and intimidation are never properly recompensed for the losses and damage they suffer in trying to expose wrongdoing. And to add to the futility of making such disclosures and suffering is the fact that very seldom those who perpetrate the bullying are ever properly dealt with by the employer, the courts or other relevant authority.

This perception that employees have about whistleblowers being invariably bullied and suffering harm without recompense or compensation is because those examples are the only ones which are generally known or highlighted in the workplace.

Whistleblowing events which do not lead to bullied whistleblowers suffering serious harm and disabilities, if such events exist, are seldom publicised let alone lauded for its promotional value. Nor are examples promoted in which whistleblowers have

been rewarded, if it ever happens, because they have helped resolve wrongdoing conduct in the organisation.

Nonetheless it is recognised that most organisations generally do not tolerate or condone proactive bullying regardless of their attitude towards whistleblowing. But conversely in relation to the reactive bullying of whistleblowers, even organisations which have high ethical standards, an open approach to accountability and anti-bullying measures may abandon those attributes particularly if the whistleblowing disclosure brings accountability pressures on the executive levels of the organisation. This is particularly true in relation to public sector organisations.

The 'Chilling Effect'

Therefore as a general rule it is fair to say that the employee's traditional understanding of whistleblowing is that the usual response by an employer or an organisation's senior manager is negative. This is so, even if the whistleblowing eventually resolves wrongdoing in the organisation. It is also understood that the whistleblower will end up seriously disadvantaged for trying to expose a suspected wrongdoing in the organisation.

What this amounts to is a 'chilling effect' on any person contemplating whistleblowing about wrongdoing in an organisation. Moreover the persistent understanding that whistleblowers suffer as a result of making public interest disclosures helps this 'chilling effect' permeate the cultures of most organisations. And the general failure of governments, legislators, employers and senior executives to promote whistleblowing and protect whistleblowers has only institutionalised the 'chilling effect'.

There is no evidence that whistleblowers get any benefit for making a disclosure which they believe will serve the public interest. The adverse cost to a whistleblower's career, health, well-being and family is a price too great to pay. For those whistleblowers who hold the view that they have gained a moral victory for doing what is ethically right, it is a victory that is purely pyrrhic.

Recommendation

To help remedy the employee's traditional understanding of whistleblowing, all whistleblowing cases should be widely promoted and used to establish best practice industrial standards in instances where the whistleblower considers;

- I. that the whistleblowing event was properly handled,
- II. that they were treated fairly,
- III. that they were properly protected from the outset of the disclosure,
- IV. that full and ongoing support was provided throughout the process,
- V. that the organisation publicly and properly commended the whistleblowing activity,

- VI. that the investigation into the wrongdoing was thorough,
- VII. that during the investigation the whistleblower was kept properly informed,
- VIII. that where the wrongdoing was proven, those responsible were held fully to account,
- IX. that where defects in the organisation allowed the wrongdoing to occur, changes were made to prevent any re-occurrence,
- X. that where organisational defects were corrected, the whistleblower was given credit for the remedial action taken,
- XI. that where bullying had occurred, those responsible were held fully and properly to account,
- XII. that in view of the bullying that had occurred, the organisation had reviewed and strengthened relevant practice and procedure to promote a more effective anti-bullying framework,
- XIII. that where it was possible to sue any bully for damages or injury, the organisation fully supported (including financially) such action,
- XIV. that where any bullying amounted to a criminal breach of the law the organisation fully supported (including financially) action taken to have the offender charged,
- XV. that where the bully was given licence or support by anyone in the organisation (either implicitly or explicitly) to carry out the bullying, the organisation fully supported (including financially) any action to make those persons directly accountable,
- XVI. that they suffered no loss or harm (or if any loss or harm was suffered, all possible action was taken immediately to mitigate that loss or harm),
- XVII. that where the organisation failed in its duty of care to protect the whistleblower an appropriate offer to remedy that defect was made,
- XVIII. that where injuries were sustained, full assistance to obtain appropriate compensation and remedial services were provided,

Of course the problem remains that if all or almost outcomes listed above are not achieved, then the employee's existing perception of whistleblowing, unresolved wrongdoing, bullying and a lack of accountability will remain firmly and justifiably entrenched.

Whistleblowing about criminal matters.

In organisations where a whistleblower discloses suspicions about wrongdoing of a criminal nature such as theft, fraud or assault the response of the organisation is similar to that of organisations that experience proactive bullying. Such matters are beyond the control of the organisation or its managers and it will inevitably involve police actions and court proceedings. Regardless of the level of the persons involved in the theft, fraud or assault, the organisation will maintain a safe distance from the matter and refer the whistleblower and whistleblowing allegations to the

relevant authority. In these criminal type circumstances it is obvious that such organisations do not tolerate or condone any bullying of the whistleblower.

Nonetheless, although matters may be referred to police or other authorities it does not necessarily mean that the whistleblower will not suffer various forms of bullying reprisals for making people in the management structure accountable or for bringing the organisation into question or even disrepute. However, given that police are already involved in the investigation, any form of reprisal would tend to be limited and indirect and deferred if possible till the police had finalised their involvement.

Likewise it is possible that confederates of the wrongdoer will subsequently apply covert forms of bullying against the whistleblower. It would of course depend on the strength and relationship between the wrongdoer and the confederates. Nonetheless any such bullying by confederates is likely to be covert and cautious so as to avoid criticism that they support the wrongdoing or that they may have been involved in wrongdoing.

The type of covert bullying used in these circumstances is likely to be the spreading of false rumours and defamatory lies about the whistleblower to prejudice their position amongst their peers and within the organisation. Normally such bullying will diminish over time but in some instances it will consolidate and continue for extended periods. Eventually even covert bullying can cause harm and distress to the whistleblower.

Whistleblowing about noncriminal matters.

In organisations where a whistleblower discloses suspicions about wrongdoing of a kind that is unlikely to involve police action, the organisational response is invariably directly proportionate to the level of accountability of persons in the organisation. The more people who are accountable and the status of those people within the organisation will determine the level and extent of bullying that the whistleblower is likely to suffer.

Responses involving subordinate positions.

Putting it plainly, if the wrongdoing is being carried out by a person usually at the junior supervisory or base level, who can be easily held to account (by those in managerial positions) then the probability of severe bullying is minimal. Managers generally will want to show how willing they are to purge the organisation of people engage in wrongdoing and who may be liable to bully the whistleblower. Regardless of the type of wrongdoing, it will not reflect badly on the management of the organisation particularly if strong and decisive action is taken by management to resolve the issue. That sort of strong action against such corrupt people is proof to any observer that the management is responsive and accountable and that the organisation does not tolerate wrongdoing or bullying.

However at the supervisory level into the lower management and professional levels, the organisational response will be less certain. At these levels, there is a degree of accountability that reflects on the rest of the management structure and the organisation as a whole.

Responses involving middle management positions

A lot will depend on the degree and extent of the wrongdoing and how badly it is affecting the organisation. If the wrongdoing is affecting the organisation in a practical sense (actual theft, fraud, misappropriation) then it is likely such conduct will not be tolerated and appropriate remedial action taken. However if the perceived noncriminal wrongdoing is open to value judgements or interpretation, such as maladministration, malfeasance, misfeasance, waste of public monies, nepotism, bias, favouritism, abuse of office, falsification of records and the like, then such matters touch on the ethics and probity of those in the management structure. Questions about such conduct will immediately bring the management of the organisation into the spotlight and will significantly raise levels of managerial accountability. The situation will tend to promote an indignant and antagonistic response.

At this stage much will depend on how much support the alleged wrongdoer has in upper management and the amount and strength of evidence that exists about the wrongdoing. But in any event a disclosure about possible wrongdoing in middle management will tend to generate adverse reactions against the whistleblower.

The whistleblower will start to recognise some isolation and less cooperation by management. Questions about the whistleblower start to emerge.

The whistleblower is usually placed under more scrutiny. Work performance becomes more critical and job opportunities seemed to diminish.

In circumstances where a middle manager is actually found to be engaged in noncriminal wrongdoing and is poorly regarded, upper management may use a whistleblowing disclosure as a means to terminate their employment. However if the middle manager is well regarded the managerial responses tend to make allowances for the wrongdoing and tend to pass adverse judgements against the whistleblower.

Any issue, but particularly a whistleblowing disclosure, which increases the level of accountability on the management hierarchy is not well received. A criticism of anyone in the management structure, even if it is criticism by a fellow manager, is taken to be disloyalty against the management structure generally and against senior members specifically.

Responses involving upper management positions

When the prospect of a whistleblowing disclosure appears to be about the wrongdoing of people in senior or executive management, the organisational

responses are invariably hostile. Traditionally there is a closing of ranks. Managers generally repudiate any suggestion that a member of their standing could be engaged in wrongdoing. The issue of whether or not a senior manager is actually involved in any wrongdoing appears to become irrelevant. The primary concern is to avoid accountability particularly to any authority outside the agency or the organisation. This is known as the “shoot the messenger period”.

Employees generally expect senior managers to protect their staff particularly when those staff are expressing concern about suspected wrongdoing in the workplace.

Therefore it comes as a catastrophic shock when managers (and particularly, senior managers) give every indication that they would prefer to silence the whistleblower and avoid accountability rather than resolve a possible instance of wrongdoing in the organisation.

And once the ‘silencing’ starts it is frightening to realise that the senior people of an organisation have virtually unlimited resources and toady subordinates to bring to bear on the whistleblower.

Most people would not believe that some senior managers of an organisation would resort to an abuse of power, misuse of resources and possibly misfeasance or malfeasance to silence a whistleblower and thus avoid accountability.

However a 2007–09 project by the New South Wales, Griffith University, titled ‘Whistling while they work’ (WWTW) which involved extensive federal and state government agencies showed that most bullying suffered by Whistleblowers was carried out by managers and mostly senior managers. Below are some extracts from that project.

- The WWTW study noted that 65 percent of whistleblowers who reported adverse treatment believed it was deliberate action by one or more levels of management.
- Most bad treatment was seen as coming from management, rather than colleagues or co-workers.
- Proportions of reporters of wrongdoing indicating bad treatment by management range from 0% to 46% in some agencies.
- 22% of whistleblowers said they were treated badly by management and/or co-workers (4% treated badly by co-workers only, 13% treated badly by management only, 5% treated badly by management and co-workers)

(stretching the latter point – as managers were already identified as being the people most likely to treat whistleblowers badly, it would be fair to suggest that of the 5% of whistleblowers treated badly by management and co-workers, 3% were treated badly by managers and 2% treated badly by co-workers.

If that was the case, then joining the bad managerial treatment of 13% and the additional 3% would amount to 16%.

That equates out to about 72% of the whistleblowers who were treated badly, being badly treated by managers.

- 48% of casehandlers and managers (case study agencies) surveyed believed that employees who report wrongdoing often or always experience problems (e.g. emotional, social, physical) as a result
- Bad treatment or harm suffered by whistleblowers was most likely intimidation, harassment, heavy scrutiny of work, ostracism, unsafe or humiliating work, and other workplace-based negative behaviour
- Even successful whistleblowers report adverse psychological experiences from their whistleblowing, although not as adverse as those treated badly.

If a disclosure made by the whistleblower is essentially wrong, an organisation with good managers and an open accountability policy can easily resolve a whistleblowing event. The solution is to hold a meeting with the whistleblower and any support person the whistleblower deems necessary and explain the misconception the whistleblower has. Even if the whistleblower is not satisfied with the result, the whistleblower's disclosure, the subsequent discussions and the management's explanations and the whistleblower's misunderstanding can then be published within the organisation. The issue was exposed and the whistleblower's concerns are properly addressed.

However when an organisation's management is faced with a whistleblowing disclosure and their immediate reaction is to 'bunker down', 'drops the shutters' and 'shoot the messenger', one tends to think that the whistleblower's assessment is correct and that there is some wrongdoing in the organisation that needs to be resolved.

As one who is in constant contact with dozens of whistleblowers from across the country, employed in all manner of organisations (but especially in public sector organisations) it is easy to believe that there must be a managerial operational manual for bullying whistleblowers. The absolute uniformity of the processes used to harass and bully whistleblowers is astoundingly consistent regardless of the location of the agency or organisation or of the status of the person being victimised.

The first casualty of a whistleblowing event is the total disinterest senior management has in the suspected wrongdoing that is being reported. That issue is dropped as if it has no bearing on all subsequent events.

The initiation of the bullying commences when the whistleblower is criticised for failing to provide proof absolute to substantiate their suspicions of wrongdoing. They also criticise the whistleblower for failing to raise their concerns in a way that

would not expose middle or senior managers to unwanted levels of accountability. The whistleblower is invariably labelled disloyal and or a traitor to the organisation. The whistleblower's personal file is immediately scrutinised to determine if any punishment options are available or whether anything may be interpreted as a medical condition to prove that any allegation of wrongdoing is baseless. Timesheets are fastidiously checked. The slightest workplace error invokes a totally disproportionate negative response by management. Usually a compulsory job transfer is thrown into the mix which is usually at a lower status level in an area which provides minimal contact with other employees.

There is actually no limit to the forms of bullying, intimidation and harassment that a whistleblower may suffer if they have made a disclosure which may cause senior or executive management to be held to account. The forms of harassment can be complaints about leaving a coffee cup mark on a table, through to a complete review of work which was previously accepted but since the whistleblowing event has been reclassified as unacceptable. Whistleblowers may be forced into new positions for which they have no qualifications and would be open to ridicule if they were unable to meet workplace expectations and standards.

In some circumstances the executive management may seek to silence the whistleblower by laying bogus counter-charges against them. It may even extend to illegal phone caller traces on their home and work phone and interruptions to their normally free access workplace e-mail accounts.

The workplace stress caused by this form of bullying and harassment inevitably lead to ill health. The whistleblower has to take time off work because of the physical and mental injury being inflicted by the organisation's managers. The response of management is to rigidly oppose any form of workers compensation claim on the part of the whistleblower. Even if the doctors to whom the whistleblower has been referred by the organisation advise that the whistleblower is suffering a workplace related injury, the organisation's executive management persist in opposing any form of workers compensation claim.

From personal experience all of the above bullying and harassment tools have been used by executive management to silence an employee that they believe will force them into a position of greater accountability.

Many organisations will rightly claim that they have mechanisms available to protect the whistleblowers from the type of managerial misconduct described above. However if the senior managers are the persons being held to account and they strongly opposed that situation, then they have the power to quash the protection mechanisms and will use or abuse their power and resources within the organisation in an attempt to control and subjugate the whistleblower.

In this scenario the original suspected wrongdoing may or may not be handled, but most probably, it will not be investigated. However if it is, any adverse outcome will

not be recorded. If anything was recorded it would only validate the disclosure of the whistleblower and that would not be acceptable to those who bullied the whistleblower. Employees generally will see that the whistleblower who has made a public interest disclosure has been bullied and victimised. There will be no acknowledgement of any organisational remedial action taken to address any wrongdoing. The organisational culture will be reinforced to ensure that nobody will blow the whistle on any matter likely to bring a heightened level of accountability to middle or senior managers.

Legislation

In respect of the proactive form of bullying, the legislative protections and remedies are available through Occupational Health and Safety legislation, antidiscrimination laws, the common law duty of care, and criminal offences.

In the reactive whistleblowing form, there are newly developed Public Interests Disclosure or Whistleblowing laws, some Ombudsman's legislation and some clauses in various legislation all of which are supposed to offer protection and remedies to whistleblowers against workplace bullying and intimidation. Of course Work Health and Safety legislation, the common law duty of care and criminal offences should also offer protection and remedy to whistleblowers subjected to bullying and harassment.

Unfortunately there is little evidence that any of the legislation or procedures ostensibly intended to protect whistleblowers actually works. There is a significant deficit of evidence which proves that any of this legislation or processes actually serves the protection and remedial interests of the whistleblower.

As a general observation, though legislation exists to deal with both proactive and reactive forms of bullying, the fundamental problem seems to be;

- i. That most legislation is failing to deter or stop bullying before harm is done to the victim (as is evidenced by this inquiry).
- ii. When a person claims to be the subject of bullying, the legislation fails to empower that person to effectively stop the bullying until an investigation is completed.
- iii. The legislation fails to adequately protect the victim from ongoing injury and harm before or during any investigation into allegation of bullying.
- iv. Most legislation puts the onus on the victim to prove that they have been bullied.
- v. Most legislation fails to recognise that the bullied victim is usually facing the hostile opposition of the bully or bullies, the employer who is seeking to avoid liability and costs and the insurer who will resist any injury claim.
- vi. Most legislation neglects to address the possibility that although bullying maybe imposed by an individual or a small group it is possible that the

- organisation or parts of the hierarchy of the organisation may tolerate or even condone bullying (as a means to deter whistleblowing).
- vii. Bullied victims may already be psychologically, emotionally, financially or even physically damaged are often required to pursue their allegations of bullying without any direct assistance.
 - viii. Only after a bullied victim is confirmed to be suffering injuries does most legislation seek to offer protection and limited treatment for injuries suffered.
 - ix. Most legislation barely touches on fair restitution, restoration, reinstatement or reimbursement for losses or damage suffered by the bullied victim and where those matters are addressed they are dealt with as an afterthought.
 - x. Legislation which provides for any investigation requires that the investigation is fair to both parties. Whereas many bullies already have power and resources available to protect their interests, the legislation does not provide comparable resources to the bullied victim.
 - xi. The legislation usually sets the standard of proof of bullying to 'beyond reasonable doubt' rather than 'on the balance of probability'.
 - xii. Most seriously lacking in almost all the legislation and particularly in relation to whistleblowing is;
 - a. how bullies will be dealt with and
 - b. how those who incited the bullies are dealt with and
 - c. how those who were aware of the conduct of the bullies and who did nothing to stop it are held to account and
 - d. how those in organisations who are responsible for failing to prevent injury to bully victims are held to account or
 - e. how those in organisations who commit a culture which tolerates or condones bullying are held to account.

The above comments apply generally to both forms of bullying but in relation to the bullying of whistleblowers these issues are more significant.

The recent development where bullies have been criminally charged and convicted in relation to the bullying of a fellow employee has been singularly effective in bringing the broad ranging deficiencies of the current legislation into the light.

The greatest failure of most of the current legislation is to impose a comprehensive penalty regime on those who are found to be involved in bullying and on those who allow it or even foster it within organisations.

At present most legislation offers no effective deterrent to bullying in the workplace. The legislative, structural and procedural hurdles that the unassisted, resource deficient, bullied and harmed victim must jump to prove they will be, are being or have been bullied are too high. Bullies and their sponsors are reasonably safe from any penalties likely to ensue from current legislation.

Moreover, in most legislation the damaged and harmed whistleblower is obliged to pursue their own legal action to remedy the injuries inflicted or damages caused by other employees in the workplace. This is clearly unjust. The bullied whistleblower seldom has anywhere near the physical, mental, organisational or financial resources that many bullies have, particularly those at senior levels of an organisation.

Having provided virtually no protection against workplace bullying injuries, most legislation puts the onus on the whistleblower to prove they were bullied, and even when that hurdle is cleared, it requires the whistleblower to mount a case for damage and losses against the bully.

The reality is that most whistleblowers cannot take that sort of sustained pressure. Most resign from their employment. Most have virtually no resources or backing to mount a case against the bully, or against the employer for failing in their duty of care to protect the whistleblower.

Recommendation;

1. Federal and state governments agree to extend the nationally harmonised Work, Health and Safety legislative framework to;
 - a. recognise whistleblowing or public interest disclosures as a required workplace activity and
 - b. to protect whistleblowers from bullying and harassment.
2. Establish a scheme which check-lists the procedures to investigate allegations of wrongdoing in an organisation and the procedures to ensure protection against bullying.
3. Elevate workplace whistleblowing as an acknowledged workplace risk.
4. Set workplace insurance rates against the form of effective pro-whistleblowing and anti bullying policies that exist in an organisation.
5. Produce provisions that better balances the power differential between the whistleblower and any person seeking to carry out a bullying reprisal against the whistleblower.
6. Produce provisions that empowers the whistleblower to seek and obtain protection against bullying if the organisation fails to do so.
7. Produce provisions that shift the ONUS OF PROOF about bullying from the whistleblower to the alleged bully.
8. Produce provisions that require independent medical/health assessments of all whistleblower bullying victims.
9. Produce provision that require independent assessments of the loss and damages suffered by a whistleblower and the compensation that is warranted.

Disclosure and Protection Agencies

At present whistleblowing disclosures are made

- i. within organisations
- ii. to regulatory authorities (i.e Ombudsman's offices)
- iii. a member of Parliament
- iv. or the media

but as a generalisation the disclosure will eventually end up within the executive management level of the organisation.

If the disclosure is lodged within the organisation, a person at the executive level of the organisation will be informed in double quick time.

If the disclosure is made to a ombudsman's office chances are it will be referred back to the relevant agency or organisation for preliminary investigation.

If a disclosure is made to a parliamentarian, it is regrettable but few parliamentarians have the resources to do anything with such disclosures and they will eventually, either directly or indirectly, return the disclosure to the agency or organisation.

If the disclosure is made to the media, it will immediately become of interest to the executive management of an agency or organisation.

The immediate issue for executive managers of agencies or organisations will be the response from the shareholders, the boards of directors, the regulatory authorities, the ministers or the public. The last item on the agenda of these entities will be the welfare of the whistleblower.

So while the issue of wrongdoing is being dealt with the whistleblower seldom has any support framework on which to rely and which can revive proper and effective protection against the inevitable bullying and victimisation.

The only organisation which has some marginal control over the progress of the investigation into the alleged wrongdoing and the possible oversight of any damage being done to the whistleblower tends to be the ombudsman's office.

Comment about the effectiveness of having both the investigation into the wrongdoing and the protection of the whistleblower vested in the ombudsman's office must be generalised as it is too difficult to identify different procedures in every jurisdiction. However it is noted that in New South Wales the ombudsman's office has made significant advances on lifting workplace and public awareness about issues concerning whistleblowing disclosures and whistleblower protection. That is not to say that similar advances have not been forthcoming in other jurisdictions. But the feedback from whistleblowers around Australia is that there is little confidence that any ombudsman's office is capable of objectively carrying out

an investigation into alleged wrongdoing and protecting the well-being of all whistleblowers.

As matters stand, this process of using the ombudsman's office to carry out both functions does not appear to be working. The specialised skills needed to test whether there is any serious criminal or administrative wrongdoing in an organisation seems to be well outside the scope and capacity of the ombudsman's offices in the various jurisdictions.

However it seems likely that most ombudsman's offices are capable of monitoring and oversighting the threat of possible bullying reprisals against a whistleblower within an organisation. The only question is whether the current powers are sufficiently adequate to fill that role effectively.

Recommendation

- i. Whistleblower reporting of wrongdoing should only go to sub units in an integrity type organisation within the relevant jurisdiction. i.e. the ICAC, CMC, CCC, VIACC or the Australian Crime Commission.
- ii. Whistleblower protection activities and processes should be oversighted by the Ombudsman's Office in relevant jurisdictions.
- iii. The role, powers and resources of the various ombudsman's offices in relation to managing the protection of a whistleblower needs to be clarified and reinforced.